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PART 3

EXCLUSIONARY RULES AND EXCEPTIONS

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CHAPTER 6

Evidence of Opinion

"Opinion" may be defined as an inference drawn from perceived facts.[1] The general rule is that evidence of opinion is not admissible. However, the rule is subject to certain well-known exceptions, particularly relating to expert evidence. **6–01**

1. GENERAL RULE

The general rule is that while evidence of fact is admissible, evidence of opinion is not. This rule flows from the principle that while witnesses give evidence as to facts, the inferences to be drawn from those facts are matters for the jury. Thus, in a murder case, a witness may say "A shot B". He may not say "A killed B" because it is for the jury to determine whether A killed B, i.e. whether the shot caused B's death. **6–02**

The rule may be further illustrated as follows. Suppose a smash and grab raid has taken place at a jeweller's shop. A witness in a nearby street heard the crash of the breaking glass. Shortly afterwards he saw a man running into the street from the direction of the jeweller's shop. The man was carrying jewellery and his hands were bleeding. The obvious inference is that the man was the thief. In ordinary speech the witness would say "I saw the thief". However, when giving evidence the witness may only say what he saw. He may not say that the man was the thief. That is an inference for the jury to draw.

There are essentially two reasons for the rule excluding evidence of opinion. They are as follows: **6–03**

1. The opinion of the witness is irrelevant. Thus, in the example given above, the opinion of the witness that the man he saw was the thief does not matter. The relevant parts of his evidence are those involving what he saw and heard. A familiar example of the same principle is the eye-witness in a case of dangerous driving. He may give evidence of what he saw. He may not, however, give his opinion as to whether the defendant's driving was dangerous.

Similarly, the opinion of the non-expert witness as to a matter requiring expert evidence is irrelevant and inadmissible. Thus, if a person is attempting to establish a defence of insanity, he may not call his friends and relations to give evidence of their opinion on the subject. In *Loak*[2] a friend of the defendant and a magistrate were not allowed to give evidence of their opinion that the defendant was insane.

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[1] *Landau* (1944) 60 L.Q.R. 201.
[2] *Loak* (1911) 7 Cr.App.R. 71.

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2. If evidence of opinion is admitted, the function of the jury, i.e. to decide on the "ultimate issue", will be usurped. This is the primary reason for the rule. It is thought that it is the reason why the rule was developed.[3]

6–04 A witness cannot, therefore, say that in his opinion the defendant is guilty. Thus, a bystander cannot say that A was driving dangerously, a store detective cannot say that B stole the goods from the shops; an eye-witness cannot say C murdered D. These are all issues which the jury have to decide. For example, evidence is not admissible as to (a) whether an article is such as to "tend to deprave and corrupt" under s.1 of the Obscene Publications Act 1959[4]; or (b) whether a driver is unfit to drive through drink or drugs[5]; or (c) whether a defendant intended to commit a particular crime or not.[6] In *Chard*[7] a prison doctor was not permitted to say that in his opinion the defendant who was charged with murder had not intended at the time of the offence to commit murder. The Court of Appeal held that this evidence had been rightly excluded because it went to the very issue which the jury had to decide. The Court said:

> "It is not permissible to call a witness, whatever his personal experience, merely to tell the jury how he thinks an accused man's mind—assumedly a normal mind—operated at the time of the alleged crime with reference to the crucial question of what the man's intention was."[8]

An example is to be found in *Jeffries*.[9] The defendant in that case was charged with possessing drugs with intent to supply them. At trial a detective constable gave evidence that in her opinion certain lists found at the defendant's flat related to the sale of drugs. The Court of Appeal held that this evidence should not have been admitted because the officer was essentially giving her opinion on the ultimate issue, namely whether the defendant had the drugs in his possession with intent to supply them (although she was entitled to give evidence, based on her experience, as to value and prices).

6–05 It follows that questions must be framed in such a way as to avoid the risk that the witness will give an opinion on the ultimate issue which the jury have to decide. Thus, if a victim has died of gunshot wounds, an eyewitness should be asked "Did A shoot at B?"; "Did the shot hit B?"; and *not* "Did A kill B?"

However, the rule that witnesses may not be asked questions as to the "ultimate issue" is subject to modification in the case of expert witnesses. Thus, questions on the ultimate issue are allowed if it would be artificial for the witness not to express his opinion on that issue. In the case of insanity, for instance, a medical witness may be asked in cross-examination whether in his opinion the conduct of the defendant immediately after a murder would indicate that he knew (a) the nature and quality of the act; (b) that the act was contrary to law.[10]

The reasons for allowing such questions may be summarised:

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[3] *Landau* (1944) 60 L.Q.R. 201.
[4] *Calder & Boyars Ltd* [1969] 1 Q.B. 151; *Anderson* [1972] 1 Q.B. 304.
[5] *Davies* (1962) 46 Cr.App.R. 292.
[6] *Chard* (1972) 56 Cr.App.R. 268.
[7] *Chard* (1972) 56 Cr.App.R. 268.
[8] *Chard* (1972) 56 Cr.App.R. 268 at 270–271.
[9] *Jeffries* [1997] Crim.L.R. 819.
[10] *Holmes* (1953) 37 Cr.App.R. 61.

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(i) Since the expert's opinion may have been obvious from his evidence, it would be artificial not to allow him to express it merely because it is on an ultimate issue.
(ii) The defence may be hampered in presenting their case if the expert may not be asked about that issue in the most direct way.

6–06 In fact, the tendency to allow experts to give evidence on the ultimate issue had been recognised by the courts as long as 50 years ago.[11] The practice was sanctioned by the Court of Appeal in *Stockwell*.[12] In that case the defendant was charged with robbery. The only issue was identification. The prosecution were permitted to call a "facial mapping" expert who gave his opinion that the defendant was the robber as shown on photographs taken by security cameras. The Court of Appeal held that this evidence was admissible although it was on the very issue which the jury had to decide. Lord Taylor CJ said that the old rule was more a matter of form than substance and had been more honoured in the breach than the observance. The Lord Chief Justice said that an expert should be allowed to give his opinion on an ultimate issue subject to a direction by the judge to the jury that they are not bound by it.

A witness may, similarly, state an opinion on an ultimate issue if it is a way of conveying relevant facts perceived by him. The statement is then admissible as evidence of what the witness perceived. Thus, a witness in a case of wounding may say that he saw several people attack the defendant who then took up a weapon "to defend himself". He will not be stopped if he says this, although the question whether the defendant was defending himself or not is one for the jury to decide. To say that the defendant took up the knife in self-defence is merely to describe the way in which a weapon was taken up under pressure of attack.

2. EXCEPTIONS TO THE GENERAL RULE

A. The opinions of non-experts

6–07 Evidence of the opinion of non-experts is not generally admissible. However, such evidence is admitted on certain topics. The most common example is a witness's opinion as to a person's identity (considered in Ch.14). Four other exceptions are considered below.

(1) Matters of impression and narrative

6–08 Evidence of the opinion of a witness who is not an expert may be admissible if (a) the impression received by the witness is too vague to be otherwise described; or (b) if made as a way of conveying relevant facts perceived by him.

[11] *DPP v A. & B.C. Chewing Gum* [1968] A.C. 159 at 164, per Lord Parker CJ.
[12] *Stockwell* (1993) 97 Cr.App.R. 20. See also *Atkins (Dean) and Atkins (Michael)* [2010] 1 Cr.App.R. 117(8) in relation to expert evidence on facial mapping.

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A witness may say that the person he saw was a "young woman" or a "child of about five".[13] He may state the impression as to the speed of the car[14] or (provided he states the facts upon which he relies) whether a person has taken a drink or not.[15] Therefore, if an eye-witness of an accident says "there was nothing the driver could do to avoid the accident", he has described accurately the impression which the event made on him.

(2) Witness's own condition

6–09 A witness may give evidence of his own condition, whether physical or mental. Such evidence may include evidence of opinion. Thus a witness may say "I had seven pints of beer to drink, but I was not drunk" or "I was well until I ate the food given me by the defendant, then I fell ill".

A witness may likewise give evidence (a) as to his motive for doing a particular act; or (b) as to what his feelings were. For example, in a case of robbery the witness may say that he handed over the goods to the defendant because he was frightened that if he did not, he would be injured or a witness may state that in his opinion a threat that he would "suffer as before" was a threat to burn his house down.[16]

(3) Handwriting

6–10 Whether a particular sample of handwriting is that of a particular person is one matter where the evidence of a non-expert witness may be admitted. In practice, such evidence is rarely tendered. However, the Criminal Procedure Act 1865 s.8, provides that comparison of a disputed writing with any writing proved to be genuine shall be permitted and the evidence of witnesses on the subject is admissible as evidence of the genuineness or otherwise of the disputed writing. In some instances, evidence by a lay witness may be preferred to that of an expert.[17]

The witness must be acquainted with the defendant's writing and is open to cross-examination as to the extent of his acquaintance. He may have seen the particular person write; he may have received letters from him; or he may have seen, in the ordinary course of business, documents purporting to be in the particular person's handwriting. But he must not have become acquainted with the person's handwriting simply for the purposes of the trial.[18]

A jury must not be asked to compare two pieces of handwriting; in such circumstances they must have the opinion of an expert witness to guide them.[19] In some cases, however, in which no expert has been called, jurors have before them

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[13] *Cox* [1898] 1 Q.B. 179; *Wallworth v Balmer* [1966] 1 W.L.R. 166. The court may determine a person's age: Children and Young Persons Act 1933 s.99; Criminal Justice Act 1948 s.80(3); Magistrates' Courts Act 1980 s.150(4).

[14] But the Road Traffic Regulation Act 1984 s.89(2) provides that a person shall not be liable to be convicted solely on the evidence of one witness that in his opinion the person prosecuted was driving the vehicle at a speed exceeding the specified limit.

