

CHAPTER 10

OPINION EVIDENCE AND JUDICIAL NOTICE

	PARA.
I. Expert Evidence	10-1
A. Legislation.	10-1
B. Opinion Evidence	10-19
C. Foreign Law	10-29
D. Application of Scientific Techniques to Testimony of Lay Witnesses	10-30
E. Immunity from Prosecution	10-31
F. Appeals	10-32
II. Non Expert Opinion Evidence.	10-33
III. Judicial Notice	10-34
A. Principle	10-34
B. Scope	10-36
C. Legislation.	10-37
D. Signatures of Judges.	10-38

Ch. 10

I. EXPERT EVIDENCE

A. LEGISLATION

Criminal Justice Act 1988, s.30

Expert reports

30.—(1) An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings. **10-1**

(2) If it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court.

(3) For the purpose of determining whether to give leave the court shall have regard—

- (a) to the contents of the report;
- (b) to the reasons why it is proposed that the person making the report shall not give oral evidence;
- (c) to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
- (d) to any other circumstances that appear to the court to be relevant.

(4) An expert report, when admitted, shall be evidence of any fact or opinion of which the person making it could have given oral evidence.

(5) In this section “expert report” means 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.

Advance notice of expert evidence

The PACE Act 1984, s.81, provided for the making of rules: (a) requiring a party to proceedings before the Crown Court to give advance notice of any expert evidence he proposes to adduce; and (b) prohibiting a party from adducing such evidence if he does not make the necessary advance disclosure, except with the leave of the court. See Pt 19 of the Criminal Procedure Rules 2020 (below), in particular r.19.3. As to the obligation of disclosure imposed by rule 19.3, see *Ward*, § 10-25. As to the giving of notice in relation to factual matters upon which an expert opinion is based, see also section 127 of the CJA 2003 (§ 11-80). Subsections (1)(c) and (7) refer to the giving of notice in accordance with rules made under section 81 of the 1984 Act. It seems fairly plain that Part 19 was intended to supply the necessary rules, and it may be construed as doing so, but it is submitted that the rules do not in fact cover all the matters **10-2**

dealt with by section 127(1). For section 127 to be triggered, it is submitted that the notice given under Part 19 should make express reference to the fact that the expert will rely on the contents of a statement made by [X], and that X's statement was prepared for the purposes of the proceedings or for the investigation that led to the proceedings, it should recite the matters stated in X's statement and it should deal with the extent to which X had personal knowledge of the matters stated. Much of this could of course be achieved by supplying a copy of X's statement with the notice of expert evidence

For examples of decisions to refuse leave to the defence to adduce expert evidence on account of a failure to comply with the provisions of what is now rule 19.3(3)(a) and (b) being upheld, see *Writtle v DPP* [2009] EWHC 236 (Admin); [2009] R.T.R. 28, DC (report served after conclusion of prosecution case and sought to raise an entirely new issue); and *Ensor* [2009] EWCA Crim 2519; [2010] 1 Cr. App. R. 18 (where decision not to serve a report relating to defendant's ability to give evidence until after a final decision had been taken not to call the defendant was a "deliberate tactical ploy", and "nothing less than an attempt to ambush the prosecution"); and see also *Reed and Reed*; *Garmson* (§ 10-4), for circumstances in which it was suggested it might be appropriate for a court to refuse leave for evidence to be given by an expert who is in default.

Funding

10-3 See Appendix G-13, G-17, G-20; and, as to appellate proceedings, see §§ 7-165, 7-217.

Expert's duty and content of expert's report

10-4 In *Reed and Reed*; *Garmson* [2009] EWCA Crim 2698; [2010] 1 Cr. App. R. 23, the court issued guidance as to the procedure to be followed in cases involving DNA evidence (it is submitted that it is equally applicable to expert evidence on any other subject). The court said that it is particularly important to ensure that the obligations under rule 19.4(1)(f) and (g) of the rules (below) are followed and also that, where propositions are to be advanced as part of an evaluative opinion, each proposition is spelt out with precision. The court emphasised that expert reports must be carefully analysed by the parties and, where a disagreement is identified, this must be brought to the attention of the judge. If the reports have not been served by all parties by the time of (what is now) the plea and trial preparation hearing, it is the duty of the parties to bring the matter back before the judge where a disagreement is identified, and it will then ordinarily be necessary for the judge to exercise his power under rule 19.6 to make an order for the provision of a joint statement setting out matters of agreement and disagreement. The court added that this statement should set out in clear terms for use at the trial the basic science that is agreed, and that it must then identify with precision what is in dispute. If the order as to the provision of such a statement is not observed in the absence of good reason, then the judge should consider carefully whether to exercise his power to refuse permission to the party whose expert is in default to call that expert to give evidence. In many cases, the court advised, the judge may well exercise that power, and a failure to find time for a meeting because of commitments to other matters is not to be treated as a good reason.

In *C* [2010] EWCA Crim 2578; [2011] 3 All E.R. 509, another DNA case, the court reiterated the importance of complying with the above guidance and with the rules, opining that if this were done then there were likely to be few cases where a voir dire would be necessary to determine whether the Crown's expert evidence should be excluded under section 78 of the PACE Act 1984 (§ 15B-87). In particular, the court said that, under the rules, it would not be proper for a defence advocate to embark on an application under section 78 without a statement from a qualified expert, provided to the court and to the prosecution, and duly signed and verified, identifying the shortcomings in the methodology and results of the prosecution's expert.

In *Henderson*; *Butler*; *Oyediran (Practice Note)* [2010] EWCA Crim 1269; [2010] 2 Cr. App. R. 24, it was said that in cases that turn on medical evidence, justice depends on proper preparation and control of the evidence from the outset of the investigation; only by properly marshalling the evidence before it is presented will it be possible adequately to direct the jury so as to enable them to reach a logically justifiable conclusion; the pre-trial process is of particular importance; without robust pre-trial management, the real medical issues cannot be identified and, absent such identification, a judge is unlikely to be able to prevent experts wandering into unnecessary, complicated and confusing detail; accordingly, a judge who is to hear a case of this type should deal with all pre-trial hearings, save for those in which no issue of substance

arises. By the time a trial starts, the court said, the essential medical issues which the jury have to resolve, and the expert evidence, identifying the source on which the evidence is based, should all be clear.

In *H* [2014] EWCA Crim 1555; [2014] Crim. L.R. 905, it was said that whilst primary legislative reform had not been taken forward following the Law Commission’s report (*Expert Evidence in Criminal Proceedings in England and Wales* (2011) (Law Com. No. 325)), real concern about the use of unreliable or inappropriate expert evidence had resulted in the revision of rules 19.1 to 19.4 of the 2015 rules, and a new practice direction (§ 10-16) incorporated the commission’s recommended reliability criteria to be considered when ruling on admissibility. The court advised that, following these changes, a more rigorous approach to the handling of expert evidence was required; in particular, comment that effectively usurps the task of the jury, is to be avoided; the task of the expert is only to inform a jury of matters of a scientific and medical kind of which they might be unaware, and which they ought to take into account when assessing the evidence in the case. As to this case, see also § 8-337.

In *Berberi* [2014] EWCA Crim 2961; [2015] 2 Cr. App. R. 2, it was said to have been “inexcusably casual” of the parties and the Crown Court to address the issue of admissibility of “expert” evidence on which the defence wished to rely by reference to relevance alone; compliance with rr.19.3(3) and 19.4 was a matter of substance, not of mere form.

