Law Society EU AGIS 06
Project Safeguarding Expert Evidence

Final Report of the Task Force
of England & Wales

INTRODUCTION

This report is produced as part of the AGIS 2006 Project 'Safeguarding expert evidence in the European Union' and is divided into two sections: Section A sets out the legislative and procedural framework which governs the use of expert evidence within the criminal justice process in England and Wales. It deals with five main areas: The instruction or appointment of an expert; Disclosure; Funding; Admissibility issues and Mutual legal assistance.

Section B sets out the recommendations of the Task Force with a view to addressing identified shortcomings within the current system and aims to build upon the work which has already been done and continues to be done by specialists in this area.

Annex I to the main body of the report contains a summary prepared by the Forensic Regulator. Annex II contains a schedule and analysis of case studies involving issues pertaining to the safeguarding of expert evidence in criminal courts. Annex III contains details of members of the England & Wales Task Force.

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SECTION A

I. Instruction or appointment of experts

Who may instruct an expert ?

1.1 The criminal justice system in England & Wales operates on adversarial principles under the common law and as such either party (prosecution or defence) may instruct an expert where necessary for the proper presentation of its case.

1.2 Experts may be instructed for a variety of reasons: to assist one party with analysis of the expert opinion of the opposing party; to advise in respect of potential lines of cross-examination and/or to give evidence upon a subject in which he or she has expertise.

1.3 The mere fact that an individual is instructed as an expert does not mean that he or she will give evidence before the court. This may be either because the instructing party chooses not to use the expert in evidence or because the trial judge rules that the proposed expert may not be called.[1]

1.4 In proceedings which involve more than one defendant a single expert may be instructed on behalf of multiple defendants to address an issue of joint relevance. Where "*more than one defendant wants to introduce expert evidence on an issue at trial*" the court may direct that "*evidence on that issue is to be given by one expert only*".[2] In circumstances where parties cannot agree on the identity of the joint expert the court may even go as far as selecting an expert or making directions in respect of the manner in which an expert should be appointed.[3] Such an approach however will only be appropriate where there is no conflict of interest between defendants.

[1] See section IV
[2] Criminal Procedure Rules 2005 (S.I. 2005, No. 384), Pt 24, Rules 33.7
[3] Ibid, Rule 33.7 '*Court's power to direct that evidence is to be given by a single joint expert' (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. (2) Where the co-defendants cannot*

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Method of and limitations on instruction

1.5 Experts are normally instructed by letter – usually after informal contact has been established to ascertain appropriateness, availability and the absence of any conflict of interest. Instructions to the expert are set out in writing and should clearly state the purpose for which the expert has been instructed and set out the issues which he or she is asked to deal with.[4]

1.6 In publicly funded cases, the Legal Services Commission requires that instructions to an expert must:

a) précis the facts in the case and identify issues as they are perceived
b) detail and attach relevant documents
c) include instructions on what is to be provided and how
d) arrange for the payment of fees
e) alert the supplier if a response is required within a certain timeframe (ie. in accordance with an agreement or due to a pending limitation period or a court hearing) [5]

1.7 It is for the instructing party to provide the expert with the necessary material to facilitate an informed opinion. The actual material provided in each instance will vary depending upon the nature of the case and the task which the expert is being asked to perform but in general terms, an expert should be provided with all material which may have a bearing upon the opinion he or she has been asked to give. In smaller cases this may mean that an expert will be provided with all the available case papers. In larger cases however the volume of documentation may be such as to preclude this approach. Where this is the case, it is for the instructing solicitor to ensure that the expert has possession of or access to all relevant material. In extremely specialised cases

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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 such other manner as the court may direct.

[4] Requirement F5.5 of the Legal Services Commission Specialist Quality Mark Standard, September 2005 requires instructions to a supplier to be "*clear, accurate and comprehensive*"

[5] *Ibid* Requirement F5.5

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the appropriate selection of material may require significant input from the expert and an ongoing dialogue between the expert and solicitor.