[15] *Davies* (1962) 46 Cr.App.R. 292; *Neal* [1962] Crim.L.R. 698; *Tagg*[2002] 1 Cr.App.R. 22.

[16] (1850) 4 Cox 243.

[17] *Fuller v Strum*, *The Times*, 14 February 2001, ChD.

[18] *Crouch* (1850) 4 Cox 163; *Rickard* (1918) 13 Cr.App.R. 140. The opinion may be based on comparison from a photocopy: *Lockheed Arabia v Owen* [1993] Q.B. 806.

[19] *Tilley* (1961) 45 Cr.App.R. 360; *Smith* (1968) 52 Cr.App.R. 848.

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specimens of handwriting, one of which is disputed. The Court of Appeal in *O'Sullivan*[20] recognised that, in such circumstances, it is unavoidable that the jury may try to make comparisons; but there must never be an invitation or exhortation to a jury to look at disputed handwriting (and try to make comparisons). "There should be a warning of the dangers; further than that, as a matter of practical reality, it cannot be expected that the court will go."[21]

(4) Voice recognition

6–11 In *Flynn and St John*[22] the Court of Appeal held that the admissibility of lay listener voice recognition evidence depends on the degree of familiarity of the witness with the suspect's voice. It was recognised that the danger of misidentification always exists, even more so where the voice recording is poor. It follows that the increasing use of lay listener evidence from police officers must be greeted with both caution and care. Thus, where the prosecution seeks to rely on such evidence it is preferable to instruct an expert to give an independent opinion. Whether expert or lay listener evidence is admitted, the judge must always give a careful direction warning the jury of the danger of possible mistakes in such cases.[23]

B. The opinions of experts

6–12 The chief exception to the general rule that evidence of opinion is not admissible relates to the evidence of experts. An expert is a person who is required to give or prepare expert evidence for the purpose of criminal proceedings. The purpose of expert evidence is to provide the court with information which is outside the experience of a judge or jury.[24]

The remainder of this chapter is concerned with a discussion of this exception.

(1) Admissibility

6–13 The opinion of experts is admissible on those matters which require such evidence, that is, where the subject is one which competency to form an opinion can only be acquired by a course of special study or experience. "In matters of science, no other witnesses can be called."[25] Such evidence is preserved by s.118(1) of the Criminal Justice Act 2003, which preserves certain common law categories of admissible hearsay, including "any rule of law under which in criminal proceedings an expert may draw on the body of expertise relevant to his field".

It is for the court to decide whether or not a particular point requires expert evidence; if the court decides that it does not, then the point in question must be proved either without the admission of opinion evidence at all or by non-expert

[20] *O'Sullivan* [1969] 2 All E.R. 237.
[21] *O'Sullivan* [1969] 2 All E.R. 237 at 242, per Winn LJ.
[22] *Flynn and St John* [2008] 2 Cr.App.R. 266(20).
[23] For consideration of when and in what cases voice identification expert evidence may be of assistance, see *Hersey* [1998] Crim.L.R. 281. See also para.14–52 for voice identification.
[24] *Turner* [1975] 1 Q.B. 834.
[25] *Folkes v Chadd* (1782) 3 Doug. K.B. 157, per Lord Mansfield.

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evidence. "In each case it must be for the judge to decide whether the issue is one on which the jury could be assisted by expert evidence."[26]

Account must be taken of advances in scientific expertise. In *Clarke*[27] the Court of Appeal said that there were no closed categories where expert evidence may be placed before the jury. It would be wrong to deny the law of evidence the advantages to be gained from new techniques and advances in science. Accordingly, the tendency is to admit expert evidence on a point unless it is apparent that it is not a matter for expertise. Certain types of expert evidence are not yet of sufficient scientific status to be acceptable, see para.6–18, below. However, once a scientific test is recognised as being reliable, an appropriate expert can give evidence as to its result.[28]

In *Cannings*[29] it was held that juries should not be placed in a position where they must choose between the opinion of expert witnesses where there was no cogent evidence supporting either expert's stance. The Court of Appeal held that the prosecution of a parent for murder should not be commenced if the outcome of the trial depended exclusively on a serious disagreement between distinguished and reputable experts as to the cause of death, unless there was evidence—additional to the expert evidence—supporting the conclusion that the infant was deliberately harmed.

In *Clare and Peach*[30] a police officer who had made a study of video recordings depicting scenes of violence after a football match was allowed to give evidence in order to identify offenders shown on the recordings. The Court of Appeal referred to a New Zealand case in which such a witness was described as "sufficiently expert ad hoc to give identification evidence".[31] The Court of Appeal did not comment on whether the expression "expert ad hoc" was suitable in these circumstances. It is submitted that it is not, since such a witness cannot be described as an expert.[32]

6–14 If, however, the matter is one upon which an expert *should* give evidence, the court should refrain from acting as its own expert. Thus, the Divisional Court held that justices acted wrongly when, in a case concerning defective tyres, they called for a tyre gauge and then retired with the tyres and the gauge without any evidence being given as to how the gauge should be operated.[33] Similarly, the Court of Appeal has criticised a judge for appearing to turn himself into a handwriting expert by comparing examples of the defendant's handwriting.[34] In *Akhtar v Grout*,[35] a prosecution under the Trade Marks Act 1994, it was held that expert evidence was admissible to supplement the knowledge and experience of

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[26] *Stockwell* (1993) 97 Cr.App.R. 260 at 264, per Lord Taylor CJ.

[27] *Clarke* [1995] 2 Cr.App.R. 425. The expertise in this case was facial mapping by video superimposition. This is now an accepted form of expert evidence: *Atkins (D&M)* [2009] Crim.L.R. 141. See also *Donald* [2004] Crim.L.R. 841 where facial mapping was admitted when there had been a failure to hold an identification parade.

[28] *I* [2012] Crim.L.R. 886.

[29] *Cannings* [2004] 2 Cr.App.R. 63(7).

[30] *Clare and Peach* [1995] 2 Cr.App.R. 333, cited at para.2–39, above.

[31] *Howe* [1982] 1 N.Z.L.R. 618.

[32] For further discussion of this topic, see Elliott, "Video Tape Evidence: The Risk of Over Persuasion" [1998] Crim.L.R. 159.

[33] *Tiverton Justices Ex p. Smith* [1980] R.T.R. 280.

[34] *Simbodyal*, *The Times*, 10 October 1991.

[35] *Akhtar v Grout* (1998) 162 J.P. 714.

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justices as to whether or not certain clothing was not genuinely what the trade marks indicated that it should be. As a matter of law, the mere fact that, if justices accept the evidence of the expert it would be conclusive of the question put to the court, is not by itself a reason for excluding the evidence. In *O'Toole v Knowsley MBC*[36] the Divisional Court held that justices should not have refused to accept the uncontradicted advice of experts (in a case of statutory nuisance under the Environmental Protection Act 1990). The issue was preeminently a matter of expert evidence which the justices should have taken into account and they had been wrong in refusing to do so.

If expert evidence is to be rejected there must be some logical basis for doing so: *Gregory v DPP*[37] in which it was held that the evidence of a toxicologist which raised significant doubts as to the accuracy of blood alcohol tests should not have been rejected.

6–15 On the other hand, if information is within the knowledge of the court or the issue is one which the court can decide of its own experience, expert evidence will not be admitted.

> "If on the proven facts a judge or jury can form their own conclusion without help, then the opinion of the expert is unnecessary. In such a case if it is dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion in matters of human nature or behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."[38]

Thus, in *Chard*[39] the evidence of a prison doctor was not admitted when the purpose was to show that the defendant did not have the necessary *mens rea* to commit murder and in *Turner*[40] the evidence of a psychiatrist was not admitted when the purpose was to show that a man charged with murder was likely to have been provoked.

The same applies where the issue in question is not a scientific matter. Thus, in *Wahab*[41] it was held to be inappropriate to call expert evidence of one solicitor criticising the competence of another since the judge did not need the expert legal evidence to form a view about the reliability of the confession.

6–16 There are difficulties sometimes in disentangling questions of opinion from questions of fact.[42] This distinction is particularly important when considering the evidence of experts. This is because the function of the expert witness is twofold.

First, he may give his opinion upon an issue in the case (i.e. inferences which he draws from perceived facts as a result of his knowledge and experience). Secondly, he may give evidence of facts which his training has equipped him to

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[36] *O'Toole v Knowsley MBC*, *The Times*, 21 May 1999.

[37] *Gregory v DPP* [2002] 166 J.P. 400 (QBD).

[38] *Turner* [1975] 2 Q.B. 834, per Lawton LJ.

[39] *Chard* (1972) 56 Cr.App.R. 268, 270. See also *Wood* (1989) 153 J.P. 20 where the Divisional Court held that magistrates were right to reject certain evidence given by a consultant psychiatrist on the ground, inter alia, that it dealt with matters within the knowledge and experience of the court.

[40] *Turner* [1975] 2 Q.B. 834. Note that the common law defence of provocation has now been replaced by the statutory partial defence of loss of control: Coroners and Justice Act 2009 ss.54–56.

[41] *Wahab* [2003] 1 Cr.App.R. 232.

[42] *Landau* (1944) 60 L.Q.R. 201.

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perceive, but which would not be observed by a layman, i.e. "something perceptible upon physical examination but which would be recognised only by someone possessed of special knowledge or experience".[43]

These functions are often combined. Thus, the fingerprint expert points out the "ridge" characteristics of a certain print. These are matters of fact. He compares the print with the defendant's fingerprint and draws the inference that the defendant made the print in question. That is a matter of opinion. This distinction between evidence of fact and evidence of opinion may be of importance when assessing the expert's evidence.

