

## Ch 20: Experts and opinion evidence

### The general rule and the two exceptions

#### Page 634

For a good example of the application of the rule, see *R v Sepulveda-Gomez* [2019] EWCA Crim 2174. Inadmissible opinion evidence was given by two lay witnesses on the question whether the complainant would have consented to sexual relations with the accused.

#### Page 635

The need for forensic science training was recognised in a report of the House of Commons Science and Technology Committee and recommendations were made (*Forensic Science on Trial*, HC 96–I 2005). Guides or ‘Primers for Courts’ have now been produced by the Royal Society in respect of forensic gait analysis, DNA analysis, ballistics and the use of statistics. These Primers are accessible at:

<https://royalsociety.org/-/media/about-us/programmes/science-and-law/royal-society-forensic-gait-analysis-primer-for-courts.pdf>

<https://royalsociety.org/-/media/about-us/programmes/science-and-law/royal-society-forensic-dna-analysis-primer-for-courts.pdf>

<https://royalsociety.org/-/media/about-us/programmes/science-and-law/royal-society-ballistics-primer.pdf>

<https://royalsociety.org/-/media/about-us/programmes/science-and-law/science-and-law-statistics-primer.pdf>

## **Expert evidence**

### **Matters calling for expertise**

#### **Examples**

#### **Page 636**

Intermediaries are recognised as experts in relation to the difficulties of vulnerable witnesses when giving evidence: *R v Pringle* [2019] EWCA Crim 1722. See also *R v Beards* [2016] EW Misc B 143 (CC) 23 May 2016 at [20] – [21].

Concerning evidence of DNA, scientific advances mean that very small quantities of biological DNA may be recovered. In *R v Dawes* [2021] EWCA Crim 760 at [41], the Court of Appeal rejected the notion that there is a threshold below which the quantity of DNA evidence is unreliable and inadmissible: "... the essential principle is that quantity is not necessarily an indicator of reliability." However, DNA evidence is highly susceptible to contamination and great care is needed when recovering and preserving DNA from crime scenes. See, eg, the Forensic Science Regulator, Codes of Conduct, "Crime scene DNA: Anti-contamination guidance", 11<sup>th</sup> September 2020, accessible at: <https://www.gov.uk/government/publications/crime-scene-dna-anti-contamination-guidance>.

#### **Footnote 23**

See also The Chartered Society for Forensic Sciences, The College of Podiatry, Code of Practice for Forensic Gait Analysis, September 2020, accessible at:

<https://www.gov.uk/government/publications/forensic-gait-analysis-code-of-practice>

The guidance points out the limits to expert gait analysis including lack of published data and objective measurable techniques, problems of cognitive bias and poor quality imagery. See also, Samuels, 'Body of evidence', [2020] NLJ 21, February 21.

### **Matters within or outside the experience and knowledge of the tribunal of fact**

#### **Page 638**

A witness with considerable experience in collating and presenting call data evidence for the purpose of attributing a phone to a specific person may give evidence about how frequently a number used a mast and the position of the mast in relation to the person's home, but may not give evidence as to whether the mast serves the home, this being a matter for an expert in radio frequency: *R v Turner* [2020] EWCA Crim 1241.

## **Mental states**

### **Page 640**

In *R v SJ* [2020] 4 WLR 26, CA, it was held that a counsellor who counselled a complainant in a sexual case who should neither have been treated as an expert nor have been allowed to give evidence on the veracity of the complainant's allegations.

## **Expert witnesses**

### **Expertise**

#### **Page 644**

In *R v Byrne* [2021] EWCA Crim 107 at [101] the court emphasised that the prosecution must take all necessary steps to ensure that inappropriate experts are not called in criminal trials.

A counsellor might give an opinion in the rarest of cases where there is a dispute as to appropriate counselling techniques, but may not give an opinion interpreting the demeanour of complainants and attesting to the veracity of their complaints: *R v SJ* [2020] 4 WLR 26, CA.

A case worker for a 'Single Competent Authority' (part of the Home Office) may not now give his opinion in the form of an administrative finding of 'conclusive grounds' that a person is a victim of modern slavery for the purposes of the defence in s 45(4) of the Modern Slavery Act 2015: See *R v Brecani* [2021] EWCA Crim 731 overturning *DPP v M* [2021] 1 WLR 1669, DC.

## **Footnote 99**

See also *R v Byrne* [2021] EWCA Crim 107 at [99]: formal qualifications are an obvious consideration when deciding whether a witness is entitled to give expert opinion evidence, but they are not determinative.

### **The requirement of sufficient reliability**

**Page 646**

**Footnote 123**

See also the report of the Inns of Court College of Advocacy 'Promoting Reliability of Expert Evidence' Project, 'Guidance on the preparation, admission and examination of expert evidence, 3<sup>rd</sup> ed, 2020, accessible at:

<https://www.icca.ac.uk/promoting-reliability-in-expert-evidence/>

### **The duty of the lawyer**

**Page 652**

Lawyers also have a responsibility to ensure that the experts understand their obligations under the relevant procedural rules and directions and that expert reports served on behalf of clients are both reliable and admissible: See *DPP v Walsall Magistrates' Court* [2019] EWHC 3317 (Admin) at [73]. In *DPP v Walsall Magistrates' Court*, the expert's report on the reliability of a breath testing device contained "...general speculative assertions of unreliability and unexplained workings...", failed to deal with contrary views previously expressed and omitted key data. (at [69] – [71]).

### **Weight**

**Page 659**

In a civil case, the court may be entitled to reject an uncontradicted expert's report where it is literally a bare *ipse dixit*, that is, no more than a simple unsubstantiated assertion. However, such a report is impossible to imagine given procedural requirements as to the form and content of expert reports, which are minimum standards. (see CPR, Part 35 & CPD, para 3). Where these requirements are met and the report is truly uncontradicted, the court's role

falls away. The court must accept the report and not subject it to the kind of critical analysis applied when determining the weight of a controverted or contested report. *Griffiths v TUI UK Limited* [2020] EWHC 2268 (QB) at [33].

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

### **The contents of the expert's report**

#### **Page 666**

In *R v Dunleavy*, [2021] EWCA Crim 39 it was held that an expert's report must state in sufficient detail why expert evidence is required. If the report is generalised in nature and fails to relate with particularity to the issues in the case, it will not be admissible.

Furthermore, it would not be appropriate to hold a *voir dire* to deal with uncertainties, since this would simply allow the expert to introduce new matters and details not contained in the report.