Quality control of experts

1.9. In principle, a party to criminal proceedings may instruct any individual to provide expert assistance on a subject in which he or she has relevant expertise. Whilst the selection of an expert is a matter of choice for the instructing party, if it is intended to call the expert to give evidence at trial then this choice will be open to challenge from the opposing party and review by the trial judge. In addition, even where it is not anticipated that an expert will give evidence at trial, the instructing party will wish to ensure that the advice provided by the expert is of a competence which can be relied upon in case preparation and cross examination. For all these reasons, the professional judgment of a competent instructing solicitor provides the first stage of quality control in the instruction of an expert.

1.10. In publicly funded cases, the discretion of the instructing party as to choice of expert is also subject to the authorisation of the relevant funding body.[6] In addition, under the requirements of the Legal Services Commission Specialist Quality Mark Standard any expert instructed must generally be an '*approved supplier'*.[7] In exceptional circumstances experts who have not previously been approved may be instructed for instance where there is a need to use a new supplier on a one-off occasion because of the nature of the expert report required. In addition, evaluations must be completed for all opinions and reports received and any adverse findings recorded.[8]

1.11. There exists at present no mandatory form of registration or accreditation for individuals holding themselves out as 'experts' in a particular field. However, many experts hold professional qualifications and/or membership

[6] See section III

[7] By virtue of Requirement F5.2 of the Legal Services Commission Specialist Quality Mark Standard, September 2005 the details of an approved supplier must appear in a register of approved suppliers created by the solicitor according to objective assessment criteria.

[8] Requirement F5.3, LSC Specialist Quality Mark Standard, September 2005

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of relevant professional bodies which are self-regulating.[9] In addition, experts may choose voluntarily to register with bodies such as the Council for the Registration of Forensic Practitioners which require candidates to undergo a peer-review assessment process prior to admission on the register.[10]

1.12. However, in the absence of mandatory regulation, the standard and quality of experts is largely ensured by instructing solicitors acting in order to obtain the best quality services for their clients. In addition, the structure of the adversarial system is such that where any doubts arise as to the competence of an individual expert the opposing party may challenge the qualifications or competence of the relevant individual. Even in the absence of such a challenge the court itself must be satisfied as to the standard of expertise possessed by an expert who is to be relied upon in evidence.

[9] By way of example, The British Medical Association medico-legal committee provide expert witness guidance to its members.
[10] www.crfp.org.uk (reassessment is conducted every four years)

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II. Relevant disclosure provisions

2.1. Disclosure in criminal investigations commencing on or after 1 April 1997 are regulated by Statute, namely the Criminal Procedure and Investigations Act 1996 and the relevant codes of practice. The Code requires that all material obtained in a criminal investigation which may be relevant to the investigation should be recorded and retained. The prosecution must disclose to the defence any item which *"might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused*".[11] The law in this area is complemented by a protocol entitled 'Disclosure: A Protocol for the control and management of unused material in the Crown Court'[12]

2.2. Initial disclosure should be carried out as soon as possible after a not guilty plea in the Magistrates' Court, or immediately after committal or transfer of cases in the Crown Court. However guidelines from the Attorney-General require that prosecutors must always be alive to the potential need to disclose material, in the interests of justice and fairness in the particular circumstances of any case, after the commencement of proceedings but before their duty arises under the Act.[13]

2.3. Following disclosure by the prosecution, a defendant in all trials on indictment must within 14 days disclose details of his/her defence in the form of a 'defence statement' which sets out the nature of the defence and indicates *inter alia* aspects of the prosecution case which the defendant takes issue with and why he takes issue.[14] Indeed, in future, by virtue of section 60 of the Criminal Justice and Immigration Act 2008, the accused will have to set out the particulars of the matters of fact on which he intends to rely for the purposes of his defence. This provision has not yet been implemented. Following service of a defence statement the defence may apply to the court

