

Chapter 19: Experts and opinion evidence

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Expert evidence will be required only rarely in judicial review proceedings, as when the decision in question is irrational because it is based on an error not obvious to a non-expert but which an expert can show to be incontrovertible: *R (The Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin).

Footnote 3

See also *R(DPP) v Stratford Magistrates' Court* [2018] 4 WLR 47 (expert entitled to explain the conduct of participants at an arms fair and to invite the court to consider it was likely to be repeated in the present arms fair, but not to give an opinion that the conduct constituted a crime).

Footnote 9

Guides or 'Primers for courts' have now been produced by the Royal Society in respect of gait analysis, accessible at <https://royalsociety.org/-/media/about-us/programmes/science-and-law/royal-society-forensic-gait-analysis-primer-for-courts.pdf>, and DNA analysis, accessible at <https://royalsociety.org/-/media/about-us/programmes/science-and-law/royal-society-forensic-dna-analysis-primer-for-courts.pdf>. Concerning the need for a better understanding by lawyers of commonly used scientific terms, see Likwornik, Chin and Bielinski, 'The diverging dictionaries of science and law', (2018) IJEP 30.

Matters calling for expertise

Examples

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The question whether the accused was subject to 'coercive control' is another example. See *R v Challen* [2019] EWCA Crim 916.

Points of foreign law

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Footnote 40

The words 'cited as an authority' include findings or decisions on foreign law whether or not they were necessary to the ultimate decision: *Joint Stock Co 'Aeroflot-Russian Airlines' v Leeds* [2017] 1 WLR 4537 (Ch). Obiter findings and decisions may not be

cited as binding precedent, but may be persuasive, their persuasiveness depending on the cogency of the reasoning upon which they are based (at [22]).

Matters within or outwith the experience and knowledge of the tribunal of fact

Mental states

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Concerning the defence of loss of self-control under s 54 of the Coroners and Justice Act 2009, see also *R v Challen* [2019] EWCA Crim 916. Expert evidence relating to the effect of coercive control was admitted in an appeal against a conviction for murder on grounds of diminished responsibility and provocation.

Credibility

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Footnote 71

Compare *R v Hayes* [2018] 1 Cr App R 134 (10), CA: medical evidence of the accused's mental distress was not admissible as to the credibility of his reasons for entering into an agreement under the Serious Organised Crime and Police Act 2005 - the jury would have readily understood the pressure and distress the accused was under.

Impact of sexual offences on victims

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Footnote 74

See now the Crown Court Compendium (July 2019), Part 1, 20-1

Expert witnesses

Expertise

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Those instructing expert witnesses must also satisfy themselves as to the witness's expertise: *R v Pabon* [2018] EWCA Crim 420 at [77].

Footnote 93

See also *R v Fender* [2018] EWCA Crim 2829.

Reliability

The requirement that the expert evidence is sufficiently reliable

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For a critical review of the authorities on voice comparison evidence, see Morrison, 'Admissibility of forensic voice comparison testimony in England and Wales', [2018] Crim LR 20.

In respect of the reliability of DNA profiles and fingerprint data which the prosecution may seek to rely on, additional safeguards are provided by the Accreditation of Forensic Science Providers Regulations (SI 2018/1276). The Regulations provide that competent law enforcement authorities may only use a forensic science provider to perform laboratory activity that (a) results in a DNA profile or and dactyloscopic (fingerprint) data and (b) is requested in relation to the prevention, detection or investigation of a crime, if that provider is accredited to EU standards of accreditation on general requirements for the competence of testing and calibration laboratories (ibid, Regulations 3 and 4, and the Explanatory Note to Regulation 4).

The duty of the expert

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An expert called by the prosecution in breach of the duty may be personally responsible for the accused's costs: see s 19 of the Prosecution of Offences Act 1985 and *R (DPP) v Aylesbury Crown Court* [2018] 4 WLR 30.

Evidence of facts upon which an opinion is based

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Footnote 172

For an example of an opinion which was valueless because the expert had not taken into account relevant facts, see *R v Moore* [2017] EWCA Crim 1304. Cf *R v Metcalfe* [2016] 2 Cr App R 297 (21), considered in **Ch 2**.

Evidence on ultimate issues

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As stated in the text, in criminal cases, an expert may be called to give an opinion on an ultimate issue, but only where ‘necessary in order that his evidence provide substantial help to the trier of fact.’ See the example of *R(DPP) v Stratford Magistrates’ Court* [2018] 4 WLR 47, (Admin), mentioned earlier in this update under

Page 583, Footnote 3.