6–17 The expert may, like any other witness, give evidence of fact. He may give evidence of fact which is *not* within his field of expertise. In this case, the jury must be directed that the witness was not speaking as an expert. Thus, in *Cook*[44] the defence to a charge of murder was provocation. A pathologist gave evidence that, as a matter of personal (but not medical) opinion, the blows to the victim were not consistent with having been inflicted by someone in a frenzy. There was held to have been a material irregularity in the case in that the judge in summing up had indicated that the pathologist had spoken as an expert and the jury might have attached far greater weight to his view than it merited.[45]

An expert's inadmissible opinion (outside his area of expertise) does not become admissible when adduced on behalf of a co-defendant. In *Theodosi*[46] T and a co-defendant were both charged with causing death by dangerous driving. Each blamed the other for the offence. A police officer gave evidence of the estimated speed of T's car. In cross-examination counsel for the co-defendant adduced the police officer's opinion that T was wholly to blame for the accident. The Court of Appeal held that the trial judge should have discharged the jury because inadmissible and very prejudicial evidence had been given.

6–18 The subjects of expert evidence fall into a number of broad categories; the most common are matters of science, art or skill, for example the evidence of medical practitioners as to the cause of injury or death; mechanical experts as to the functioning of a motor car; handwriting or fingerprint experts on the subject of their expertise. The categories of expert evidence will expand as new techniques are developed and new advances in science are made.[47] So long as the field of expertise is sufficiently well-established to pass ordinary tests of relevance and reliability no enhanced tests need be applied: *Dallagher*.[48] Examples include lip-reading evidence;[49] historical evidence from an expert engaged in the study of terrorism;[50] and linguistic evidence as to the meaning of code words.[51]

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[43] Law Reform Committee, 17th Report, *Evidence of Opinion and Expert Evidence*, Cmnd. 4489, para.7.

[44] *Cook* [1982] Crim.L.R. 670.

[45] Since the pathologist was speaking outside his field of expertise, it must be doubtful whether his view should have *any* weight.

[46] *Theodosi*, *The Times*, 13 April 1992.

[47] See *Clarke* [1995] 2 Cr.App.R. 425, above, at para.6–13.

[48] *Dallagher* [2003] 1 Cr.App.R. 195.

[49] *Luttrell, Dawson and Hamburger* [2004] Crim.L.R. 939.

[50] *Ahmed (Rangzieb) and Ahmed (Habib)*[2011] Crim.L.R. 734.

[51] *Nguyen* [2007] NSWCCA 249.

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Not all topics on which expert opinions are available are admissible as evidence. For instance, in *Gilfoyle*,[52] it was held that the evidence of a psychologist relating to a "psychological autopsy" was not expert evidence of a kind properly to be put before the court since, inter alia, the academic status of such autopsies was not such as to permit them to be admitted as a basis for expert opinion. It has also been held that post-hypnosis evidence is unreliable and therefore inadmissible.[53] And in *Dallagher*[54] evidence of ear prints was not admitted; although there was no objection in principle, the expertise was in its infancy and conclusions could not be expressed in terms of statistical probability. It is for the court to decide whether a point requires expert evidence. In *Kempster*[55] it was acknowledged that ear print comparison was capable of providing information that could identify a person who had left an ear print on a surface, but it would only be safe to rely upon such evidence where the minutiae of the ear structure could be identified and matched.

Subjects will now be considered where there are particular considerations in relation to expert evidence, namely psychiatric evidence, sudden unexplained infant death and "shaken baby cases", cases of obscenity, special measures directions, and credibility of witnesses.

Psychiatric evidence. In some cases psychiatric evidence is a necessity.[56] Thus, it is a practical necessity in order to establish a defence of automatism[57] or diminished responsibility.[58] Despite authority to the contrary[59] it is also difficult to see how a defence of insanity could succeed in the absence of medical evidence. Where the possible effect of hypoglycaemia on intent has to be considered, expert evidence is required since the matter is outside the experience of ordinary jurors.[60] **6–19**

Reliability of a confession. Expert evidence may also be admissible to assist the judge and jury in assessing the reliability of a confession. In *O'Brien, Hall and Sherwood*,[61] the Court of Appeal said that, where expert evidence of the abnormality of a defendant's personality is to be admitted as being relevant to the reliability of a confession, there must be a significant deviation from the norm and also a history predating the confession (not based solely on the history given **6–20**

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[52] *Gilfoyle* [2001] 2 Cr.App.R. 57. See also *Stagg* unreported, 14 September 1994 CCC, per Ognall J, *Archbold News*, issue 9, 4 November 1994, where it was doubted whether psychological profiling could properly be described as expert evidence.

[53] *Trochym v The Queen* 216 CCC (30) 225, Supreme Court of Canada.

[54] *Dallagher* [2003] 1 Cr.App.R. 195.

[55] *Kempster* [2008] 2 Cr.App.R. 19.

[56] For a discussion of psychiatric evidence, see Kenny, "The Expert in Court" (1983) 99 L.Q.R. 197; and for a discussion of the role of the expert, see Gee, "The Expert Witness in the Criminal Trial" [1987] Crim.L.R. 307. Not all categories of psychiatric evidence are admissible: see *Gilfoyle* and *Stagg*, above.

[57] *Hill v Baxter* [1958] 1 Q.B. 277 at 285, per Devlin J; *Smith* (1979) 69 Cr.App.R. 378 at 385, per Geoffrey Lane LJ; *Bratty v Att-Gen* [1963] A.C. 386 at 413, per Lord Denning.

[58] *Byrne* [1960] 2 Q.B. 396; *Dix* (1982) 74 Cr.App.R. 306. "While the subsection does not in terms require that medical evidence be adduced in support of a defence of diminished responsibility, it makes it a practical necessity if that defence is to begin to run at all": *Dix*, above, at 311, per Shaw LJ.

[59] *Att-Gen for S. Australia v Brown* [1960] A.C. 432; (1960) 44 Cr.App.R. 100 at 112, 113.

[60] *Toner* (1991) 93 Cr.App.R. 382.

[61] *O'Brien, Hall and Sherwood*, *The Times*, 16 February 2000.

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by the subject) which pointed to or explained the abnormality. The jury should be directed that they were not obliged to accept the evidence but should consider it, if they think right, as throwing light on the personality of the defendant and bringing to their attention aspects of his personality of which they might otherwise be unaware. In *Blackburn*[62] the Court of Appeal said that *O'Brien, Hall and Sherwood* was not a comprehensive statement as to the circumstances when expert evidence will be admissible on the reliability of a confession. *Blackburn* concerned the phenomenon of "coerced compliant confession" arising often from fatigue when an individual (in this case a boy of 15 who was questioned for over three hours) experiences a strong desire to give up refusing suggestions put to him. In *Raghip*[63] the defendant was aged 19 but was of low IQ and had the reading age and level of functioning of a child under 10 years old. In these circumstances the Court of Appeal said that psychological evidence was necessary and admissible to assist the jury in assessing the reliability of a confession made by R. The Court drew a distinction between evidence admissible for this purpose and such evidence relating to a defendant's *mens rea* (which is generally inadmissible). In *Ward*[64] the Court of Appeal held that expert evidence of a psychiatrist or psychologist may be admitted if it is to the effect that the defendant is suffering from a condition not properly described as mental illness, but from a personality disorder so severe as to be categorised as a mental disorder.

In *Pora v The Queen*[65] the Privy Council held that evidence from a clinical psychologist that the appellant's confessions to rape and murder were unreliable because he suffered from foetal alcohol spectrum syndrome was inadmissible. The court said that it was the duty of an expert to provide material on which a court could form its own conclusions on relevant issues, and that an expert witness should be careful to recognise the need to avoid supplanting the court's role as the ultimate decision maker on matters that were central to the outcome of the case.

6–21 In *Lowery v The Queen*,[66] the Privy Council upheld the evidence of a psychologist, called by one of two co-defendants charged with murder, to the effect that the defendant was less likely on the grounds of personality to have committed the murder.[67]

On the other hand, psychiatric evidence will not be admitted if the issue is one which the jury should determine without assistance. The question is whether the jury require the help of a psychiatrist in deciding the issue or not. Will the psychiatrist tell the jury something which they do not know from their own knowledge and experience?

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[62] *Blackburn* [2005] 2 Cr.App.R. 440(3).
[63] *Raghip*, *The Times*, 9 December 1991.
[64] *Ward* (1993) 96 Cr.App.R. 1 at 66.
[65] *The Times*, April 20, 2015.
[66] *Lowery v The Queen* [1974] A.C. 85.
[67] *Lowery* has been distinguished as a decision on its own special facts because the evidence was called on behalf of one defendant to rebut the evidence of his co-defendant: *Turner* [1975] Q.B. 834 at 842: *Masih* [1999] Crim.L.R. 395. Accordingly it would appear that *Lowery* cannot be taken as establishing any general rule relating to the admissibility of psychiatric evidence.

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In all the following examples the essential point is that the issue of the defendant's state of mind is one that the members of the jury can judge for themselves.

The leading case is *Turner*[68] in which the defendant was charged with murdering his girlfriend who admitted to sleeping with other men and to being pregnant by another man. The defendant's defence was provocation and he sought to admit psychiatric evidence to the effect that he had had a deep emotional relationship with his girlfriend and that her admissions were likely to have caused a blind explosion of rage. He was not, however, suffering from a mental illness. The Court of Appeal held that the trial judge had been right to exclude the psychiatric evidence. A similar approach will most likely be taken to the partial defence of "loss of self-control" which has now replaced the abolished defence of provocation.[69]

The Court said that (i) the question whether the defendant suffered from mental illness was within the expert's province, but was not relevant since it was not in issue; (ii) the remaining points in the psychiatrist's opinion were matters which were well within ordinary human experience. The Court commented that "Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from a mental illness are likely to react to the stresses and strains of life".[70]

6–22 If there is an underlying medical condition which the defendant claims made him unable to commit the crime alleged there must be an organic or psychiatric connection between the condition and the inability to commit the crime. In *Loughran*[71] where the defendant was charged with rape and robbery he sought to adduce psychiatric evidence that, due to an underlying physical condition, he suffered from pathological anxiety at the prospect of sexual intercourse which tended to confirm his contention that he was incapable of sexual intercourse. The Court of Appeal held that the evidence had been rightly excluded since it went to the defendant's credibility and did not furnish information outside the jury's own experience.