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[11] Section 3 of the CPIA 1996 as amended by section 32 Criminal Justice Act 2003.
[12] http://www.cps.gov.uk/legal/section20/chapter_g.html
[13] Paragrahs 55 & 56 of the Attorney General's Guidelines
[14] Section 6A of the CPIA as inserted by Section 33 of the CJA 2003

for additional disclosure if they have reasonable cause to believe that the prosecution hold material which they are required to disclose.[15] Where a defendant has not complied with his or her disclosure obligations the court or jury may *"draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned"*.[16]

2.4. The prosecutor is under a continuing duty of disclosure and must keep under review the question of whether at any time (and in particular following the service of a defence statement) there is material which might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused.[17] Operational instructions on disclosure and how the prosecution team should fulfil their duties to disclose unused material to the defence have been agreed between the CPS and the Association of Chief Police Officers and are found in 'The Disclosure Manual'.[18] Any expert witness instructed on behalf of the CPS must sign a declaration confirming *inter alia* that he/she has complied with his/her duties to record, retain and reveal material in accordance with the CPIA 1996. [19]

2.5. The test for disclosure of unused material generated by an expert is the same as that set out above in respect of other forms of unused material. The overriding duty of an expert witness is to assist the court[20] and where the expert is instructed on behalf of the prosecution this will include obligations relating to disclosure.

2.6. In accordance with the general disclosure regime as provided for by the CPIA, any opinion obtained by the prosecution which is unfavourable to the prosecution case must be disclosed to the defence. By contrast, there is at

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[15] Section 8 CPIA 1996 as amended by the CJA 2003 s.38
[16] Section 11 of the CPIA 1996 as substituted by the CJA 2003, s.39
[17] Section 7A of the Act
[18] The Disclosure Manual [http://www.cps.gov.uk], Annex K
[19] The Disclosure Manual [http://www.cps.gov.uk], Annex K, Appendix B 'Declaration'
[20] Criminal Procedure Rules 2005 (S.I. 2005, No. 384), Pt 24, Rule 33.2 sets out an expert's duty to give "*objective, unbiased opinion on matters within his expertise*" and emphasises that this duty overrides any obligation to the person from whom he receives instructions or by whom he is paid. Included within this duty is the obligation upon an expert to inform all parties and the court if his opinion changes from that contained in a report served as evidence or given in a statement.

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present no obligation upon the defence to disclose any expert material upon which they do not seek to rely and therefore no obligation to disclose the substance or even the existence of an unfavourable expert opinion.[21]

2.7. However any expert report which is served (on behalf of prosecution or defence) must include details of any literature or other information which the expert has relied upon in making the report[22] and 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.[23] It is at all times the duty of an expert to *"help the court to …by giving objective, unbiased opinion on matters within his expertise…overrides any obligation to the person from whom he receives instructions or by whom he is paid".* [24]

[21] However, Part 24 of The Criminal Procedure Rules 2005 'Disclosure of Expert Evidence' (which is not yet in force) would impose a requirement upon any party to the proceedings proposing to adduce expert evidence in the proceedings to *'furnish the other party or parties with a statement in writing of any finding or opinion which he proposes to adduce by way of such evidence and where a request in writing ….(to) provide a copy of….the record of any observation, test, calculation or other procedure on which such finding or opinion is bases and any document or other thing or substance in respect of which any such procedure has been carried out.' (Rule 24.1).* There is at present no indication of when (if at all) these provisions will come into force.

[22] *Ibid,* Rule 33.3(b)

[23] *Ibid*, rule 33.3(c)

[24] *Ibid*, rule 33.2

III. Public and private funding

Defence

3.1. An instructing solicitor acting for a defendant in a publicly funded case may apply for funding in respect of the costs of an expert in one of two separate ways.

