

# General rules for admissibility of opinion hearsay evidence law essay



Q. 1 ' Given the inflexibility of the general rules governing the admissibility of opinion and hearsay evidence, it has been necessary for the law to develop exceptions to these rules in respect of the expert witness. However, there are several provisions under which the judge can still exclude evidence which he or she thinks would prejudice a fair trial.'

Discuss.

### **What are the general rules governing Hearsay?**

Under Common Law, a witness may only testify about that which he/she personally observed or encountered through his/her five senses.

Reports of what the witness might have been told by, or overheard from, others are not admissible. Similarly, any deductions the witness might have formed from what they saw, heard, smelled, tasted or felt are inadmissible. Deductions are the realm of the jury.

The right of the defendant to cross-examination those giving evidence against him is considered fundamental to a fair trial. If an ' out of court' statement is presented to the court by a third party, no cross-examination may take place to assess both the demeanour[1]and credibility of the original source or errors in interpretation and transmission.

With the passage of time, several exceptions have been made to the strict rule such as: a public document or record, a Res Gestae[2]utterance, a confession, hearsay evidence of a person's reputation, a statement made by a party to a common criminal enterprise, and dying declarations[3].

In 1964 the House of Lords in *R v Myers*[4], found there was no proper principle being followed and that future developments to exceptions to the hearsay rules should be left to legislation.

A couple of years later, the need for legislating for exceptions to the strict rule of hearsay was emphasised by Diplock L. J. in the case of *Jones v Metcalfe*[5], an appeal against from Lytham Magistrates. ‘Reluctantly’ allowing the appeal, the Lord Justice described the rule on hearsay as: “ a branch of the law which has little to do with common sense” and “ absurd”. He went on to state: “ This case does illustrate, ..... the need to reform the law of evidence .....”. Widgery J. agreed “ with equal reluctance”.

The Criminal Justice Act 1988 did much to formalise the rules regarding hearsay until it was superseded by the Criminal Justice Act 2003, section 118 of which, preserves some of the Common Law exceptions.

## **What are the exceptions for Expert Witnesses?**

In the eighteenth century it became apparent that the strict rule was too restrictive. In the 1782 case of *Folkes v. Chadd*[6], Lord Mansfield delivered the opinion of the Court: “ I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received.”

More recently, in *R. v Somers*[7]and *R. v. Abadom*[8], the principle was established that an expert witness was entitled to draw upon the work of others in his field when forming an opinion. However, the expert witness should state the facts on which his opinion is based; and such facts should be proved by admissible evidence. (See *R. v. Edwards* below)

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Post Abadom[9], an issue arose in distinguishing between primary facts, (such as the findings of the Expert Witness's colleagues and assistants) which were not covered by the Abadom[10]ruling, and “ expert facts” which were admissible. In R. v. Jackson[11]. Kennedy, L. J. exceptionally allowed the prosecution to call colleagues of the expert witness.

Section 127 of the Criminal Justice Act 2003 created statutory provisions allowing the expert witness to draw on the work done by others in preparing his/her report.

Notwithstanding this, Sections 127(4) and 127(5) allow the court discretion to require the attendance of those who have worked on the case in certain circumstances.

Effectively, Section 127 creates an exception to the hearsay rule for an expert to give evidence as to the reports of his/her colleagues, subject to the court's discretion to require attendance of the relevant witness. This resolves the problem identified in R. v Jackson[12]

### **What are the provisions under which the judge can exclude evidence which “ may prejudice a fair trial”?**

Evidence which the Judge deems prejudicial to a fair trial may be excluded under one or more of:

Police and Criminal Evidence Act 1984 section 78. – Exclusion of unfair evidence;

Criminal Procedure Rules 2010/60. – Part 33 Expert Evidence

Criminal Appeal Act 1968 c. 19 section 23(2)

## **Human Rights Act 1998; Article 6 ECHR**

Prior to PACE, under English Common Law, improperly obtained evidence had always been prima facie admissible, to the extent that in *R. v Sang*[13], Diplock L. J. held: “..... a judge has no discretion to exclude relevant admissible evidence on the ground that it was obtained by improper or unfair means”

After several miscarriages of justice, the 1981 report of The Royal Commission on Criminal Procedure led to the Police and Criminal Evidence Act 1984, section 78 of which empowered the court to “ refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”.

The key here is the catch-all phrase:” having regard to all the circumstances”. In *R. v. Luttrell*[14]the Court ruled that expert evidence may be inadmissible on the grounds that its “ probative force is too slight to influence a decision”.

Addressing the issue of the defence “ ambushing” the prosecution by introducing expert evidence during the trial, the new Criminal Procedure Rules 2010/60, Part 33. 4 Expert Evidence; which came into force on April 5, 2010 require, in the interests of a fair trial, any party wishing to introduce expert evidence to serve it as soon as practicable on the court and each <https://assignbuster.com/general-rules-for-admissibility-of-opinion-hearsay-evidence-law-essay/>

other party and to furnish the other parties with the opportunity to inspect any records and equipment used. The court may refuse to admit expert evidence if a party has not complied with this rule.

Whilst the new rule has been introduced only two days prior to this assignment being written, the case of *Writtle v. DPP*[15]16, is an example of a decision 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 33. 4(1) (a) and (b). The defence served expert evidence after conclusion of prosecution case and sought to raise an entirely new issue. The Divisional Court decided that magistrates' court had been entitled to rule as inadmissible expert evidence that the defence had sought to admit after the close of the prosecution's case.