In *Masih*[72] the defendant, who was charged with rape, sought unsuccessfully to adduce psychiatric evidence to the effect that his low intelligence and immaturity made him easily led by his two co-defendants. However, although his intelligence was low, it was within the scale of normality. The Court of Appeal, upholding the trial judge, said that in these circumstances expert evidence was not as a rule necessary and should be excluded, but that if a person came into the class of mentally defective (i.e. with an IQ of 69 and below) and mental defectiveness was relevant to an issue, expert evidence should be admitted; the evidence should be confined to an assessment of the defendant's IQ and an explanation of any relevant abnormal characteristics which such an assessment involved. In *Jackson-Mason*[73] the Court of Appeal held that the principle in

[68] *Turner* [1975] Q.B. 834.
[69] Coroners and Justice Act 2009 s.56(1).
[70] *Turner* [1975] Q.B. 834 at 841.
[71] *Loughran* [1999] Crim.L.R. 404.
[72] *Masih* [1999] Crim.L.R. 395. See applied in *Henry* [2006] 1 Cr.App.R. 118(6) which concerned a defendant with an IQ of 71.
[73] *Jackson-Mason* [2015] 1 Cr.App.R. 6.

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Antar[74] (that evidence from a psychologist that the defendant had a very low IQ, and that his suggestibility level was higher than that of the general population) did not extend to cases that did not involve the defence or duress or in circumstances where suggestibility might otherwise be in issue, such as confession evidence.

In *Reynolds*,[75] a defendant charged with murder wished to call a psychiatrist to give evidence that his ability to separate reality from fantasy was flawed. The trial judge refused to admit the evidence. The Court of Appeal held that this ruling was correct: the evidence was irrelevant. This was because the issue in the case was whether the defendant had the necessary intention or not and there was no suggestion in the evidence that he had been fantasising at the time of the killing. The Court said that even if there had been such a suggestion, it amounted to a personal trait, about which the jury could use their common sense and did not require psychiatric evidence.

6–23 Some Commonwealth courts have taken a less restrictive view.[76] In *Lupien*[77] a majority of the Supreme Court of Canada held that psychiatric evidence should have been admitted to show that a defendant would react violently to homosexual advances.[78] In *Schultz*[79] the Supreme Court of Western Australia held that psychiatric evidence was admissible on the issue of intent in a case of murder to establish that the appellant was of borderline mentally defective intelligence with an IQ of between 69 and 78. Burt CJ said that the evidence, if accepted, would "take the appellant outside the range of the ordinary and would alert the jury to the fact . . . that he was in a class apart".[80] However, the Court of Appeal said in *Masih*that *Schultz* went too far and would not be followed.

Thus, as a general rule, it would appear that the court should distinguish between a case where the defendant suffers from mental illness or abnormality of mind (in which case psychiatric evidence is admissible to assist the jury) and a case in which there is no mental illness or abnormality of mind (in which case the jury can draw on its own knowledge and experience without assistance). It is sometimes argued that this test cannot be applied because mental abnormality and illness cannot be precisely defined.[81] However, the question whether mental illness or abnormality exists in a particular case is for the court to determine on the evidence before it. Each case must be decided on its own facts.[82]

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[74] *Antar*, *The Times*, 4 November 2004.

[75] *Reynolds* [1989] Crim.L.R. 220.

[76] See Pattenden, "Conflicting Approaches to Psychiatric Evidence" [1986] Crim.L.R. 92 for a comparison of the approaches in England, Canada and Australia.

[77] *Lupien* 1970 S.C.R. 263. For a discussion of decisions on this topic and a plea that *Turner*, above, should be reconsidered, see Mackay and Colman, "Equivocal Rulings on Expert Psychological and Psychiatric Evidence" [1996] Crim.L.R. 88.

[78] *Lupien* 1970 S.C.R. 263, per Ritchie, Spence and Hall JJ. The author is grateful to Judge Gordon Killeen, Senior Judge for the County of Middlesex, District Court of Ontario, for pointing out this result.

[79] *Schultz* [1982] W.A.R. 171.

[80] *Schultz* [1982] W.A.R. 171 at 174.

[81] See, e.g. Pattenden, "Conflicting Approaches to Psychiatric Evidence" [1986] Crim.L.R. 99–100 and Mackay and Colman, "Excluding Expert Evidence" [1991] Crim.L.R. 800, where the authors suggest that the present rule is too restrictive and that expert evidence should be admitted if the defendant exhibits any abnormality of mind or personality.

[82] *Weightman* (1991) 92 Cr.App.R. 291 at 297, CA.

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Sudden unexpected deaths in infancy. Cases involving the sudden unexpected death of an infant and the death of a child from sudden brain bleeding and swelling with no evidence of external injury (shaken baby syndrome) have posed particular difficulties for courts in establishing the cause of death. Disagreement between experts and conflicting data and research present the courts with a real problem: if the experts cannot agree about such conflicting data and research, how can a jury be expected to reach a conclusion beyond reasonable doubt in cases that turn on such evidence? **6–24**

In *Cannings*,[83] where three of the defendant's four children had died in infancy for no apparent reason, the Court of Appeal held that, where there was serious disagreement between experts as to the cause of an infant's death, and where natural causes cannot be excluded as a reasonable (and not fanciful possibility), the parent should not be prosecuted absent any evidence of deliberate harm to the child in addition to the expert evidence.[84] However, in *Kai-Whitewind*[85] the Court of Appeal held that *Cannings* was not authority for the proposition that whenever there is a genuine conflict of opinion between reputable experts, the prosecution should not proceed or that the evidence of the prosecution expert should be disregarded. The Court said that *Cannings* did not reveal any new principle of law or approach:

> "it is no more than an example of the judge's general obligation to ensure that the case, however it is put, proceeds on a logically justifiable basis, and is not left to the jury unless the evidence, taken at its highest, is such that the jury properly directed could convict."[86]

In *Harris*[87] the Court of Appeal heard together four separate "shaken baby syndrome", or otherwise called, non-accidental head injury cases involving very complex medical evidence. The appeal turned on research that demonstrated that the long-held medical opinion of the conventional signs giving rise to inferences of unlawful assaults on infants and very young children were unreliable. The Court held that the cases demonstrated that instances of alleged non accidental head injury were fact specific and had to be determined on their own facts. Moreover, the Court reminded judges, practitioners and experts of the guidance concerning expert witnesses provided in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd*[88] (see para.6–35, below) and in *re AB (Child Abuse: Expert Witnesses)*[89] which were said to be very relevant to criminal proceedings. In *re AB*, Wall J gave helpful guidance for experts giving evidence involving children. It was acknowledged that there will be cases of 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. Where that occurs in criminal cases the jury will have to resolve the issue raised. To assist them:

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[83] *Cannings* [2004] 2 Cr.App.R. 63(7).
[84] A similar approach was taken in *Anthony* [2005] 5 *Archbold News* 2 and *Gay and Gay* [2006] 5 *Archbold News* 1.
[85] *Kai-Whitewind* [2005] 2 Cr.App.R. 31(73).
[86] As set out in the well-known test in *Galbraith* (1981) 73 Cr.App.R. 124.
[87] *Harris* [2006] 1 Cr.App.R. 55(5).
[88] *National Justice Cia Naviera SA v Prudential Assurance Co Ltd* [1993] Lloyd's Rep. 68.
[89] *AB (Child Abuse: Expert Witnesses) Re* [1995] 1 F.L.R. 181.

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(1) 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 place before the court all material which contradicts the hypothesis.
(2) 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.

In hearing the appeal of three joined shaken baby syndrome cases in *Henderson*,[90] the Court of Appeal gave detailed guidance on the case management of expert evidence and the content of the summing up regarding such evidence. The Court emphasised the importance of the pre-trial phase in cases where juries are required to evaluate complex medical evidence. The jury could only approach conflicting expert evidence if it was marshalled and controlled before it was presented to the jury. Thus, the judge dealing with the pre-trial hearings should have experience of the complex issues and understanding of the medical learning and also go on to hear the case. The Court drew particular attention to the Kennedy Report on "Sudden unexpected death in infancy"[91] which recommended a checklist of matters to be established by the trial judge before expert evidence was admitted, including: (i) whether the proposed expert is still in practice; (ii) the extent to which he is an expert in the subject to which he testifies; (iii) when he last saw a case in his own clinical practice; and (iv) the extent to which his view is widely held. The Court also referred to the importance of Part 33 of the Criminal Procedure Rules 2014[92] (see para.14–50, below) to ensure that the overriding objective to deal with criminal cases justly was achieved. The jury should be given a detailed guide as to how to approach conflicting expert evidence and the summing up should stress to the jury that they should not convict unless the evidence led to the exclusion of any realistic possibility of an unknown cause. Moreover, special caution is required where the prosecution case heavily relied on developing medical science.

6–25 **Cases of obscenity.** The general rule is that expert evidence is not admissible to prove that material is obscene under the Obscene Publications Act 1959, i.e. whether it tends to deprave and corrupt the class of persons likely to read it.[93] The issue whether it has that tendency is for the jury to decide. The rationale of the

[90] *Henderson* [2010] 2 Cr.App.R. 24.
[91] The Report of a working group convened by the Royal College of Pathologists and the Royal College of Paediatrics and Child Health, published September 2004.
[92] With effect from 5 October 2015, the Criminal Procedure Rules 2015 (SI 2015/1490) revoke and replace the 2014 rules (as amended). The rules will be substantially reorganised and reduced from 76 to 50 parts. Part 33 will become Part 19 and is amended to clarify the extent of an expert's duty to the court.
[93] *Calder & Boyars Ltd* [1969]1 Q.B. 151; *Anderson* [1972] 1 Q.B. 304 at 313; cf. Post Office Act 1953 s.11; *Stamford* [1972] 2 Q.B. 391.