3.2. At the conclusion of criminal proceedings the fees and expenses claimed by a defence solicitor conducting a publicly funded case are assessed by the Legal Services Commission ('LSC')[25] prior to payment. Where an expert witness has been instructed, the cost of that expert will be granted where it is an expense deemed by assessors to be *"reasonably incurred and …reasonable in amount."*[26] In this context reasonable is defined as meaning *"what is reasonable for the proper conduct of the case"*.[27] Where an assessor considers that the amount claimed is unreasonable, a lesser sum may be allowed but where it is considered that that the disbursement was not reasonably incurred, the whole sum may be disallowed.[28] Published guideline rates are generally followed in assessing the reasonableness of an expert's fees.[29]

3.3. However, in order to avoid the uncertainty of ex-post facto assessment of expenditure, a solicitor may apply in advance to the relevant funding body for 'prior authority' to instruct an expert. Authority may be granted if the office is satisfied that instructing the expert is necessary for the proper

[25] The Legal Services Commission ('LSC') manages the provision of legal aid in England and Wales.
[26] General Criminal Contract, Part C, Rule 1.13 "*Disbursements will be assessed on the basis of determining whether they were reasonably incurred and are reasonable in amount subject to any prior authority granted*" [Criminal Bills Assessment Manual, Issue 9: May 2006]
[27] Rule 1.18, note 6 provides that *"in deciding whether the amount sought is reasonable regard must be had to all the circumstances including the purpose of the disbursement in the context of the particular case (that is, having regard to the justification/need for it as against the value/importance of the case) the particular service involved, the extend to which there is a choice of alternative service providers and whether all elements of the service are justified in the particular case/at the particular time*"
[28] Criminal Bills Assessment Manual (Issue 9: May 2006) Part 4, paragraph 15
[29] "Guide to Allowances", Criminal Bills Assessment Manual, Issue 9: May 2006, Appendix 5

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conduct of proceedings and the proposed fee is reasonable.[30] The relevant provision states:

"Where you consider it necessary for the proper conduct of criminal proceedings, within the scope of this contract in the magistrates' court or High Court, for costs to be incurred under a representation order by taking any of the following steps:

(a) obtaining a written report or opinion of one or more experts;
(b) employing a person to provide a written report or opinion (otherwise than as an expert)…………….

you may apply to the Regional Director for prior authority before the expenditure is incurred" [31]

3.4. In respect of Crown Court proceedings, applications for prior authority are not governed by the General Criminal Contract ('GCC') but determined instead by the Legal Services Commission ('the Commission') under Regulation 19 of the General Regulations which provides that:

"(1) Where it appears to the solicitor necessary for the proper conduct of proceedings in the Crown Court for costs to be incurred under the representation order by taking any of the following steps:

(a) obtaining a written report or opinion of one or more experts;
(b) employing a person to provide a written report or opinion (otherwise than as an expert)……………………..
he may apply to the Costs Committee for prior authority to do so.."[32]

[30] Criminal Bills Assessment Manual, Issue 9: May 2006, Part 4, page 64, paragraph 2
[31] General Criminal Contract, Part B, Rule 5.2 (quoted in Criminal Bills Assessment Manual, Issue 9: May 2006, part 4, page 64, paragraph 2
[32] Regulation 19 of the General Regulations (quoted in Criminal Bills Assessment Manual, Issue 9: May 2006, part 4, page 64, paragraph 3

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3.5. An application to the Commission for prior authority must be made on the relevant application form and may require accompanying explanation or documentation such as a summary of the defence case setting out the nature of the defence, so as to show how the report will possibly assist the case; an opinion from the advocate identifying the need for the report and the way in which it will materially assist the case; the relevant prosecution evidence; a minimum of two quotations from proposed experts and details of any approaches made to the prosecution with a view to agreeing forensic evidence and/or reducing or defining the issues with details of the results.[33]