In *Pabon* [2018] EWCA Crim 420; [2018] Crim. L.R. 662, the court considered the impact of a banking expert’s failure to comply with the basic duties of an expert, including the duty to stay within their area of expertise. As to this case, see also § 10-21.

As to the duty of experts, see also § 10-25.

Criminal Procedure Rules 2020 (SI 2020/759), Pt 19

When this Part applies

19.1—(1) This Part applies where a party wants to introduce expert opinion evidence. **10-5**

(2) A reference to an “expert” in this Part is a reference to a person who is required to give or prepare expert evidence for the purpose of criminal proceedings, including evidence required to determine fitness to plead or for the purpose of sentencing.

(3) Where evidence that is introduced as evidence of fact within a witness’ direct knowledge includes expert opinion the court may direct that the requirements of rules 19.2 (Expert’s duty to the court) and 19.3 (Introduction of expert evidence) apply, to the extent and with such adaptations as the court directs.

[This rule is printed as amended by Criminal Procedure (Amendment No.2) Rules 2021 (SI 2021/849), r.7.]

Expert’s duty to the court

19.2—(1) An expert must help the court to achieve the overriding objective— **10-6**

- (a) by giving opinion which is—
 - (i) objective and unbiased, and
 - (ii) within the expert’s area or areas of expertise; and
- (b) by actively assisting the court in fulfilling its duty of case management under rule 3.2, in particular by—
 - (i) complying with directions made by the court, and
 - (ii) at once informing the court of any significant failure (by the expert or another) to take any step required by such a direction.

(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;
 - (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; and
 - (d) to disclose to the party for whom the expert’s evidence is commissioned anything—
 - (i) of which the expert is aware, and
 - (ii) of which that party, if aware of it, would be required to give notice under rule 19.3(3)(c).

Introduction of expert evidence

19.3—(1) A party who wants another party to admit as fact a summary of an expert’s conclusions must serve that summary— **10-7**

Ch. 10

10-7

10. OPINION EVIDENCE AND JUDICIAL NOTICE

- (a) on the court officer and on each party from whom that admission is sought; and
- (b) as soon as practicable after the defendant whom it affects pleads not guilty.
- (2) A party on whom such a summary is served must—
 - (a) serve a response stating—
 - (i) which, if any, of the expert’s conclusions are admitted as fact, and
 - (ii) where a conclusion is not admitted, what are the disputed issues concerning that conclusion; and
 - (b) serve the response—
 - (i) on the court officer and on the party who served the summary, and
 - (ii) as soon as practicable, and in any event not more than 10 business days after service of the summary.
- (3) A party who wants to introduce expert evidence otherwise than as admitted fact must—
 - (a) serve a report by the expert which complies with rule 19.4 (Content of expert’s report) on—
 - (i) the court officer, and
 - (ii) each other party;
 - (b) serve the report as soon as practicable, and in any event with any application in support of which that party relies on that evidence;
 - (c) serve with the report
 - (i) notice of anything of which the party serving it is aware which might reasonably be thought capable of undermining the reliability of the expert’s opinion, or detracting from the credibility or impartiality of the expert; and
 - (ii) an explanation of how facts stated in the report are admissible as evidence if that is not explained by the report;
 - (d) if another party so requires, give that party a copy of, or a reasonable opportunity to inspect—
 - (i) a record of any examination, measurement, test or experiment on which the expert’s findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and
 - (ii) anything on which any such examination, measurement, test or experiment was carried out.
- (4) Unless the parties otherwise agree or the court directs, a party may not—
 - (a) introduce expert evidence if that party has not complied with paragraph (3); or
 - (b) introduce in evidence an expert report if the expert does not give evidence in person.

[This rule is printed as amended by Criminal Procedure (Amendment No.2) Rules 2021 (SI 2021/849), r.7.]

Content of expert’s report

10-8

- 19.4** Where rule 19.3(3) applies, an expert’s report must—
- (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) where the expert has based an opinion or inference on a representation of fact or opinion made by another person for the purposes of criminal proceedings (for example, as to the outcome of an examination, measurement, test or experiment)—
 - (i) identify the person who made that representation to the expert,
 - (ii) give the qualifications, relevant experience and any accreditation of that person, and
 - (iii) certify that that person had personal knowledge of the matters stated in that representation;
 - (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;
 - (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

I. EXPERT EVIDENCE

10-13

- (k) contain the same declaration of truth as a witness statement.

As to compliance with this rule, see *Berberi and Pabon*, § 10-4.

The requirements of the rule reflect in large part what was said as to the contents of a report in *B. (T.)*, § 10-26.

Expert to be informed of service of report

19.5 A party who serves on another party or on the court a report by an expert must, at once, **10-9** inform that expert of that fact.

Pre-hearing discussion of expert evidence

19.6—(1) This rule applies where more than one party wants to introduce expert evidence. **10-10**

(2) The court may direct the experts to—

- (a) discuss the expert issues in the proceedings; and
- (b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.

(3) Except for that statement, the content of that discussion must not be referred to without the court's permission.

(4) A party may not introduce expert evidence without the court's permission if the expert has not complied with a direction under this rule.

Court's power to direct that evidence is to be given by a single joint expert

19.7—(1) 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 is to be given by one expert only. **10-11**

(2) Where the co-defendants cannot agree who should be the expert, the court may—

- (a) select the expert from a list prepared or identified by them; or
- (b) direct that the expert be selected in another way.

Instructions to a single joint expert

19.8—(1) Where the court gives a direction under rule 19.7 for a single joint expert to be used, **10-12** each of the co-defendants may give instructions to the expert.

(2) A co-defendant who gives instructions to the expert must, at the same time, send a copy of the instructions to each other co-defendant.

(3) The court may give directions about—

- (a) the payment of the expert's fees and expenses; and
- (b) any examination, measurement, test or experiment which the expert wishes to carry out.

(4) The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.

(5) Unless the court otherwise directs, the instructing co-defendants are jointly and severally liable for the payment of the expert's fees and expenses.

Application to withhold information from another party

19.9—(1) This rule applies where— **10-13**

- (a) a party introduces expert evidence under rule 19.3(3);
- (b) the evidence omits information which it otherwise might include because the party introducing it thinks that that information ought not be revealed to another party; and
- (c) the party introducing the evidence wants the court to decide whether it would be in the public interest to withhold that information.

(2) The party who wants to introduce the evidence must—

- (a) apply for such a decision; and
- (b) serve the application on—
 - (i) the court officer, and
 - (ii) the other party, but only to the extent that serving it would not reveal what the applicant thinks ought to be withheld.

(3) The application must—

- (a) identify the information;
- (b) explain why the applicant thinks that it would be in the public interest to withhold it; and
- (c) omit from the part of the application that is served on the other party anything that would reveal what the applicant thinks ought to be withheld.

(4) Where the applicant serves only part of the application on the other party, the applicant must—

- (a) mark the other part, to show that it is only for the court; and

Ch. 10

10-13

10. OPINION EVIDENCE AND JUDICIAL NOTICE

- (b) in that other part, explain why the applicant has withheld it from the other party.
- (5) The court may—
 - (a) direct the applicant to serve on the other party any part of the application which has been withheld; and
 - (b) determine the application at a hearing or without a hearing.
- (6) Any hearing of an application to which this rule applies—
 - (a) must be in private, unless the court otherwise directs; and
 - (b) if the court so directs, may be, wholly or in part, in the absence of the party from whom information has been withheld.
- (7) At any hearing of an application to which this rule applies—
 - (a) the general rule is that the court must consider, in the following sequence—
 - (i) representations first by the applicant and then by the other party, in both parties' presence, and then
 - (ii) further representations by the applicant, in the absence of the party from whom information has been withheld; but
 - (b) the court may direct other arrangements for the hearing.