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rule is that the jury has been given the responsibility of making the decision as representing the ordinary man. It should not, therefore, be taken away from the jury and given to experts.[94]

However, there may be cases where expert evidence is admissible because it is not aimed at establishing that material has a tendency to deprave and corrupt, but at providing information to assist the jury to decide whether it has such a tendency. Thus, in *Skirving and Grossman*[95] the defendants were charged with having an obscene article for publication for gain. The article was a pamphlet concerned with the different ways of taking cocaine. The Court of Appeal held that expert evidence relating to the taking of cocaine had rightly been admitted because the expert was not usurping the function of the jury but informing them of something which they could not be expected to know, i.e. the effects of taking cocaine.

6–26 There may be an exception to the rule if the material is to be read by an exceptional class of reader, "such that a jury cannot be expected to understand the likely impact of the material upon its members without assistance".[96] In *DPP v A. & B.C. Chewing Gum Ltd*,[97] the Divisional Court held that evidence from a psychiatrist was admissible as to the effect of certain "battle cards" upon the minds of children aged from five years upwards. The reason for the decision was that while an adult jury is perfectly capable of considering the effect of something on an adult, the jury or justices need help when considering the effect upon children.[98]

The correctness of the decision has been doubted,[99] but it has not been overruled. But there must be doubt whether there is sufficient cogency in the reason given by the court to justify such a departure from principle. Most parents do not need assistance from an expert on the question whether material was likely to deprave and corrupt children.

Section 4(2) of the Obscene Publications Act 1959 provides that expert evidence is admissible to establish or negative the defence[100] that publication of an obscene article is for the public good on the grounds that it is in the interests of science, literature, art, or learning or other subjects of general interest. However, that evidence is to be limited to "the literary, artistic, scientific or other merits" of the articles.[101] It does not extend to evidence that the publication of the obscene material would be of therapeutic benefit to a minority of the public with certain sexual tendencies or difficulties[102] or would tempt young people to read it,[103] or would promote sex education.[104]

Special measures directions. **6–27** An expert witness may now give evidence in connection with an application for a special measures direction under s.20(6)(c)

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[94] *DPP v Jordan* [1977] A.C. 699 at 717, per Lord Wilberforce.
[95] *Skirving and Grossman* [1985] Q.B. 819.
[96] *Jordan* [1977] A.C. 699 at 718, per Lord Wilberforce.
[97] *A. & B.C. Chewing Gum Ltd* [1968] 1 Q.B. 159.
[98] *A. & B.C. Chewing Gum Ltd* [1968] 1 Q.B. 159 at 164–165, per Lord Parker CJ.
[99] *Jordan* [1977] A.C. 699 at 722, per Lord Dilhorne.
[100] Provided by s.4(1) of the Obscene Publications Act 1959.
[101] Obscene Publications Act 1959 s.4(2).
[102] *Jordan* [1977] A.C. 699.
[103] *Sumner* [1977] Crim.L.R. 614.
[104] *Att-Gen's Ref. (No.3 of 1977)* (1978) 67 Cr.App.R. 393.

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of the Youth Justice and Criminal Evidence Act 1999. An expert may also give evidence as to whether a witness is competent (s.54(5)), and can give sworn or unsworn evidence (s.55(6)).

6–28 **Credibility of witnesses.** Medical evidence may be called to show that a witness through disease or defect or abnormality of mind is not capable of giving true or reliable evidence. The House of Lords held in *Toohey v Metropolitan Police Commissioner*[105] that such evidence was admissible. Lord Pearce stated the principle thus:

> "Medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the *reliability* of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness, but may give all the matters necessary to show, not only the foundation of and reasons for the diagnosis, but also the extent to which the credibility of the witness is affected."[106]).

This principle appeared to have been extended by the decision of the Privy Council in *Lowery*, above, para.6–21. However, the scope of this decision has been considerably restricted by subsequent decisions.[107] In *Turner*,[108] the Court of Appeal said that the Court did not consider it "authority for the proposition that in all cases psychologists and psychiatrists can be called to prove the probability of the accused's veracity".[109] Thus, it will only be in an exceptional case that such evidence will be admitted. For instance, it is not permissible for the prosecution to call a psychiatrist or psychologist to give evidence as to why a witness's evidence should be accepted as reliable (unless the defence is calling a witness to say that it is unreliable).[110] Thus in *Pinfold*[111] it was held that expert medical evidence calling into question the reliability of a co-accused's confession was admissible even where no physical examination of the witness had been carried out. Moreover, in *H and X (Childhood Amnesia)*[112] expert evidence was admitted to the effect that adults have an impoverished memory of events happening in childhood before the age of seven and therefore a detailed memory of such events is likely to be unreliable; adult memories of events in later childhood are usually better. However, it was noted that it would only be in the most unusual circumstances that expert evidence of childhood amnesia would be relevant and admissible.

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[105] *Toohey v Metropolitan Police Commissioner* [1965] A.C. 595.

[106] *Toohey v Metropolitan Police Commissioner* [1965] A.C. 595 at 609 (emphasis supplied by author).

[107] *Turner* [1975] Q.B. 834; *Neale* (1977) 65 Cr.App.R. 304; and *Rimmer and Beech* [1983] Crim.L.R. 250.

[108] *Turner* [1975] Q.B. 834.

[109] *Turner* [1975] Q.B. 834 at 842. Attempts to call psychiatric evidence in circumstances where one defendant blamed the other for an offence failed in *Neale*(1977) 65 Cr.App.R. 304 and *Rimmer and Beech*[1983] Crim.L.R. 250. In both cases, the evidence was held not to be relevant.

[110] *Robinson* (1994) 98 Cr.App.R. 370.

[111] *Pinfold* [2004] 2 Cr.App.R. 3 (5).

[112] *H and X (Childhood Amnesia)* [2006] 1 Cr.App.R. 195(10).

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Evidence of the assessment of the credibility of witnesses by means of a lie detector machine (polygraph) has not been admitted in this country.[113] There is no reported authority on the subject and in the unreported case of *Burnal and Moore* the Privy Council said that polygraph evidence should only be made admissible, if at all, as a result of legislation based on full scientific and legal research.[114] However, such machines are now used to assist with risk assessment and as investigative tool for known sex offenders as part of probation conditions. Sections 28–30 of the Offender Management Act 2007 provide for lie detectors to be used as part of the determination of licence conditions for someone released from prison.[115] Section 30, however, expressly prohibits the use of such evidence in criminal proceedings. **6–29**

There is good reason for this. The admissibility of polygraph evidence in any criminal trial bristles with difficulty. First, the evidence of the operator of the machine concerning statements by a witness relating to any incident or offence must be hearsay. Secondly, if a defendant seeks to introduce evidence of a test which he has taken, he will be in contravention of the rule prohibiting previous consistent statements.[116] There are also practical difficulties since there are doubts about the accuracy of the test. Thus, the Royal Commission on Criminal Procedure concluded that the machine's "lack of certainty from an evidential point of view" told against its introduction in this country.[117] A yet more fundamental objection to its introduction is that it would make considerable inroads into the jury's function of assessing the credibility of witnesses. It can hardly be in the interests of justice that this important function be handed over to a machine, the accuracy of which is in doubt.

Qualifications of experts. It is for the court to decide whether a witness is qualified to give expert evidence or not. Such competence may have been derived either from a course of study or from experience. Thus, a medical practitioner or a scientist will give evidence of his qualifications and thereby establish his expertise. On the other hand, the witness may be an expert, but not in the relevant subject. In that case, his opinion will not be admissible. Thus a witness with training in psychology was not allowed to give medical evidence.[118] **6–30**

However, the expertise may be derived from experience and not formal study. Such experience may have been gained in a trade or business, for example an antique dealer. Alternatively, it may have been gained simply during the course of work. Thus, an experienced police officer was allowed to give expert evidence as to how an accident had occurred.[119] In *Murphy*[120] the Court of Appeal held that a police officer could give evidence of any matter that was within his expertise and

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[113] For use of the polygraph in the US, see D.W. Elliott's essay in *Well and Truly Tried* (1983) and for its use in Israel see Harnon, "Evidence Obtained by Polygraph: an Israeli Perspective" [1982] Crim.L.R. 340.

[114] *Burnal and Moore* unreported 28 April 1997 ("Polygraph Evidence in Jamaica—The Door Left Ajar", Broadbent, 62 Jo.Crim.L. 585).

[115] The use of such machines was upheld in *Corbett v Secretary of State for Justice and NOMS* [2009] EWHC 2671 (Admin).

[116] See D.W. Elliott's essay in *Well and Truly Tried*(1983) for a discussion of these difficulties.

[117] Cmnd. 8092 (1981), para.4–76.

[118] *Mackenney* (1983) 76 Cr.App.R. 271.

[119] *Oakley* (1979) 70 Cr.App.R. 7.

[120] *Murphy* [1980] Q.B. 434.

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in *Ibrahima*[121] the long-standing deputy director of a national drug advice charity should have been allowed to give expert evidence based on their substantial experience in the area of drug use. In *Clare and Peach*[122] a police officer who had made a lengthy study of a poor quality, confused video which purported to show the defendants committing offences was allowed to give evidence as to what, in his opinion, was happening on the video. As the court pointed out, the witness was open to cross-examination and the jury, after proper directions and warnings, would be free to accept or reject his assertions. Similarly, in *Breddick*[123] expert identification from a person with specialist skills in enhancing and interpreting video images was admissible despite it being of a non-technical nature. Even so, the judge should have warned the jury to approach the evidence with caution due to its "lack of scientific basis".