3.6. In cases of very substantial proposed expenditure the Costs Committee may authorise a preliminary report at a lower cost before considering the expenditure of further costs. [34]

3.7. If prior authority is refused or partially refused, the application will be referred to the Costs Committee.[35] Where the Costs Committee refuses prior authority then there is no right of appeal, but the solicitor can re-apply with further information. Alternatively, the expense may be allowed on assessment at the end of proceedings if the assessing officer considers that the disbursement was reasonably incurred by the solicitor on the client's behalf. [36]

3.8. Finally, if an application for prior authority is refused, the solicitor may obtain payment privately to undertake the step for which authority has been refused.[37]

<u>Prosecution</u>

3.9. In the case of an expert instructed by the prosecution responsibility for payment normally falls into two parts. Tasks completed as part of the

[33] Criminal Bills Assessment Manual, Issue 9: May 2006, part 4, page 66, paragraph 6
[34] Criminal Bills Assessment Manual, Issue 9: May 2006, part 4, page 67, paragraph 7
[35] Criminal Bills Assessment Manual, Issue 9: May 2006, part 4, page 67, paragraph 10
[36] Criminal Bills Assessment Manual, Issue 9: May 2006, part 4, page 67, para 11
[37] General Criminal Contract, Part C, Rule 1.20

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investigation such as post mortems; scientific tests; reports on findings etc. are paid by the investigating authority (usually the police). However attendance at court to give evidence, including preparatory work such as revision of a report and/or further research and conferences with counsel is paid for by the Crown Prosecution Service.[38]

3.10. Expert witness fees for the major providers of expert witness services are agreed centrally.[39] Fees for any other expert witnesses are discretionary and assessed in accordance with the nature and difficulty of the case; the complexity of the evidence; the work necessarily involved; the choice of experts available; the market rates otherwise being applied and the amount of travelling time involved.[40]

Court experts

3.11. In limited circumstances the court may order the preparation of medical reports upon a defendant for the purposes of determining whether to make a hospital or guardianship order, or a community rehabilitation order requiring medical treatment for a mental condition. Where these circumstances arise, the court will pay for the cost of the relevant reports out of central funds.[41] Where the court has refused to order a report, then defence solicitors may apply in the ordinary way for authority to commission one.[42]

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[38] The Crown Prosecution Service Legal Guidance: '*Payment of witnesses' expenses and allowances'* [available at http://www.cps.gov.uk/index.html]
[39] Fees for expert witness services from the Forensic Science Service, Document Evidence Limited and The Laboratory of Government Chemist are agreed centrally (see The Crown Prosecution Service Legal Guidance: 'Payment of witnesses' expenses and allowances; Expert witness fees' [available at http://www.cps.gov.uk/index.html]
[40] Starting points for the assessment of expert fees are set out in 'National forms EFC 1B – The Expert Witness Scales of Guidance [available at http://www.cps.gov.uk/legal/section16/chapter_k_fee_guidance.html]
[41] Criminal Bills Assessment Manual, Issue 9: May 2006, part 4, page 70, paragraph 12
[42] *Ibid*, page 72

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IV. Criminal law of evidence – admissibility, exclusion and weight

<u>Criteria and general principles for the admissibility of evidence</u>

4.1. As a general rule in common law proceedings, a witness is only permitted to give evidence about events which occurred within his or her presence or hearing.[43] This rule excludes the expression of opinion and fact. However expert evidence represents an exception to this rule in the following areas[44]

a) On questions of the identity of things or persons, or the genuineness of handwriting[45]

b) In matters of science or trade, the opinion of an expert, or a 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[46]