Court's power to vary requirements under this Part

- 10-14** **19.10**—(1) The court may extend (even after it has expired) a time limit under this Part.
- (2) A party who wants an extension of time must—
 - (a) apply when serving the report, summary or notice for which it is required; and
 - (b) explain the delay.

- 10-15** Rule 25.12 of the 2020 rules provides that if, in a trial on indictment, the court admits the written statement of a witness to which Part 19 applies, each relevant part of the statement must be read or summarised aloud, unless the court otherwise directs. Rule 24.5 makes corresponding provision for summary trials.

Criminal Practice Direction V Evidence 19A: Expert Evidence (as amended by the Criminal Practice Directions 2015 (Amendment No. 8) [2019] EWCA 495)

- 10-16** **19A.1** Expert opinion evidence is admissible in criminal proceedings at common law if, in summary, (i) it is relevant to a matter in issue in the proceedings; (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and (iii) the witness is competent to give that opinion.

19A.2 [Summarises the CJA 1988, s.30 [§ 10-1], and the Criminal Procedure Rules 2015, Pt 19 [§§ 10-5 and following].]

19A.3 [Refers to the non-implementation of a Law Commission proposal for the enactment of a statutory test for admissibility [as to which, see § 10-4].] The common law, therefore, remains the source of the criteria by reference to which the court must assess the admissibility and weight of such evidence; and rule 19.4 ... lists those matters with which an expert's report must deal, so that the court can conduct an adequate such assessment.

19A.4 In ... [*R. v Dlugosz*; *R. v Pickering*; *R. v S (MD)* [2013] EWCA Crim 2; [2013] 1 Cr. App. R. 32], the Court of Appeal observed (at [11]): "It is essential to recall the principle which is applicable, namely in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury." Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors.

19A.5 Therefore factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include:

- (a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;
- (b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
- (c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;
- (d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

- (e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;
- (f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);
- (g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and
- (h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

19A.6 In addition, in considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:

- (a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;
- (b) being based on an unjustifiable assumption;
- (c) being based on flawed data;
- (d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or
- (e) relying on an inference or conclusion which has not been properly reached.

19A.7 To assist in the assessment described above, CrimPR 19.3(3)(c) requires a party who introduces expert evidence to give notice of anything of which that party is aware which might reasonably be thought capable of undermining the reliability of the expert's opinion, or detracting from the credibility or impartiality of the expert; and CrimPR 19.2(3)(d) requires the expert to disclose to that party any such matter of which the expert is aware. Examples of matters that should be disclosed pursuant to those rules include (this is not a comprehensive list), both in relation to the expert and in relation to any corporation or other body with which the expert works, as an employee or in any other capacity:

- (a) any fee arrangement under which the amount or payment of the expert's fees is in any way dependent on the outcome of the case (see also the declaration required by paragraph 19B.1 of these directions);
- (b) any conflict of interest of any kind, other than a potential conflict disclosed in the expert's report (see also the declaration required by paragraph 19B.1 of these directions);
- (c) adverse judicial comment;
- (d) any case in which an appeal has been allowed by reason of a deficiency in the expert's evidence;
- (e) any adverse finding, disciplinary proceedings or other criticism by a professional, regulatory or registration body or authority, including the Forensic Science Regulator;
- (f) any such adverse finding or disciplinary proceedings against, or other such criticism of, others associated with the corporation or other body with which the expert works which calls into question the quality of that corporation's or body's work generally;
- (g) conviction of a criminal offence in circumstances that suggest:
 - (i) a lack of respect for, or understanding of, the interests of the criminal justice system (for example, perjury; acts perverting or tending to pervert the course of public justice),
 - (ii) dishonesty (for example, theft or fraud), or
 - (iii) a lack of personal integrity (for example, corruption or a sexual offence);
- (h) lack of an accreditation or other commitment to prescribed standards where that might be expected;
 - (i) a history of failure or poor performance in quality or proficiency assessments;
 - (j) a history of lax or inadequate scientific methods;
 - (k) a history of failure to observe recognised standards in the expert's area of expertise;
 - (l) a history of failure to adhere to the standards expected of an expert witness in the criminal justice system.

19A.8 In a case in which an expert, or a corporation or body with which the expert works, has been criticised without a full investigation, for example by adverse comment in the course of a judgment, it would be reasonable to expect those criticised to supply information about the conduct and conclusions of any independent investigation into the incident, and to explain what steps, if any, have been taken to address the criticism.

19A.9 The rules require disclosure of that of which the expert, or the party who introduces the expert evidence, is aware. The rules do not require persistent or disproportionate enquiry, and courts will recognise that there may be occasions on which neither the expert nor the party has been made aware of criticism. Nevertheless, where matters ostensibly within the scope of the disclosure obligations come to the attention of the court without their disclosure by the party who

10-16

10. OPINION EVIDENCE AND JUDICIAL NOTICE

introduces the evidence then that party, and the expert, should expect a searching examination of the circumstances by the court; and, subject to what emerges, the court may exercise its power under section 81 of the Police and Criminal Evidence Act 1984 or section 20 of the Criminal Procedure and Investigations Act 1996 to exclude the expert evidence.

CPD V Evidence 19B: Statements of Understanding and Declarations of Truth in Expert Reports (as inserted by Criminal Practice Directions 2015 (Amendment No. 2) [2016] EWCA Crim 1714, Lord Thomas CJ, and as amended by Criminal Practice Directions 2015 (Amendment No. 4) [2017] EWCA Crim 310, Lord Thomas CJ)

10-17 **19B.1** The statement and declaration required by CrimPR 19.4(j), (k) should be in the following terms, or in terms substantially the same as these:

“I (name) DECLARE THAT:

1. I understand that my duty is to help the court to achieve the overriding objective by giving independent assistance by way of objective, unbiased opinion on matters within my expertise, both in preparing reports and giving oral evidence. I understand that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied with and will continue to comply with that duty.
2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.
4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.
5. I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.
6. I have shown the sources of all information I have used.
7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others including my instructing lawyers.
10. I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction or qualification.
11. I understand that:
 - (a) my report will form the evidence to be given under oath or affirmation;
 - (b) the court may at any stage direct a discussion to take place between experts;
 - (c) the court may direct that, following a discussion between the experts, a statement should be prepared showing those issues which are agreed and those issues which are not agreed, together with the reasons;
 - (d) I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert;
 - (e) I am likely to be the subject of public adverse criticism by the judge if the court concludes that I have not taken reasonable care in trying to meet the standards set out above.
12. I have read Part 19 of the Criminal Procedure Rules and I have complied with its requirements.
13. I confirm that I have acted in accordance with the the code of practice or conduct for experts of my discipline, namely [*identify the code*].
14. [For experts instructed by the prosecution only] I confirm that I have read guidance contained in a booklet known as *Disclosure: Experts' Evidence and Unused Material* which details my role and documents my responsibilities, in relation to revelation as an expert witness. I have followed the guidance and recognise the continuing nature of my responsibilities of disclosure. In accordance with my duties of disclosure, as documented in the guidance booklet, I confirm that:
 - (a) I have complied with my duties to record, retain and reveal material in accordance with the CPIA 1996, as amended;
 - (b) I have compiled an index of all material; I will ensure that the index is updated in the event I am provided with or generate additional material;
 - (c) in the event my opinion changes on any material issue, I will inform the investigating officer, as soon as reasonably practicable and give reasons.