6–31 On the other hand, ordinary experience is not sufficient to make a witness an expert. Thus, the fact that a witness is a driver himself does not entitle him to give an opinion as to whether another driver is unfit through drink.[124] Likewise, in *Inch*[125] the Courts-Martial Appeal Court held that a medical orderly should not have been allowed at a court-martial to give evidence of his opinion that a wound was the result of a blow from an instrument and was not consistent with a clash of heads: such evidence should have been given by a person qualified to provide a medical opinion. There may, however, be occasions when the opinions of amateurs are admissible. Thus, in *Silverlock*[126] a solicitor was allowed to give evidence as an expert on handwriting, having gained his experience during the course of his practice. However, such circumstances must be rare. It must be very doubtful if an amateur would now be allowed to give evidence on a subject when there are experts available.

In practice, provided (a) the subject is one on which expert evidence is admissible[127]; and (b) the witness has specialised knowledge or experience of the subject, the witness's evidence will usually be admitted and questions as to his qualifications then go to the weight of the evidence rather than its admissibility.[128] For instance, the Court of Appeal in *Robb*[129] held that a phonetician, qualified by academic training and practical experience, was qualified to express an opinion on voice identification, although he relied on a technique which had minority support in his profession.

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[121] *Ibrahima* [2005] Crim.L.R. 887.
[122] *Clare and Peach* [1995] 2 Cr.App.R. 333.
[123] *Breddick, Independent*, 21 May 2001, [2001] EWCA Crim 984.
[124] *Davies* (1962) 46 Cr.App.R. 292.
[125] *Inch* (1990) 91 Cr.App.R. 51.
[126] *Silverlock* (1894) 2 Q.B. 766. See para.6–10, above, for a discussion concerning the opinion of non-experts as to handwriting.
[127] This does not apply to all topics. See para.6–18, above.
[128] Law Reform Committee, 17th Report, *Evidence of Opinion and Expert Evidence*, Cmnd.4489, para.19.
[129] *Robb* (1991) 93 Cr.App.R. 161.

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(2) The expert as witness

6–32 In 2011 the Law Commission published a report dealing specifically with expert evidence: *Expert Evidence in Criminal Proceedings in England and Wales.*[130] The Report highlighted a concern that too much expert evidence is admitted in criminal trials without adequate scrutiny because no clear test is applied to determine whether the evidence is sufficiently reliable. Thus, the Report recommended that there be a new reliability-based admissibility test for expert evidence in criminal proceedings so as to result in the exclusion of unreliable opinion evidence. The Report also raised concerns about whether advocates always cross-examine experts effectively to reveal potential flaws in the experts' methodology, data and reasoning. A draft Criminal Evidence Bill was attached to the Report with an appendix setting out the reliability-based admissibility test to be applied by judges. Expert opinion evidence would not be admitted unless it was adjudged to be sufficiently reliable to go before a jury.

The Government accepted the Law Commission's concern about problems caused by the use of inappropriate or unreliable expert evidence.[131] However, rather than create a statutory reliability test, the Government instead opted to invite the Criminal Procedure Rule Committee to consider amending the Criminal Procedure Rules to ensure that judges are provided with more information about the expert evidence at an early stage in the initial proceedings. Those proposed amendments were incorporated into the Criminal Procedure Rules 2014[132], which came into force on October 6, 2014. The amendments seek to clarify what information the court must have so as to be able to make an informed decision about the admissibility of the evidence, having regard to the reliability of the expert's opinion and, where relevant, having regard to the expert's own credibility. Where evidence is likely to be in dispute, the rules now provide for it to be introduced in the first instance in summary form, and a full report will only be required if the conclusions are contested. Part 33 is further amended by the Criminal Procedure Rules 2015[133], which come into force in October 2015[134].

The Criminal Procedure Rules must now be read alongside new Criminal Practice Direction (Evidence), 33A on expert evidence that also came into force on October 6, 2014. The direction lists the factors that a court may take into account in determining the reliability of expert opinion (especially of expert scientific opinion), and identifies some of the potential flaws in such opinion, which might deract from its reliability, that the court should be astute to identify.

In *H.*[135] Lord Justice Leveson stated that following the changes made to the Criminal Procedure Rules and the Criminal Practice Direction, advocates and the

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[130] *Expert Evidence in Criminal Proceedings in England and Wales*, 21 March 2011, Law Com. No.325. Recommendations on expert evidence were previously made by the Royal Commission on Criminal Justice, Cm.2263 [1993], Ch.9, and in the Auld Report, Review of the Criminal Courts of England and Wales, 2001, pp.571–582.

[131] *The Government's response to the Law Commission Report*, 21 November 2013.

[132] SI 2014/1610.

[133] SI 2015/1490.

[134] For further detail on the restructuring and amendments to the Criminal Procedure Rules 2014, see n.89, above.

[135] [2014] Crim.LR. 905.

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courts must adopt a new and more rigorous approach to the handling of expert evidence. In particular, comment based only on analysis of the evidence which effectively usurped the task of the jury was to be avoided.

6–33 **Compellability and privilege.** Expert witnesses are, like other witnesses, compellable.[136] They may also be required to produce documents as the result of a subpoena.[137] There is no property in an expert witness. Therefore, if a psychiatrist interviews a defendant in prison, he may be called as an expert by the prosecution or defence.[138]

Confidential communications between a solicitor and an expert are protected by legal professional privilege.[139] There is, however, no privilege in relation to (i) the documents or materials upon which the expert's opinion is based; or (ii) the independent opinion of the expert himself.[140] Thus, in *King*[141] the defence solicitor had sent various documents to a handwriting expert for his opinion. The prosecution served a subpoena on the expert requiring him to produce the documents. The defence objected to the production of the documents on the ground of privilege. The judge ruled that no privilege attached to the documents and allowed the prosecution to call the expert to produce the documents. The Court of Appeal upheld this ruling.

6–34 In many cases, the expert's evidence is not in dispute and there is no need to call him. In some cases, however, it may be essential to do so. *Hipson*[142] is an example of such a case. An expert was called at the committal proceedings. He said, without giving reasons, that in his opinion the handwriting on an endorsement of a cheque was the defendant's. He was conditionally bound as a witness. His deposition was read at the trial. There was no other evidence against the defendant. A submission of no case was refused. The subsequent appeal was allowed on the ground that the undisputed evidence fell short of the required standard of proof. The Court of Appeal said that in such cases the jury should have the assistance of the expert witness in court in order to help them make a decision as to the weight and reliability of the evidence.

6–35 **Independence.** The expertise and integrity of experts is fundamental to the proper functioning of the criminal system. This point was stressed in *Kumar v GMA*[143] which concerned a consultant psychiatrist who gave evidence in a case involving diminished responsibility without disclosing that he had no experience as an expert in homicide cases. He was found guilty of misconduct by the GMC.

The expert's duty to the court is set out in r.33.2 of the Criminal Procedure Rules 2014[144]:

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[136] *Harmony Shipping Co v Davis* [1979] 3 All E.R. 177, CA. For the compellability of witnesses, see Ch.17, below.

[137] *King* (1983) 77 Cr.App.R. 1.

[138] See, e.g. *Smith* (1979) 69 Cr.App.R. 378.

[139] *Harmony Shipping Co* [1979] 3 All E.R. 177 at 181, CA. For legal professional privilege, see para.11–33, below.

[140] *Harmony Shipping Co* [1979] 3 All E.R. 177 at 181, CA, per Lord Denning MR; *King* (1983) 77 Cr.App.R. 1.

[141] *King* (1983) 77 Cr.App.R. 1.

[142] *Hipson* 112 S.J. 945, [1969] Crim.L.R. 85.

[143] *Kumar v GMA* [2013] ACD 25(10).

[144] SI 2014/1610. As to the replacement and restructuring of the 2014 rules, see n.89, above.

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(1) An expert must help the court to achieve the overriding objective by giving opinion on matters which is—
  (a) objective and unbiased; and
  (b) within the expert's area or areas of expertise.
(2) This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.
(3) This duty includes obligations—
  (a) to define the expert's area or areas of expertise—
    (i) in the expert's report, and
    (ii) when giving evidence in person;
  (b) when giving evidence in person, to draw the court's attention to any question to which the answer would be outside the expert's area or areas of expertise; and
  (c) to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement.

The Court of Appeal in *Harris*[145] summarised the obligations of experts as previously set out by Cresswell J in a civil case[146]:

(1) Expert evidence presented to the court should be and 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 should never assume the role of advocate.
(3) An expert witness should state the facts and assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.
(4) An expert should make it clear when a particular question or issue falls outside his expertise.
(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 of material matters, such changes of view should be communicated to the other side without delay and, when appropriate, the court.

In another civil case, *Toth v Jarman*,[147] it was held that, so long as the opinion of the expert witness is independent of the parties and the pressures of litigation, the existence of a potential conflict of interest on his part does not automatically disqualify them from giving expert evidence, nor is it a breach of art.6(1). In *Gokal*[148] an expert who was a member of the investigating team was not thereby

[145] *Harris* [2006] 1 Cr.App.R. 5. This case was approved in *Bowman* [2006] 2 Cr.App.R. 3.
[146] *National Justice Cia Naviera SA v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep. 68.
[147] *Toth v Jarman* [2006] 4 All E.R. 1276.
[148] *Gokal* [1999] 6 *Archbold News* 2.

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disqualified. Similarly, in *Leo Sawrij v North Cumbria Magistrates Court*,[149] the evidence of an expert witness who had a commercial connection with the party calling him was held admissible.