Criminal Appeal Act 1968 c. 19 section 23(2) authorises the judge to rule additional evidence inadmissible for a variety of reasons.

In *R v Jason Lee Revill*[17]& others, counsel for Revill argued (unsuccessfully) that use of a voice recording, from an interview without consent, for voice analysis, offends against Article 6, of the Human Rights Act[18].

### **What might “ prejudice a fair trial”?**

Expert evidence which might prejudice a fair trial, may be considered under three headings[19]20: unreliable evidence, unreliable expert and unnecessary expert.

(i)Unreliable evidence

English Law requires expert opinion to be drawn from an “ established body of evidence”[21]22: Cross & Tapper on Evidence: “ so long as the field is sufficiently well established to pass the ordinary tests of relevance and reliability, then no advanced test of admissibility should be applied[23]“

#### (ii) Unqualified expert

The individual proffering the opinion must have the necessary expertise: A witness may qualify as an expert through academic study, vocational experience[24], and, rarely, extensive “ private” study[25].

If the qualifications of a witness are in question, evidence may be heard on the voir dire[26], however, most lawyers and judges lack the adequate scientific background to argue or decide the admissibility of expert testimony[27]and directions for a voir dire should be exercised sparingly[28]. A judge can, during a trial, remove a witness’s “ expert” status and limit his evidence to factual matters[29]. The evidence of a discredited expert, is still admissible, but goes to weight of evidence[30].

In R. v. Robb[31], Bingham L. J. stated “ A defendant cannot fairly be asked to meet evidence of opinion given by a quack, a charlatan or an enthusiastic amateur.”

Expert evidence was excluded in the case of R. v Edwards[32]where it was found that a drug advisor’s evidence which amounted to opinion evidence founded on hearsay, with no statistical or forensic basis, was inadmissible.

### **(iii) Unnecessary expert**

The third category is whether the subject matter is something on which the jury needs advice[33].

R. v. Turner[34]provides: “ An expert’s opinion is admissible to furnish the court with scientific information which is likely to be outside the experience or knowledge of a judge or jury.” This leaves the Judge with much “ discretion” (see reference to R v. Land[35]and R. v. Cuddeford[36]in “ Conclusions”, below.)

In cases which fail the Turner[37]test, judges may rule expert evidence inadmissible on the grounds that the jury may be unduly influenced by the status of the expert and defer to a “ more highly qualified” authority[38]39. This “ aura of infallibility” may be particularly significant where the expert is introduced as “ Professor” or “ Sir”[40].

In the Canadian case of R. v. Mohan[41], the Judge found: “ There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.” and, in the amicus curiae brief in Kumho Tire v. Carmichael[42]: “..... juries are frequently incapable of critically evaluating expert testimony, are easily confused, give inordinate weight to expert evidence, are awed by science [and] defer to the opinions of unreliable experts.”



## **Conclusion**

The admission of expert evidence remains very much at the whim of the Judge, resulting in inconsistencies and egregious errors.

### **Consider two cases of child pornography:**

In R. v. Land[43], Judge, LJ ruled:” The purpose of expert evidence is to assist the court with information which is outside the normal experience and knowledge of the judge or jury. .... and the jury is as well placed as an expert to assess ..... that the person depicted in the photograph is under 16 years”.

Whereas in R. v. Cuddeford[44], Kay, LJ, admitted the expert evidence of a consultant paediatrician who attested: “ The age of the children seemed to be about 10 years, but some were younger than that.”

In R v Horncastle[45]Baron Phillips of Worth Matravers QC, PC, PSC, confirmed that: “ Jury trials are presided over by a judge who acts as gatekeeper as to what is and what is not permitted to be placed before the jury as evidence”. However, it is evident from the cases of R v Baluchi[46]and R. v Morrison (Gene)[47]that the judiciary are conspicuously failing in this role.

Baluchi a former taxi driver with no medical qualifications, held himself out to be an expert counsellor, neuropsychiatrist, plastic surgeon and even a professor who had trained at Harvard and Oxford. He is understood to have given expert testimony at least 1, 500 Immigration Appeals Tribunal and received over £1. 5 million in taxpayer funding[48].

Morrison, who left school with no qualifications and downloaded sham degrees from a fictitious U. S. university set himself up as an expert investigator, was convicted in 2007 on 23 counts of deception, obtaining property by deception, perverting the course of justice and perjury. In 2009 he was further convicted of raping two girls under 13, six counts of indecent assault, four counts of engaging in sexual activity with a child and one count of perverting the course of justice. The court heard that Morrison had infiltrated the lives of those he abused over nearly 30 years, All the victims were aged under 16 at the time[49]. During the same period, Morrison had appeared before judges as an “ expert” in over 700 trials for which he was paid at least £250, 000 of taxpayers’ money[50].

Neither the lawyers who instructed them, nor the judges who admitted their evidence were diligent enough to check on the credentials of the so-called “ experts”. Furthermore, it is evident that the solicitors making claims on the Legal Aid budget for the cost of an expert, had negligently failed to provide the same.

In closing it is interesting and, perhaps regrettable, to note that LA2800 is a compulsory module for students studying forensic science, yet there is no compulsory module in science for those wishing to become lawyers and, perhaps, future judges.

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