I confirm that the contents of this report are true to the best of my knowledge and belief and that I make this report knowing that, if it is tendered in evidence, I would be liable to prosecution if I have wilfully stated anything which I know to be false or that I do not believe to be true.”

CPD V Evidence 19C: Pre-hearing Discussion of Expert Evidence (as inserted by Criminal Practice Directions 2015 (Amendment No. 2) [2016] EWCA Crim 1714, Lord Thomas CJ)

19C.1 To assist the court in the preparation of the case for trial, parties must consider, with their experts, at an early stage, whether there is likely to be any useful purpose in holding an experts’ discussion and, if so, when. Under CrimPR 19.6 such pre-trial discussions are not compulsory unless directed by the court. However, such a direction is listed in the magistrates’ courts’ Preparation for Effective Trial form and in the Crown Court Plea and Trial Preparation Hearing form as one to be given by default, and therefore the court can be expected to give such a direction in every case unless persuaded otherwise. Those standard directions include a timetable to which the parties must adhere unless it is varied. **10-18**

19C.2 The purpose of discussions between experts is to agree and narrow issues and in particular to identify:

- (a) the extent of the agreement between them;
- (b) the points of and short reasons for any disagreement;
- (c) action, if any, which may be taken to resolve any outstanding points of disagreement; and
- (d) any further material issues not raised and the extent to which these issues are agreed.

19C.3 Where the experts are to meet, that meeting conveniently may be conducted by telephone conference or live link; and experts’ meetings always should be conducted by those means where that will avoid unnecessary delay and expense.

19C.4 Where the experts are to meet, the parties must discuss and if possible agree whether an agenda is necessary, and if so attempt to agree one that helps the experts to focus on the issues which need to be discussed. The agenda must not be in the form of leading questions or hostile in tone. The experts may not be required to avoid reaching agreement, or to defer reaching agreement, on any matter within the experts’ competence.

19C.5 If the legal representatives do attend:

- (a) they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and
- (b) the experts may if they so wish hold part of their discussions in the absence of the legal representatives.

19C.6 A statement must be prepared by the experts dealing with paragraphs 19C.2(a)-(d) above. Individual copies of the statements must be signed or otherwise authenticated by the experts, in manuscript or by electronic means, at the conclusion of the discussion, or as soon thereafter as practicable, and in any event within 5 business days. Copies of the statements must be provided to the parties no later than 10 business days after signing.

19C.7 Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement. The joint statement should include a brief re-statement that the experts recognise their duties, which should be in the following terms, or in terms substantially the same as these:

“We each DECLARE THAT:

1. We individually here re-state the expert’s declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue to do so.
2. We have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid reaching agreement, or defer reaching agreement, on any matter within our competence.”

19C.8 If an expert significantly alters an opinion, the joint statement must include a note or addendum by that expert explaining the change of opinion.

B. OPINION EVIDENCE

Admissibility

As a general rule, parol evidence is not admissible with regard to anything not immediately within the knowledge of the witness; he must speak of facts which happened in his presence, or within his hearing. This rule excludes both hearsay and the expression of opinion or belief. But to this rule there is a necessary exception on questions of the identity of things or persons, or the genuineness of handwriting, where the witness is qualified to express a credible opinion or belief on the subject: *Silverlock* [1894] 2 Q.B. 766, CCR; Taylor, *Evid.*, 12th ed., ss.1414 and following, § 14-96. **10-19**

In matters of science or trade, the opinion of an expert, or person intimately acquainted with it, is admissible to furnish the court with information which is likely to be outside the experience and knowledge of a judge or jury. If, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary: *Turner (T.)* [1975] Q.B. 834; (1974) 60 Cr. App. R. 80, CA. For an example of the application of this principle, see *Loughran* [1999] Crim. L.R. 404, CA. And as to the need to guard against allowing a witness of undoubted expertise in his field to give opinion evidence with an unwarranted appearance of science on account of the use of technical language where the opinion is not in fact founded on his specialist knowledge but on observations equally open to a layman, see *Honeysett v The Queen*, 311 A.L.R. 320, High Court of Australia (anatomist, asked to compare CCTV footage of offender at crime scene with footage of suspect in custody, described both as “ectomorphic”, where layman might have used the word “skinny”).

A cautious approach by a scientist in interpreting his findings does not render his evidence necessarily irrelevant and inadmissible: see *George (Dwaine)* [2014] EWCA Crim 2507; [2015] 1 Cr. App. R. 15.

The fact that a well-recognised and reliable test had been used for a new purpose, or in a new context, did not of itself render it unproven; such considerations merely went to the weight to be accorded to the evidence: *I.* [2012] EWCA Crim 1288; [2012] Crim. L.R. 886.

In *Kwaik* [2013] EWCA Crim 2397; [2014] Crim. L.R. 454, an unsuccessful attempt was made to rely on evidence from a computer modelling technique to show that the prosecution expert’s opinion as to how a fatal road traffic accident had occurred was wrong. The evidence was insufficiently robust where the modelling had covered around 200 different simulations, whereas several thousand simulations would have needed to be carried out to explore all the variables relating, inter alia, to braking, steering, speed, overlap and separation of the vehicles.

Where an expert for the prosecution had visually illustrated her opinions by the use of “animations” or cartoons, which were different from simulations, in that they were not a scientific model produced by a computer in accordance with set parameters, the judge’s decision to admit the animations was well within the ambit of his discretion under s.78 of the PACE Act (§ 15B-87); by the terms of his ruling, his intervention during the expert’s evidence and his directions to the jury, the judge understood and made clear that the animations were no more than an illustration of the expert’s opinion and did not constitute any form of independent scientific evidence; there was no arguable basis for submitting that the animations were capable of having a subliminal effect that could undermine the jury’s focus on the evidence, the defence’s extensive criticisms of the expert, other alternative scenarios, or the clear directions of the judge: *Metcalf* [2016] EWCA Crim 681; [2016] 2 Cr. App. R. 21.

The topics upon which expert evidence has been received are manifold. Apart from the matters dealt with specifically in § 10-29, no attempt is made in this section to provide a definitive list of such topics. However, reference may be made to the following paragraphs: §§ 4-394 and following, (defendant’s mental state, I.Q., etc.); § 8-45 (whether witness may be sworn); § 8-51 (competency); §§ 8-337 and following (witness’s reliability); §§ 14-66, 14-67, 14-71, 14-75, 14-95 and following (identification issues); § 17-112 (insanity); § 17-130 (duress); § 19-94 (diminished responsibility); § 19-249 (psychiatric injury as bodily harm); § 24-124 (firearms); §§ 27-77, 27-77a (drugs); § 30-57 (insider trading); §§ 31-17, 31-21, 31-23 (foreign marriages, etc.); §§ 31-64 and following (obscenity); § 31-109 (indecent photographs); and §§ 32-19, 32-101, 32-102, 32-144, 32-222, 32-257 (road traffic issues).

In *Ahmed (Rangzieb) and Ahmed (Habib)* [2011] EWCA Crim 184; [2011] Crim. L.R. 734, it was held to be permissible to adduce expert evidence to establish historical facts (about Al Qaeda). In *RT and MAM* [2020] EWCA Crim 1343; [2021] 1 Cr. App. R. 14, expert evidence to assess age from a film or photograph which shows only the lower half of the body was held to have been properly admitted.

As to proof of the facts on which an expert bases their opinion, see §§ 11-80, 11-81.