6–36 **Expert reports.** Section 30 of the Criminal Justice Act 1988 provides that a report by an expert is admissible as evidence in criminal proceedings of any fact or opinion of which the expert could have given oral evidence. This is so, whether or not the expert gives evidence. But if he is not to give oral evidence, the leave of the court is required before his report is admitted. The section defines an "expert report" as a written report by a person dealing wholly or mainly with matters on which he is or would, if living, be qualified to give expert evidence. The section provides that in determining whether to give leave, the court shall have regard to the contents of the report; the reason why it is proposed that the expert shall not give oral evidence; the risk, having regard in particular to whether it is likely to be possible to controvert statements in the report without oral evidence, of unfairness to the accused; and any other relevant circumstances.

Accordingly, if the expert gives evidence, his report is admissible as evidence of the facts and opinions stated in it. This means that the court and jury can have copies of the report while the expert is giving evidence. It is thus possible to avoid the laborious process of the expert reading out his report when giving evidence. He can simply produce his report and be cross-examined upon it.

6–37 Whether leave is granted for the report to be admitted when the expert does not give evidence depends on the circumstances of the particular case. The court must consider all the matters set out in the section. In some cases it may be proper to admit the report without oral evidence because its contents are not in dispute or not substantially in dispute. On the other hand, in most cases where there is a substantial dispute about the contents, it is difficult to see how it will be possible properly to controvert the statements in the report unless the maker gives oral evidence and is cross-examined. It may be said that the statements can be controverted by other evidence. However, the jury will not be able to assess the evidence properly unless they have seen the expert cross-examined on his report.

6–38 **Preparatory work.** Before the coming into effect of s.127 of the Criminal Justice Act 2003 an expert was not permitted to give an opinion based on scientific facts run by assistants unless all those assistants were called upon to give supporting evidence in court.[150] This situation could in theory affect all such evidence since experts almost invariably depend on primary facts provided by machines or derived from the evidence of others or from their own earlier observations[151] and had considerable potential for the waste of public time and money.[152]

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[149] *Leo Sawrij v North Cumbria Magistrates Court* [2010] 1 Cr.App.R. 304(22).

[150] Report of the Royal Commission on Criminal Justice, Cm.2263 (1993), para.9.78, quoted Law Commission Report, "Evidence in Criminal Proceedings: Hearsay and Related Topics", Law Com. No.245, 1997, para.9.1. The situation was also criticised in the Law Commission Consultative Paper No.138, 1995, "Evidence in Criminal Proceedings: Hearsay and Related Topics".

[151] Morland J in *Galizadeh* [1995] Crim.L.R. 232.

[152] Illustrated by *Jackson* [1996] Crim.L.R. 732, Law Com. Rep. at para.9.11. At the time of writing, the section is expected to come into effect in April 2005.

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The position has now been rectified by s.127 of the 2003 Act as follows. An expert giving evidence in criminal proceedings may base an opinion or inference on a statement prepared by another person for the purposes of criminal proceedings or a criminal investigation.[153] That person must have, or be reasonably supposed to have had, personal knowledge of the matters stated,[154] and notice must be given that the expert will be basing his opinion or inference on that statement.[155]

Such a statement is to be treated as evidence of what it states,[156] but the court may, if applied to by one of the parties to the proceedings, order in the interests of justice that the statement not be admitted.[157] In deciding whether or not to call the original maker of statement, the court should take into consideration the expense of calling the statement maker, whether he could give relevant evidence which the expert could not, and whether he could reasonably be expected to remember the matters stated well enough to give oral evidence of them.[158]

Contents of expert's report. The required contents of any expert's report are now set out in r.33.4 of the Criminal Procedure Rules 2014[159] which states that an expert's report must: **6–39**

(a) give details of the expert's qualifications, relevant experience and accreditation;
(b) give details of any literature or other information which the expert has relied on in making the report;
(c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;
(d) make clear which of the facts stated in the report are within the expert's own knowledge;
(e) say who carried out any examination, measurement, test or experiment which the expert has used for the report and—
    (i) give the qualifications, relevant experience and accreditation of that person,
    (ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and
    (iii) summarise the findings on which the expert relies;
(f) where there is a range of opinion on the matters dealt with in the report—
    (i) summarise the range of opinion, and
    (ii) give reasons for the expert's own opinion;
(g) if the expert is not able to give an opinion without qualification, state the qualification;

[153] Criminal Justice Act 2003 s.127(1)(a), (2), (6).
[154] Criminal Justice Act 2003 s.127(1)(b).
[155] Criminal Justice Act 2003 s.127(1)(c); "under the appropriate rules" as to advance evidence: by subs.(7). No such rules have been made to date.
[156] Criminal Justice Act 2003 s.127(3).
[157] Criminal Justice Act 2003 s.127(4).
[158] Criminal Justice Act 2003 s.127(5).
[159] SI 2014/1610. As to the replacement and restructuring of the 2014 rules, see n.89, above.

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(h) include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence;
(i) contain a summary of the conclusions reached;
(j) contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty; and
(k) contain the same declaration of truth as a witness statement.

The Court of Appeal has stressed the importance of complying with these obligations: *Reed and Reed*[160] and *C.*[161]

Disclosure of expert evidence.

6–40 *Advance notice.* Rule 33.3 of the Criminal Procedure Rules 2014[162] sets out the procedure for admitting a summary of an expert's conclusions and states that the summary must be served on both the court and each party from whom that admission is sought as soon as practicable after the defendant whom it affects pleads not guilty. Where more than one party wants to introduce expert evidence, r.33.6 provides that the court may direct the experts to discuss the issues in the proceedings and prepare a statement for the court on the matters upon which they agree and disagree (with their reasons). Where more than one defendant wants to introduce expert evidence on an issue at trial, the court may direct that the evidence on that issue be given by only one expert thereby requiring the co-defendants to agree upon a single expert: r.33.7.

A party who fails to disclose expert evidence is not permitted to adduce it without leave of the court. In deciding whether to give leave, the court will be required to exercise its discretion by balancing the interests of the public represented by the Crown and the interests of the defendant. The result may be that it is necessary to admit evidence (albeit at the last minute) because of its importance in relation to the issues in the trial. On the other hand, if the defence keeps expert evidence to itself and then seeks to "ambush" the prosecution it is likely to be excluded. See for example: *Ensor*[163] and *Reed and Reed.*[164]

6–41 The purpose of these rules is to ensure that a party is not taken by surprise by expert evidence being adduced without notice at trial. In particular, the prosecution is thus afforded an opportunity to evaluate any such evidence and thereby avoid the delay which may be occasioned by an adjournment to consider evidence during the trial. If delay is occasioned in these circumstances a "wasted costs" order may appropriately be made against the party responsible.

Section 20(3) of the Criminal Procedure and Investigations Act 1996 permits similar rules relating to the disclosure of expert evidence as apply to trials on indictment (under s.81 of the Police and Criminal Evidence Act 1984) in magistrates' courts, and the Criminal Procedure Rules 2014 also apply to summary trials.[165] Such a provision is to be welcomed as lessening the

[160] *Reed and Reed* [2010] 1 Cr.App.R. 23.
[161] *C* [2011] 3 All E.R. 509.
[162] SI 2014/1610. As to the replacement and restructuring of the 2014 rules, see n.89, above.
[163] *Ensor* [2010] 1 Cr.App.R. 18.
[164] *Reed and Reed* [2010] 1 Cr.App.R. 23.
[165] The rules which have been issued are the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997 (SI 1997/533).

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opportunity for "trial by ambush" by springing expert evidence on the other party with the consequent unfairness and the potential for waste of time if an adjournment has to be granted for the other party to meet the evidence.

Unused material. There is a requirement that forensic scientists make full disclosure of unused material: *Ward*.[166] The duty extends to anything casting doubt on the scientists' opinions and includes anything that might arguably assist the defence. It exists irrespective of requests by the defence. The Royal Commission on Criminal Justice[167] interpreted the decision to mean that, if expert witnesses are aware of experiments or tests (even if not carried out by them), they are under an obligation to bring the records of the experiments to the attention of the police and prosecution. **6–42**

As to disclosure of unused material, see further generally paras 18–05 to 18–30.

Written material, experiments, personal experience. Experts, when giving evidence of opinion, may make reference to text books and other material written in their field of expertise. The material does not have to be in published form.[168] The Law Reform Committee summarised the principle succinctly. "Experts may refer to a text book or other written material if it is regarded as authoritative by those qualified in their speciality."[169] It is obviously essential that experts should be allowed to refer to such written material in order to give authority for their opinions and keep abreast with developments in the subject of their expertise. **6–43**

The expert may thus rely on the accepted work of others. He may rely on experiments conducted by others. He is not required to have conducted an experiment himself in order to make his evidence about it admissible. Thus, a doctor may refer to recognised tables relating to the rates of conversion and destruction of alcohol in the body, although he himself has not conducted the experiments on which the tables are based.[170] The fact that he himself has not made the experiments *may*go to the weight of the evidence: it does not go to admissibility.[171]

Similarly, the expert may rely on statistics collated by others. In *Abadom*[172] the Court of Appeal held that an expert was entitled to rely on statistics of the refractive index of broken glass collated by the Home Office in giving his opinion that glass samples found on the defendant's shoes came from a window broken during the course of an armed robbery. It was argued in *Abadom* that the evidence based on the statistics was hearsay and therefore inadmissible. The Court rejected this argument because (a) it was inevitable that such statistics would result from the work of others; and (b) to exclude reliance upon such information would lead to the distortion of unreliability of the expert's opinion.

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[166] *Ward* (1992) 94 Cr.App.R. 1. Also *Maguire* (1992) 94 Cr.App.R. 133.
[167] Cm.2263 (1993), paras 9–46 to 9–48.
[168] *Abadom* (1983) 76 Cr.App.R. 48.
[169] Law Reform Committee, 17th Report, *Evidence of Opinion and Expert Evidence*, Cmnd.4489, para.20. The same rule applies to professional practice: see *Smith*(1974) 58 Cr.App.R. 106.
[170] *Somers* (1963) 48 Cr.App.R. 11.
[171] *Somers* (1963) 48 Cr.App.R. 11.
[172] *Abadom* (1983) 76 Cr.App.R. 48.