4.2. In order for the evidence of an expert witness to be admissible before the court it must first be relevant to an issue in the case. Secondly, the judge must be satisfied that the witness in question is competent to give evidence as an expert. To that end, the judge must decide two questions:

a) whether the subject-matter of the opinion falls within the class of subjects upon which expert testimony is permissible (ie. the subject in question is outside the experience and knowledge of a judge or jury[47])

and

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[43] There are certain exceptions to this general rule which are generally referred to as 'hearsay' the scope of which are outside the ambit of this paper.
[44] Archbold Criminal Pleading Evidence & Practice [2008], paragraph 10-64 *et seq.*
[45] R v Silverlock [1894] 2 Q.B. 766, CRR
[46] R v Turner (T.) [1975] Q.B. 834, 60 Cr. App. R. 80 (CA); R v Loughran [1999] Crim L.R. 404 CA
[47] R v Turner (1975) Q.B. 834, 60 Cr. App. R. 80

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b) 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.[48] To this end, the court is entitled to investigate the methods used by the witness in arriving at his opinion and where the witness has "*made use of new or unfamiliar techniques or technology, the court may require to be satisfied…… (of) a sufficient scientific basis to render results arrived by that means part of a field of knowledge which is a proper subject of expert evidence*".[49]

4.3. Where an expert expresses an opinion upon matters which are in issue between the parties at trial, he or she must ordinarily attend to give oral evidence and to be cross-examined by the opposing party. Where an expert has produced a report upon which one party seeks to rely but it is proposed that the witness should not give oral evidence, the report itself shall only be admissible with the leave of the court.[50]

4.4 Under the Criminal Procedure Rules[51] where more than one party wishes to introduce expert evidence, the court has power to direct the experts to discuss the relevant issues in the proceedings and to prepare a statement for the court, setting out the matters on which they agree and disagree and giving their reasons.[52] Where an expert fails to comply with such a direction, a party may not introduce the evidence of that expert without the court's permission.[53]

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[48] R v Bonython (1984) 38 S.A.S.R. 45, King C.J,

[49] ibid

[50] Criminal Justice Act 1988, section 30(2) & (3) "*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…For the purposes 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*"

[51] Criminal Procedure Rules 2005 S.I. 2005 No. 384 Pt 33 (as inserted by the Criminal Procedure (Amendment No.2) Rules 2006 (S.I. 2006 No. 2636))

[52] *Ibid*, rule 33.5

[53] *Ibid,* rule 33.6

4.5 In certain situations expert evidence may be deemed admissible in the proceedings but excluded nonetheless because the prejudicial impact of the evidence is deemed more prejudicial than probative.[54]

4.6. Where the evidence of an expert is admitted, the judge will direct the jury as to the weight which should be accorded to that evidence in the following terms[55]:

> *"In this case you have heard the evidence of X, who has been called as an expert on behalf of the prosecution/defendant. Expert evidence is permitted in a criminal trial to provide you with scientific [or e.g. accountancy] information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to one particular aspect of the evidence, namely [...].*
>
> *[In a case where e.g. handwriting is in issue or there might otherwise be a danger of the jury coming to its own 'scientific' conclusions, add: With regard to this particular aspect of the evidence you are not experts; and it would be quite wrong for you as jurors to attempt to [compare specimens of handwriting/perform any tests/experiments of your own] and to come to any conclusions on the basis of your own observations. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence.]*
>
> *A witness called as an expert is entitled to express an opinion in respect of [his findings or the matters which are put to him]; and you are entitled and would no doubt wish to have regard to this evidence and to the opinion/s expressed by the expert/s when coming to your own conclusions about this aspect of the case.*
>
> *You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert/s, you do not have to act upon it. [Indeed, you do not have to accept even the unchallenged evidence of an expert.] (In a case where two or more experts have given conflicting evidence:) It is for you to decide whose evidence, and whose opinions you accept, if any. You should remember that this evidence relates only to part of the case, and that whilst it may*

[54] Police and Criminal Evidence Act 1984, section 78(1) provides *"In any proceedings the court may 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."*

[55] Crown Court Bench Book, specimen directions, June 2007, Part III Evidence, no. 33

be of assistance to you in reaching a verdict, you must reach your verdict having considered all the evidence.