Competence

10-20 Whether a witness is competent to give evidence as an expert is for the judge to determine: *Silverlock*, above; if they do have the necessary competence, it is not open to a judge to direct that they should not act as an expert witness; the fact that a witness may have been discredited will go to the weight of the evidence, not to its admissibility: *Bates v Chief Constable of Avon and Somerset Police and Bristol Magistrates’ Court* [2009] EWHC 942 (Admin); 173 J.P. 313, DC; as will the fact that he has some connection with the party intending to call him: *Leo Sawrij Ltd v*

North Cumbria Magistrates' Court [2009] EWHC 2823 (Admin); [2010] 1 Cr. App. R. 22, DC. As to conflicts of interest, see § 10-27.

In *Bonython* (1984) 38 S.A.S.R. 45, King CJ, giving the principal judgment of the South Australia Supreme Court, said that there were two questions for the judge to decide.

“The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This ... may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.

An investigation of the methods used by the witness in arriving at his opinion may be pertinent, in certain circumstances, to the answers to both the above questions. If the witness has made use of new or unfamiliar techniques or technology, the court may require to be satisfied that such techniques or technology have a sufficient scientific basis to render results arrived at by that means part of a field of knowledge which is a proper subject of expert evidence Where the witness possesses the relevant formal qualifications to express an opinion on the subject, an investigation on the voir dire of his methods will rarely be permissible on the issue of his qualifications. There may be greater scope for such examination where the alleged qualifications depend upon experience or informal studies Generally speaking, once the qualifications are established, the methodology will be relevant to the weight of the evidence and not to the competence of the witness to express an opinion ...

If the qualifications of a witness to give expert evidence are in issue, it may be necessary to hear evidence on the voir dire in order to make a finding as to those qualifications. If there is an issue as to whether the subject matter upon which the opinion is sought is a proper subject of expert evidence, any disputed facts relevant to the determination of that issue should be resolved by the reception of evidence on the voir dire” (at pp. 46–48).

A police officer may give evidence as an expert witness: see *Hodges* [2003] EWCA Crim 290; [2003] 2 Cr. App. R. 15 (as to street value of drugs (see § 27-77)); and this is so even if they are the investigating officer: *Myers v The Queen*; *Cox v Same*; *Brangman v Same* [2015] UKPC 40; [2016] A.C. 314 (officer expert in local gang culture giving evidence as to gangs and their feuding, but ambit of admissible gang evidence will depend on what legitimate role it may have in helping jury to resolve issues in case (and, as to this case, see also § 10-26)). This approach was applied in *Abdi* [2022] EWCA Crim 315. In *AAD* [2022] EWCA Crim 106; [2022] 1 Cr. App. R. 19, the Court of Appeal issued guidance about the admissibility of opinion evidence (including conclusive grounds decisions by the single competent authority) in human trafficking cases, both on appeal and at trial (seeking to explain the decision in *Brecani* [2021] EWCA Crim 731; [2021] 2 Cr. App. R. 12): expert evidence may be admissible on discrete issues but it was impermissible for a trafficking expert, in the context of a case where the defendant relies on the defence under s.45 of the Modern Slavery Act 2015 (see § 19-464 in the main work), to express an opinion in evidence before the jury as to the plausibility and consistency of the defendant’s account, the vulnerability of the defendant, or whether a given set of facts meets the legal definition of trafficking. For examples of expert evidence which might be admissible in the competent authority’s determination of human trafficking see *MN v Secretary of State for the Home Department* [2020] EWCA Civ 1746; [2021] 1 W.L.R. 1956. For a detailed discussion of expert evidence given by police officers and other non-academic ‘experts’ in respect of drugs, gangs and human trafficking issues, see *Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking* [2021] Crim L.R. 442.

The fact that an academic researching terrorism was engaged upon “a first draft of history” did not mean that he was not an expert, or that his “draft” was unreliable, still less inadmissible; the task of the contemporary historian includes the collection of information from a variety of sources and its assessment by testing it against other pieces of information (whether known to the wider public, or amongst academics and others working in the same field); the jury would not necessarily be asked to accept that each piece of original information was correct; in fact, it was almost inevitable that some original information would turn out to be wrong; but they would be asked to consider whether or not the expert’s conclusions about the whole picture were correct once his expertise in the field was established: *Ahmed (Rangzieb) and Ahmed (Habib)*, above.

In *Henderson; Butler; Oyediran (Practice Note)*, § 10-4, the Court of Appeal said that any judge hearing a case that turns on medical evidence should have experience of the issues and an understanding of the relevant learning; and courts dealing with “shaken baby” cases should be familiar with “Sudden unexpected death in infancy: The report of a working group convened by the Royal College of Pathologists and the Royal College of Paediatrics and Child Health” (September 2004), which recommends a checklist of matters to be established by the judge before expert evidence is admitted (including “Is the proposed expert still in practice? To what extent is he an expert in the subject to which he testifies? When did he last see a case in his own clinical practice? To what extent is his view widely held?”). The court said that the third of these questions is of particular importance, as clinical practice affords experts the opportunity to maintain and develop their experience.

In *Pabon*, § 10-4, the Court of Appeal stressed the need for those instructing expert witnesses to satisfy themselves as to the witness’ expertise and to engage an expert of a suitable calibre. In that case, a witness who was able to give evidence about general banking concepts strayed into more specialised areas in which he did not have sufficient expertise. In *SJ* [2019] EWCA Crim 1570; [2020] 1 Cr. App. R. 7 it was held that it would only be in the rarest cases that expert or opinion evidence from a counsellor would be relevant or admissible.

If the prosecution are permitted to call a witness of tenuous qualifications, the burden of proof might shift imperceptibly, and a burden be cast on the defendant to rebut a case which should never have been before the jury at all; a defendant could not fairly be asked to meet evidence of opinion given by a quack, a charlatan or an enthusiastic amateur: *Robb* (1991) 93 Cr. App. R. 161, CA (evidence of voice identification by expert, well-qualified by academic training and practical experience, admissible, despite reliance upon technique accepted as unreliable by majority of professional opinion). A lack of formal qualifications is a factor properly to be considered and should be made clear but is not determinative of whether a person is entitled to give expert opinion: *Byrne* [2021] EWCA Crim 107.

10-22 “It would be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and ... advances in science”, per Steyn LJ, in *Clarke (R.L.)* [1995] 2 Cr. App. R. 425 at 430, CA (facial mapping by video superimposition); following *Stockwell* (1993) 97 Cr. App. R. 260, CA (evidence of facial mapping expert properly admitted where offender caught on video was disguised; *aliter*, in the case of a clear photograph with no suggestion of a change of appearance). See also *Luttrell; Dawson and Hamberger* [2004] EWCA Crim 1344; [2004] 2 Cr. App. R. 31 (lip-reading was a well recognised skill and lip-reading from video footage was no more than an application of that skill).

As to the need to establish the reliability of the underlying scientific technique, and as to the criteria for assessing reliability, see also *Trochym v The Queen*, § 10-30.

As to the distinction between matters that go to the entitlement of a witness to give evidence as an expert and matters that go to the weight of any evidence given, see, in particular, *R. (Doughty) v Ely Magistrates’ Court, CPS (interested party)* [2008] EWHC 522 (Admin); 172 J.P. 259, DC, where the justices had wrongly excluded the evidence of a former police officer whom the defence had wished to call as to the workings of a speed detection device. His alleged lack of equivalent experience as compared with the prosecution expert, his non-attendance on courses run by the manufacturer and an alleged error in his written report were all matters that would go to the weight to be attached to his evidence, not to its admissibility in the first place.