Weight

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In the text is the following quote from *R v Brennan* [2014] EWCA Crim 2387: ‘Where, as here, there is no dispute about findings made by an expert you would no doubt wish to give effect to them, although you are not bound to do so if you see good reason to reject them.’ Endorsing *R v Brennan* in this respect, the Supreme Court in *R v Golds* [2016] UKSC stated (at [51]) that ‘...it will also ordinarily be wise to advise the jury against attempting to make themselves amateur psychiatrists, and that if there is undisputed expert evidence the jury will probably wish to accept it, unless there is some identified reason for not doing so.’ However, in *R v Sargeant* [2019] EWCA Crim 1088 at [50], the Court of Appeal deprecated any suggestion that *R v Golds* laid down a requirement for specific legal directions in respect of diminished responsibility and that the failure to give the ‘amateur psychiatrists’ warning might render a conviction unsafe. See also, *The Crown Court Compendium* (July 2019), Part 1, 10-3, paras 4 and 14(3)(b), and Note 3.

Footnote 196

As to the time when the judge should give directions on expert evidence, see the *Crown Court Compendium* (July 2019), Part 1, 10-3, para 13.

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

The duty and power to restrict expert evidence

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Footnote 220

See also *Eli Lilly v Genentech, Inc* [2018] EWHC 3522 (Pat), where the claimants proceeded with ‘brazen disregard of the Court’s orders and the well-established practice for the admission of experimental evidence.’ (At [15]).

The contents of the expert's report
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It is a significant failing for an expert not to make it clear that she has sought advice or an opinion from someone else: *Pinkus v Direct Line* [2018] PIQR 20, QB.

Disclosure, non-disclosure, and inspection

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It would seem that the condition mentioned in the case of *Edwards-Tubb v JD Wetherspoon plc* [2011] 1 WLR 1373, CA (see the text) is not mandatory and need not be imposed if on the facts there is no sound basis for concern about undesirable 'expert shopping' or suspicion of abuse of process: *Daniel Alfredo Condori Vilca v Xstrata Limited, Compania Minera Antapaccay SA* [2017] EWHC 1582, QB.

The contents of the expert's report

Pages 615-616

Concerning a declaration by the expert to the effect that he understands his duty to the court under r 19.2, best practice is to set out, even if only in summary, an express acknowledgment of the duty and the important obligation to provide objective and unbiased advice. See *R (DPP) v Stratford Magistrates' Court* [2018] 4 WLR 47 at [34]. Failure to do so offers a line of cross-examination.

Where the expert has based an opinion on an inference or representation of fact or opinion made by another, the report must identify the person, give his or her qualifications, relevant experience and any accreditation, and certify that the person had personal knowledge of matters stated in the representation. Rule 19.4(e). For an example where an expert failed to do this in a civil context, see *Pinkus v Direct Line* [2018] PIQR 20, QB.

Single joint experts

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The court may also determine an application by a party to withhold information which otherwise would be included, but which the party thinks ought not to be revealed to another party in the public interest. See Criminal Procedure Rules, r 19.9(1).

Disclosure

Rule 19.3(c) has been amended and now states

“... (c) serve with the report notice of anything of which the party serving it is aware which might reasonably be thought capable of—
(i) undermining the reliability of the expert’s opinion, or
(ii) detracting from the credibility or impartiality of the expert;..”

To assist with the assessment described in Rule 19.3(c) above, the Criminal Practice Directions 2015 provide examples of matters that should be disclosed (Para 19A.7). The list is not comprehensive, but includes such matters as: adverse judicial comment; where an appeal has been allowed because of a deficiency in the expert’s evidence; lack of accreditation or other commitment to prescribed standards; and history of poor performance in quality or proficiency assessments, of lax or inadequate scientific methods, of failure to observe recognized standards in the expert’s area of expertise or of failure to adhere to the standards expected of an expert witness in the criminal justice system. The Directions also provide that where an expert, or corporation or body with which the expert works, has been criticized without full investigation, for example by adverse judicial comment, it is reasonable to expect those criticized to provide information about the conduct and conclusions of any independent investigation into the incident and explain remedial action taken, if any (Para 19A.8). In this respect, the Criminal Procedure Rules require disclosure of matters which the expert or party introducing the expert’s evidence is aware, but do not require persistent or disproportionate enquiry, because the courts will know that there may be occasions where neither the expert nor the party will be aware of criticism (Para 19A.9).¹

Non-expert opinion evidence

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Footnote 272

See also *Pinkus v Direct Line* [2018] PIQR 20, QB at [79] – [81]: evidence of a former friend of the claimant about his resilience, including his opinion that he saw no sign of the claimant having any psychological condition, in particular PTSD, of which the friend had had personal experience following military service in Northern Ireland.

¹ Para 19A.9.