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6–44 If the expert does rely on such information (whether published or unpublished) he should refer to the material in his evidence so that his opinion can be assessed by reference to it.[173]

An expert may also rely on his own experience. Thus, in *Hodges and Walker*,[174] the evidence of an experienced drugs officer as to the method of the supply of heroin, the local purchase price and that a certain amount would have been more than would have been used for personal use was rightly admitted as expert evidence. This was consistent with the approach outlined in *Bonython*[175] and was of the type envisaged in *Abadom*.[176]

(3) Proving facts upon which expert opinion is based

6–45 There is a distinction in the evidence given by experts between (i) evidence of fact, for example the characteristics of a fingerprint; and (ii) evidence of opinion, i.e. inferences drawn from certain facts.

In the former case the expert gives evidence of his own findings and the facts are thereby proved. In this case the person who carried out any work upon which such findings are based must himself give evidence. Thus, if it is to be proved that the blood found in some stains was of a similar grouping to that of the defendant, the forensic scientist who carried out the tests to establish the grouping must be called. If another scientist were to give evidence of the tests (which he had not himself carried out), that evidence would be hearsay and inadmissible.

In the latter case ((ii) above) the expert must, in giving his opinion, rely on certain facts. These facts must be proved in the trial by admissible evidence.[177] Furthermore, the witness should state the facts upon which his opinion is based. The Court of Appeal has said that the witness should do this in examination-in-chief.[178] The jury will thereby discover whether the witness has been correctly informed about the facts, and has taken the relevant facts into consideration. The jury will then be in a position to assess the witness's evidence properly.

6–46 The witness's statement of facts may lead to the introduction of some second-hand evidence, for example a doctor may rely upon what a patient has told him. This will not be hearsay since, whether true or false, it is merely part of the information upon which the doctor's opinion was formed.[179] Thus, the Court of Appeal in *Bradshaw*[180] said that a doctor may not state what a patient told him about past symptoms as evidence of those symptoms because that would infringe the rule against hearsay, but he may give evidence as to what the patient told him in order to explain the grounds on which he came to a conclusion with regard to the patient's condition.

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[173] *Abadom* (1983) 76 Cr.App.R. 48 at 52–53.
[174] *Hodges and Walker* [2003] Crim.L.R. 472.
[175] *Bonython* (1984) 38 S.A.S.R. 45.
[176] *Abadom* (1983) 76 Cr.App.R. 48.
[177] *Abadom* [1983] 1 W.L.R. 126, (1983) 76 Cr.App.R. 48, applying dicta in *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch. 415 at 421, per Megarry J and *Turner* [1975] 1 Q.B. 834 at 840. See also *Hodges and Walker* [2003] Crim.L.R. 472; para.6–45, above.
[178] *Turner* [1975] 1 Q.B. 834 at 840.
[179] Wigmore, *A Treatise on the Anglo-American System of Evidence* (3rd edn, 1940), vol.vi, para.1320 quoted in Pattenden, "Expert Opinion Evidence on Hearsay" [1982] Crim.L.R. 85 at 87.
[180] *Bradshaw* (1985) 82 Cr.App.R. 79 at 83.

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The facts may be proved by the expert himself. Thus, the fingerprint expert will give evidence of his findings of similarity in "ridge" characteristics between the defendant's fingerprint and that found at the scene of the crime. In giving evidence the expert produces the materials on which he has worked, for example blown-up photographs of fingerprints or handwriting samples. He can then demonstrate how he has arrived at his opinion. He can also be cross-examined about both the opinion and his materials. Indeed, in the absence of the materials, it may not be possible for the jury to see how the expert arrived at his opinion. In a case where an expert gave evidence about voice identity, the Court of Appeal held that a judge was wrong to have excluded the tapes on which the expert's opinion was based.[181]

The facts must be proved, if not by the expert, then by someone else, as, for instance, when the finding of a fingerprint at the scene of crime is proved by another witness such as the Scenes of Crime Officer. If the facts are not proved, the opinion of the expert is worthless. Where the expert relies on facts which are not proved by him, it is for the prosecution (or the party calling the expert) to fill the evidential gap.[182] Once the facts have been proved by admissible evidence, experts are "entitled to draw on the work of others as part of the process of arriving at their conclusion".[183]

(4) Function and weight of expert evidence

6–47 The function of expert evidence is to assist the court by providing information which is outside the experience and knowledge of the judge or jury. The expert's function in giving his opinion is to assist the jury in the interpretation of evidence where such evidence might not otherwise be intelligible to them. (In *Clarke*[184] the evidence concerned was facial mapping by way of video superimposition: the court pointed out that this new, and valuable, crime detection technique was just as much evidence as blown-up photographs of fingerprint evidence.) On the other hand, questions relating to the weight of the evidence are for the jury to determine. These issues involve the consideration of two apparently conflicting principles.

The first principle is that the expert does not decide the case. He assists the jury or justices to do so. This principle was stated by Lord President Cooper:

> "[The duty of the expert witness] 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 of these criteria to the facts proved by the evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case."[185]

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[181] *Bentum* (1989) 153 J.P. 538.
[182] *Jackson* [1996] 2 Cr.App.R. 420.
[183] *Abadom* (1983) 76 Cr.App.R. 48 at 52.
[184] *Clarke* [1995] 2 Cr.App.R. 425. Facial mapping is now an accepted form of evidence: *Atkins (D & M)* [2009] Crim. L.R. 141.
[185] *Davie v Edinburgh Magistrates*, 1953 S.C. 34, 40.

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Thus, the fact that an expert says that in his opinion, fingerprints found at the scene of a burglary were made by the defendant, does not, itself, decide the defendant's guilt. It is for the jury to say whether he is guilty or not.

6–48 The jury must also be allowed to decide what weight to give to the expert's evidence. While it is important to direct the jury that they were not bound by an expert's opinion, the direction need not be given in a particular way (such as that promulgated in the Crown Court Bench Book and Specimen Directions)[186]: *Fitzpatrick (Gerald)*.[187] Nor should the jury be directed that the evidence of an expert *ought* to be accepted as it gives a misleading impression of the weight of the evidence.[188] A further example is to be found in the defence of insanity. This is an issue for the jury to decide. In *Rivett*,[189] the Court of Criminal Appeal would not interfere with a verdict of guilty despite medical evidence that the defendant was insane.

The second principle is that if there is nothing to contradict the expert's evidence the jury should accept it. For example, it was held to be a misdirection to invite the jury to disregard the uncontradicted evidence of an expert that there was no blood on certain boots and to substitute their own opinion.[190] Similarly, if there is uncontradicted medical evidence in support of a defence of diminished responsibility, the jury should not reject it, and convict of murder. In *Matheson*[191] and *Bailey*[192] there was uncontradicted medical evidence to this effect, but the jury convicted of murder. In both cases the Court of Criminal Appeal substituted verdicts of manslaughter. The rationale for these decisions is to be found in the judgment of Lord Goddard CJ in *Matheson*:

> "While it has often been emphasised and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for the doctors, the verdict must be *founded on evidence*. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, the court would not, and indeed could not, disturb their verdict, but if the doctor's evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence'."[193]

6–49 On the other hand, in *Walton v The Queen*,[194] the Privy Council held that a jury was entitled to reject the uncontradicted evidence of a psychiatrist in support of a defence of diminished responsibility when:

(a) the quality and weight of medical evidence fell a long way short of that in *Bailey* and *Matheson*;
(b) evidence of the conduct of the defendant at the time of the killing did not indicate a person bordering on insanity; and

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[186] *Crown Court Bench Book and Specimen Directions* (3rd edn, 2010).
[187] *Fitzpatrick (Gerald)* [1999] Crim.L.R. 832.
[188] *Lanfear* (1968) 52 Cr.App.R. 176.
[189] *Rivett* (1950) 34 Cr.App.R. 87.
[190] *Anderson* [1972] A.C. 100.
[191] *Matheson* [1958] 1 W.L.R. 474.
[192] *Bailey* (1978) 66 Cr.App.R. 31.
[193] *Matheson* [1958] 1 W.L.R. 474 at 478 (emphasis supplied by author).
[194] *Walton v The Queen* [1978] A.C. 788.

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(c) there was no objective evidence of a history of mental disorder on the part of the defendant.

Reconciling these cases is not easy; but the position may be summarised in this way:

(a) if the expert evidence is clear and uncontradicted by any other evidence, the jury should accept it.
(b) If, however, the evidence is not clear or there is evidence which tends to contradict the expert's opinion, the jury may reject it.

6–50 Where two or more expert witnesses give evidence for opposing sides, the direction to the jury should be to convict *only* if it is satisfied beyond reasonable doubt that it should accept the expert evidence adduced by the prosecution and reject that adduced by the defence. Accordingly, a direction to the jury to decide on the balance of probabilities is wrong.[195] In *Leon*[196] it was reiterated that particular care must be taken when summing-up in a case in which experts have disagreed. A clear and fair summary of each party's expert evidence with an appropriate direction as to how to approach such evidence must be given. The summing up should not simply repeat the evidence of the experts, the evidence should rather be summarised issue by issue and in such a way that the summing up will make it easier to understand how a verdict has been reached: *Henderson*.[197]

[195] *Platt* [1981] Crim.L.R. 332.
[196] *Leon* [2009] R.T.R. 26. See also *Hookway and Noakes* [2012] Crim.L.R. 130—where DNA experts disagreed it is for the jury to determine the weight to be given to each expert.
[197] *Henderson* [2010] 2 Cr.App.R. 24. For the suggested approach in DNA cases, see *Doheny and Adams*[1997] 1 Cr.App.R. 369.

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