A judge has a discretion to direct a voir dire for the purpose of deciding whether a purported expert should be allowed to give evidence as an expert witness; but the discretion should be exercised sparingly, as the judge should be astute to avoid unnecessary satellite litigation; in the vast majority of cases, the judge would be able to decide the issue on the basis of the written material before him: *G.* [2004] EWCA Crim 1240; [2004] 2 Cr. App. R. 38.

Weight and scope of expert evidence

10-23 An expert is now permitted to give his opinion on what has been called “the ultimate issue”, but the judge should make it clear to the jury that they are not bound by the expert’s opinion, and that the issue is for them to decide: *Stockwell*, above (declining to follow the former common law rule (see *Wright* (1821) Russ. & Ry. 456 at 458), long since honoured more in the breach than in the observance); but a failure slavishly to follow this formula does not automatically render a conviction unsafe: *Fitzpatrick* [1999] Crim. L.R. 832, CA.

A judge does not err in failing to withdraw a murder count from the jury on the basis of

unanimous expert evidence regarding the defendant's mental health; the issue as to whether the defendant was suffering from diminished responsibility was for the jury to determine, not the medical experts: *Hussain (Imran)* [2019] EWCA Crim 666; [2019] Crim. L.R. 877.

The decision of the Privy Council in *Pora v The Queen* [2015] UKPC 9; [2016] 1 Cr. App. R. 3, may be thought to mark a retreat from the position that it is open to the expert to express an opinion on the ultimate issue. It was held that a psychologist could give evidence as to why a confession of the defendant might be unreliable, but it was not open to him to give evidence to the effect that the particular confession was in fact unreliable. Cf. *Brennan*, § 19-94, in relation to diminished responsibility; and *Sellu*, § 19-124a, in relation to gross negligence manslaughter.

In *Gokal* [1999] 6 *Archbold News* 2, CA (97 04132 S2), it was held to have been permissible for an accountancy expert who gave evidence in relation to transactions of great complexity to have expressed the opinion that the arrangements were such as to demonstrate dishonest collusion between various parties to the transactions. It had been conceded that it was proper for him to say that the mechanics of the arrangements were such that there could have been no legitimate purpose, and that their only purpose could have been to hide the truth. The court said that the distinction between this and saying that there was dishonest collusion was one without a difference. It should be noted, however, that the dishonesty of the transactions did not go directly to the issue of the guilt of the defendant, whose defence was not so much that the transactions were honest, but that if there was a fraud, he was not part of it. It must be at least doubtful if such evidence would be allowed to be given where it goes directly to the honesty of the defendant. The line may be a fine one, but the evidence of the expert should be confined to his area of expertise; in this case, that was accountancy, not honesty.

Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed, or has taken irrelevant facts into consideration, or has failed to consider relevant ones, the opinion is likely to be valueless. An expert witness should, therefore, be asked to state the facts upon which his opinion is based. As to the need for a proper factual basis to be established by other evidence, see *J.P.* [1999] Crim. L.R. 401, CA; as to the need for such evidence to be admissible, see § 11-81. See also *Myers v The Queen; Cox v Same; Brangman v Same*, § 10-26.

The witness need not have conducted any test or examination himself; he may give his opinion on the basis of the facts proved in court: see *Mason* (1912) 7 Cr. App. R. 67, CCA (opinion as to cause of death though witness had never seen the body); and *Pinfold and Mackenney* [2003] EWCA Crim 3643; [2004] 2 Cr. App. R. 5 (expert may give evidence as to the reliability of witness notwithstanding that he had not examined the witness). The fact that the witness has not himself conducted any test or examination may naturally go to the weight to be attached to his opinion.

Proper approach to opinion evidence

An expert witness should give reasons for his conclusion. If the statement of an expert witness, who has not been required to give oral evidence, does not give full details of his reasoning, it is for the prosecution, or sometimes the court, to look at the evidence and decide whether it is right to call the witness lest the jury reach a decision of their own without proper expert assistance: *Hipson* [1969] Crim. L.R. 85, CA. 10-24

Although an expert may be regarded as giving independent evidence to assist the court, it is wrong for the jury to be directed that his evidence should be accepted in the absence of reasons for rejecting it: *Lanfear* [1968] 2 Q.B. 77; (1968) 52 Cr. App. R. 176, CA; and see *Stockwell*, above.

In *Cannings* [2004] EWCA Crim 1; [2004] 2 Cr. App. R. 7, a case of the alleged murder of a baby, it was said that if the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed; and this was particularly so, in a field of learning, where the experts were still at the "frontiers of knowledge". *Cannings* is not, however, authority for a proposition, in cases where the issue is whether a child was the victim of a deliberate killing by its mother or had died from natural, even if unexplained, causes, that whenever there is a genuine conflict of opinion between reputable experts, the prosecution should not proceed, or should be stopped, or that the evidence of the prosecution experts should be disregarded; in *Cannings*, there was nothing to establish unnatural as opposed to natural death and the basis of the case depended on inferences by one group of experts which were disputed by another reasonable body of medical opinion: *Kai-Whitewind* [2005] EWCA Crim 1092; [2005] 2 Cr.

App. R. 31. *Cannings* was again distinguished in *Hookway and Noakes* [2011] EWCA Crim 1989; [2012] Crim. L.R. 130, where experts “respectfully disagreed” as to the strength of DNA evidence as support for the proposition that the defendants had been in a “getaway car”. It had been open to the judge to leave it to the jury to place what weight they considered appropriate on the evidence of the two witnesses. The case did not depend “exclusively or almost exclusively” on the DNA evidence, the disagreement was not as to whether there was any DNA, but merely as to its strength by way of support for the prosecution case, and, significantly, the defendants accepted that they might have been in the car in question (although for innocent purposes).

As to the particular caution that is needed where the scientific knowledge of the process or processes involved is or may be incomplete, and where expert opinion evidence is not just relied upon as additional material to support a prosecution but is fundamental to it, see *Holdsworth* [2008] EWCA Crim 971; [2009] Crim. L.R. 195 (quashing a conviction for murder where the foundation of the prosecution case had been the uncontradicted medical evidence, and where fresh evidence provided a credible alternative medical explanation consistent with the appellant’s account of events).

In *Harris; Rock; Cherry; Faulder* [2005] EWCA Crim 1980; [2006] 1 Cr. App. R. 5, the Court of Appeal said that in cases of alleged non-accidental head injury to infants, the accepted hypothesis that non-accidental head injury depended on the finding of a triad of intracranial injuries consisting of encephalopathy, subdural haemorrhages and retinal haemorrhages had not been undermined by the so-called unified hypothesis (that there was a unified cause of such injuries which was not necessarily trauma); but, whilst it had not been undermined, the triad remained no more than a strong pointer; on its own, it was not possible to find that the triad automatically and necessarily led to a diagnosis of non-accidental head injury; in such cases, it was for the jury to resolve differences of medical opinion, taking account of all the circumstances, including the clinical picture.

Expert’s duty of disclosure to the court

10-25 It is the duty of an expert instructed by the prosecution to act in the cause of justice. It follows that if an expert has carried out a test which casts doubt on his opinion, or if such a test has been carried out in his laboratory and is known to him, he is under a duty to disclose this to the solicitor instructing him who has a duty to disclose it to the defence. This duty exists irrespective of any request by the defence. It is not confined to documentation on which the opinion or findings of the expert are based; it extends to anything which might arguably assist the defence. Moreover, it is a positive duty, which in the context of scientific evidence, obliges the prosecution to make full and proper inquiries from forensic scientists to ascertain whether there is discoverable material: *Ward* (1993) 96 Cr. App. R. 1, CA.

In *Harris; Rock; Cherry; Faulder*, above, the Court of Appeal said that expert evidence should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation; an expert should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise and should never assume the role of advocate; the facts or assumptions on which his opinion is based should be stated and he should not omit to consider material facts which detract from his concluded opinion; an expert should make it clear when a particular question or issue falls outside his expertise, and if his opinion has not been properly researched because he considers that insufficient data are available then he should say so with an indication that his opinion is no more than a provisional one; and if, after exchange of reports, an expert changes his view on material matters, such change of view should be communicated to the other side without delay and, when appropriate, to the court; in cases where there is a genuine disagreement on a scientific or medical issue, or where it is necessary for a party to advance a particular hypothesis to explain a given set of facts, the tribunal of fact will have to resolve the issue which is raised, but the expert who advances such a hypothesis owes a heavy duty to explain to the court that what he is advancing is a hypothesis, that it is controversial (if it is) and to place before the court any material which contradicts the hypothesis; and he must make his material available to the other experts in the case.

The court added that rule 19.6 of the 2020 rules (above) and (what is now) the plea and trial preparation hearing form (<http://www.justice.gov.uk/courts/procedure-rules/criminal/forms>) make provision for experts to consult together and, if possible, to agree points of agreement and disagreement with a summary of reasons; in cases of alleged child abuse, it was said that

the judge should be prepared to give directions in respect of expert evidence taking account of the foregoing general guidance, with a view to narrowing the areas of dispute and limiting the volume of expert evidence.

In *B (T)* [2006] EWCA Crim 417; [2006] 2 Cr. App. R. 3, the Court of Appeal approved the statement of an expert witness's duties at trial contained in *Harris*, above, and issued guidance as to the content of an expert's report. This is now largely reflected in r.19.4 of the Criminal Procedure Rules 2020 (SI 2020/759) (§ 10-8). However, the court also required a report to set out— **10-26**

- (a) the substance of the instructions received, the questions upon which an opinion was sought, the materials provided and the materials that were relevant to the opinion expressed,
- (b) any material facts or matters that detracted from the witness's opinion and any points that should be made against it, and
- (c) relevant extracts from the literature or other material that might assist the court.

In *Puaca* [2005] EWCA Crim 3001; [2006] Crim. L.R. 341, it was said that all pathologists are under a duty to comply with the obligations imposed on expert witnesses from the start; it would be wholly wrong for a pathologist carrying out the first post-mortem at the request of the police or the coroner merely to leave it to the defence to instruct a pathologist to prepare a report setting out contrary arguments.

In *Myers v The Queen; Cox v Same; Brangman v Same* [2015] UKPC 40; [2016] A.C. 314, where an investigating police officer gave expert evidence as to gang culture, it was said, in recognition of the particular difficulty of combining the role of investigator and expert witness, that the duties of the officer, qua expert witness, would involve at least the following:

- (a) he must set out his qualification to give expert evidence, by reference to his training and experience;
- (b) he must state not only his conclusions but also how he has arrived at them; if they are based on his own observations or contacts with particular persons, he must say so; if they are based on information provided by other officers, he must show how it was collected and exchanged and, if recorded, how (and in respect of such third party evidence, careful consideration should be given to the rule against hearsay, and the dividing line between opinion evidence and specific evidence of observable fact); if they are based on informers, he must at least acknowledge that such is his source, although of course he need not name them; and
- (c) in relation to primary conclusions concerning the defendant or other key persons, he must go beyond a mere general statement that he has sources of kinds A, B and C, and say whence the particular information he is advancing has come.

On this issue see also *Gokal*, § 10-23, (fact that witness was member of investigating team does not disqualify him as an expert witness, but it might go to weight to be attached to his evidence). As to the duty of an expert, see also § 10-4.

Conflicts of interest

A conflict of interest on the part of an expert witness does not operate so as automatically to disqualify him from giving evidence in the proceedings; the key question is whether his expression of opinion is independent of the parties and the pressures of litigation; and this does not infringe the requirement in Article 6 of the ECHR (§ 16-72) for an “independent and impartial tribunal”, which is concerned with the integrity of the tribunal and does not require that the same tests of independence applicable to a judge be satisfied by an expert witness; but a potential conflict of interest must be disclosed by the relevant party, even if the view is taken that any such conflict is not material: *Toth v Jarman (Note)* [2006] EWCA Civ 1028; [2006] 4 All E.R. 1276. **10-27**

Summing up

In *Henderson; Butler; Oyediran (Practice Note)*, § 10-4, the Court of Appeal said that this should be done issue by issue, unless there is good reason not to do so; merely repeating the evidence in the order in which it was given is pointless and serves only to confuse and to deflect the jury from their task. The summing up should enable anyone to understand how the verdict has been reached. In particular, **10-28**

- (a) where there is a realistic possibility of an unknown cause of death (in a “shaken baby” case), the jury should be reminded of that, and they should be instructed that unless

Ch. 10

the evidence leads them to exclude any realistic possibility of an unknown cause they cannot convict; where it is relevant to do so, they should be reminded that today's scientific orthodoxy may become tomorrow's outdated learning; and, in cases where developing medical science is relevant, they should be instructed that special caution is needed where expert evidence is fundamental to the prosecution;

- (b) the jury must be directed as to how they should approach conflicting evidence; to suggest, in cases where expert evidence is fundamental, that they should approach the evidence in the same way as they do in any other criminal case, is inadequate; rather, they must be directed as to the pointers to reliable evidence and the basis for distinguishing that which may be relied upon and that which should be rejected; where relevant, they should be asked to consider whether an expert has assumed the role of an advocate, whether he has stepped outside his area of expertise, whether he was able to point to a recognised, peer-reviewed, source for his opinion and whether his clinical experience is up-to-date and equal to that of others whose opinions he seeks to contradict.

C. FOREIGN LAW

10-29 The law of a foreign country must (in the absence of specific statutory provision, e.g. the Immigration Act 1971, s.25(3) (§ 25-286)) be proved by the testimony of witnesses of competent skill; and foreign written law cannot be proved by the production of the *written* law itself, or of an authenticated copy, but must be proved by some skilled witness who describes the law: *Dalrymple v Dalrymple* (1811) 2 Hagg. (Consist.Rep.) 54; *Sussex Peerage Claim* (1844) 6 St.Tr.(n.s.) 79; *Baron de Bode v R.* (1851) 6 St.Tr.(n.s.) 237; *Castrique v Imrie* (1870) L.R. 4 H.L. 414; Taylor, *Evid.*, 12th ed., ss.1423, 1424; unless the evidence is agreed: *Okolie, The Times*, 16 June 2000, CA. The witness to prove a foreign law must be a person. The witness to prove a foreign law may be a professional lawyer or a person holding an official position which requires knowledge of the law: *Sussex Peerage Claim*, above. But a witness, whose knowledge of the law of a foreign country is derived solely from his having studied it at a university in another country, is not a good witness to prove it: *Bristow v Sequeville* (1850) 5 Ex. 275; *In the Goods of Bonelli* (1875) 1 P.D. 69; and see Taylor, *Evid.*, 12th ed., s.1425. A witness competent to give evidence on a point of foreign law may refer to foreign law books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence: *Sussex Peerage Claim*, above. The law of one part of the Queen's dominions for the purposes of judicial proceedings in another part may be ascertained under the British Law Ascertainment Act 1859.

Any question as to the effect of any such evidence is to be decided by the judge, without being submitted to the jury: Administration of Justice Act 1920, s.15.

D. APPLICATION OF SCIENTIFIC TECHNIQUES TO TESTIMONY OF LAY WITNESSES

10-30 In *Fennell v Jerome Property Maintenance Ltd, The Times*, 26 November 1986, QBD, it was held that evidence produced by the administration of a mechanically, chemically or hypnotically induced test on a witness so as to show the veracity or otherwise of that witness is inadmissible. And as to the inadmissibility of evidence obtained during a polygraph session conducted as a condition of release on licence, see the Offender Management Act 2007, s.30.

In *Trochym v The Queen*, 216 C.C.C. (3d) 225, the Supreme Court of Canada held that whilst a party wishing to rely on novel, scientific evidence must first establish that the underlying science is sufficiently reliable to be admitted in a court of law, the same applied to the application of a scientific technique to the testimony of a lay witness; and reliability is to be evaluated according to—

- (a) whether the technique can be and has been tested,
- (b) whether it has been subjected to peer review and publication,
- (c) the known or potential rate of error, and
- (d) whether the theory or technique has been generally accepted.

Applying these principles to post-hypnosis evidence, the court held that such evidence was inadmissible, the general consensus being that most individuals were more susceptible under hypnosis, that any increase in accurate memories was accompanied by an increase in inaccurate memories, that hypnosis could compromise the subject's ability to distinguish memory from imagination and that subjects frequently reported being more confident of post-hypnotic memories, regardless of their accuracy; in relation to the admission of post-hypnosis evidence on a topic not broached during the hypnosis, a judge must be satisfied that any detrimental ef-

III. JUDICIAL NOTICE

10-35

fect arising from the risk of such evidence being tainted by post-hypnosis memories was outweighed by the probative value of the evidence.

E. IMMUNITY FROM PROSECUTION

In *Jones v Kaney* [2011] UKSC 13; [2011] 2 A.C. 398, it was held, by a majority, that the immunity from suit for breach of duty that expert witnesses in civil cases had previously enjoyed in relation to their participation in legal proceedings should be abolished. Lord Phillips and Lord Dyson, who gave majority judgments, noted that the same reasoning would apply to experts engaged in criminal litigation. Lord Hope, who dissented, said that removal of the immunity would be of particular concern in the criminal jurisdiction, and that the public interest demanded that experts who gave evidence on either side in criminal proceedings were free from the pressures of harassing litigation. In *Meadow v General Medical Council* [2006] EWCA Civ 1390; [2007] Q.B. 462, it had been held that an expert witness should not be immune from disciplinary fitness to practise proceedings in respect of evidence given in court. **10-31**

F. APPEALS

As to the admissibility of expert evidence on appeal, see, in particular, § 7-211; and as to the funding of such evidence, see §§ 7-165, 7-217. **10-32**

II. NON EXPERT OPINION EVIDENCE

There is some limited scope for non-expert opinion evidence to be admissible. Examples include evidence as to the following: a person's age (*Cox* [1898] 1 Q.B. 179) although see *RT and MAM*, § 10-47, for when expert evidence as to age might be appropriate; speed of a vehicle (*Connell v CPS* [2011] EWHC 158 (Admin)); recognition of a voice based on familiarity (*Robb* (1991) 93 Cr. App. R. 161; *Flynn* [2008] 2 Cr. App. R. 20); handwriting based on familiarity (*Mudd v Suckermore* (1836) 5 Adolphus & Ellis 703; *Rickard* (1919) 13 Cr. App. R. 140); and whether a person appeared to be drunk, providing the facts relied upon are identified (*Davies* [1962] 1 W.L.R. 1111; *Tagg* [2001] EWCA Crim 1230; [2002] 1 Cr. App. R. 2). **10-33**

III. JUDICIAL NOTICE

A. PRINCIPLE

Courts may take judicial notice of matters which are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary; and local courts are not merely permitted to use their local knowledge, but are to be regarded as fulfilling a constitutional function if they do so: *Mullen v Hackney L.B.C.* [1997] 1 W.L.R. 1103, CA (Civ. Div.). But the time had not yet come when judicial notice could be taken of generally accepted facts about Al Qaeda: *Ahmed (Rangzieb) and Ahmed (Habib)* [2011] EWCA Crim 184; [2011] Crim. L.R. 734 (as to which, see also §§ 10-19, 10-21). **10-34**

When a court takes judicial notice of a fact, it finds (or directs the jury to find) that the fact exists although its existence has not been established by evidence. The doctrine applies not only to judges but also to juries with respect to matters coming within the sphere of their everyday knowledge and experience: *Rosser* (1836) 7 C. & P. 648; *Jones (R.W.)* (1970) 54 Cr. App. R. 63, CA; but courts should be cautious in treating a factual conclusion as obvious, even though the man in the street would unhesitatingly hold it to be so: *Carter v Eastbourne B.C.*, 164 J.P. 273, DC.

Although judges and juries may, in arriving at their decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess (see *Jones*, above), they may not act on their own private knowledge or belief regarding the facts of the particular case: *Sutton* (1816) 4 M. & S. 532; *Ingram v Percival* [1969] 1 Q.B. 548, DC; *Wetherall v Harrison* [1976] Q.B. 773, DC (proper for a justice with specialised knowledge of the circumstances forming the background to a particular case to draw upon that knowledge in interpreting the evidence, but improper in effect to give evidence to himself and the other justices which is at variance with the evidence given, for to do so would offend the fundamental **10-35**

10-35

10. OPINION EVIDENCE AND JUDICIAL NOTICE

principle that evidence should be given in the presence of the parties and be subject to cross-examination); *Paul v DPP* (1990) 90 Cr. App. R. 173, DC (justices entitled to rely on knowledge of area in concluding that residents likely to be caused nuisance by practice of kerb-crawling); and *Fricker, The Times*, 13 July 1999, CA (principle in *Wetherall v Harrison* applies equally to juries). Where, however, a juror passed a note to the judge indicating that his knowledge of a particular locality was at variance with the evidence of the defendant, the judge's decision to allow the prosecution to call rebuttal evidence to this effect was upheld on appeal: *Blick* (1966) 50 Cr. App. R. 280, CCA.

As to the need for justices to be circumspect in their use of local knowledge and to inform the parties when reliance is being placed upon local knowledge, see *Bowman v DPP* [1990] Crim. L.R. 600, DC; *Norbrook Laboratories (G.B.) Ltd v Health and Safety Executive, The Times*, 23 February 1998, DC.

B. SCOPE

- 10-36** For a full examination of the areas of law and fact to which the doctrine of judicial notice applies, see *Phipson on Evidence*, 19th ed., paras 3-02 and following.

C. LEGISLATION

- 10-37** Every Act passed since 1850 is a public Act to be judicially noted as such, unless the contrary is expressly provided: Interpretation Act 1978, s.3, and Sch.2, para.2, and see *Pillai v Mudanayaka* [1953] A.C. 514 at 528, PC.
 As to the proof of statutory instruments, see § 9-89.

D. SIGNATURES OF JUDGES

Evidence Act 1845, s.2

- 10-38** 2. All courts, judges, justices, masters in Chancery, masters of courts, commissioners judicially acting and other judicial officers, are henceforth to take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

The reference to "any of the equity or common law judges of the superior courts at Westminster" should be construed as referring to judges of the High Court and Court of Appeal: see the Supreme Court of Judicature (Consolidation) Act 1925, ss.18(2), 26(2), and the Senior Courts Act 1981, s.151(5), and Sch.4, para.1(1).