V. Mutual legal assistance (MLA) and Mutual Assistance (MA)

5.1. The provision of mutual assistance in criminal matters in the UK is principally governed by the Crime (International Co-operation) Act 2003 ('CICA 2003') and the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 ('the POCA order'). CICA 2003 contains provisions allowing the UK to seek and provide assistance in a number of ways, including the service of process; the provision of evidence and information; the enforcement of foreign driving disqualifications and other related matters. The POCA Order enables the UK to restrain assets at the request of foreign states and also to enforce external confiscation orders.[56]

5.2. Mutual legal assistance in the UK does not require the existence of a treaty arrangement or international agreement and requests for mutual assistance from any state may be considered even in the absence of a treaty arrangement.[57] However, relevant treaty provisions must be taken into consideration when interpreting the applicable domestic legislation.[58]

5.3. The UK is party to a large number of multilateral conventions and agreements which deal with mutual legal assistance. These include:

- The European Convention on Mutual Assistance in Criminal Matters 1959 (and the First Additional Protocol to the Convention)
- The European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990
- The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988
- The Commonwealth Scheme relating to Mutual Assistance in Criminal Matters 1986

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[56] Nicholls, Montgomery & Knowles, The law of extradition and mutual legal assistance, OUP, 2nd edition, 2007, paragraph 17.03
[57] Mutual Legal Assistance Guidelines for the UK (4th Edition, Home Office November 2006)
[58] Nicholls, Montgomery & Knowles, The law of extradition and mutual legal assistance, OUP, 2nd edition, 2007, paragraph 17.07-17.09

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- The UN Convention against Transnational Organised Crime 2000
- The UN Convention against Corruption 2003

5.4. These multi-lateral agreements are supplemented by a number of bilateral mutual legal assistance treaties.

5.5. Particular provisions which relate to mutual legal assistance within Europe:

- The European Convention on Mutual Legal Assistance in Criminal Matters was ratified by the UK in 1991
- Certain provisions of the Schengen Convention[59] implemented within the UK by virtue of the CICA 2003[60]
- The Convention on Mutual Assistance in Criminal matters and its Protocol 2000
- Council Framework Decision on the execution in the European Union of orders freezing property or evidence 2003[61]
- The UK will also be party to the European Evidence Warrant which is due to be adopted at the end of 2008.

5.6. Responsibility for mutual assistance in criminal matters in England & Wales lies with the Secretary of State for Justice[62] whose department acts as the 'central authority' for the transmission of incoming and outgoing requests for mutual legal assistance in criminal matters.

5.7. The Mutual Legal Assistance Guidelines[63] which are published by the United Kingdom Central Authority Judicial Co-operation Unit Policing Policy and

[59] The Schengen Convention was signed in June 1990 and came into effect in March 1995..
[60] These provisions include the continuation of surveillance by law enforcement officers if the subject crosses into another member state (Article 40); the sending of procedural documents directly by post rather than via central authorities (Article 52) and the designation of a supervisory authority to carry out independent supervision of national data files from the Schengen Information System (Article 41)
[61] Which is given effect by Part I of the CICA 2003
[62] Previously the Secretary of State for the Home Department
[63] 6th Edition published 16th June 2008 (http://police.homeoffice.gov.uk/publications//operational-policing/MLA_Guidelines_6thedition.pdf?view=Binary)

Operations provide in-depth guidance on the relevant procedures which are applied in respect of requests both to and from the UK.

5.8. In addition, the Serious Organised Crime Agency ('SOCA') has primary responsibility for processing requests for investigative help from overseas. Requests for investigative assistance need not be sent to the UK Central Authority unless it is a requirement of the foreign authority making the request.[64]

[64] Nicholls, Montgomery & Knowles, The law of extradition and mutual legal assistance, OUP, 2nd edition, 2007, paragraphs 17.91-97

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SECTION B

RECOMMENDATIONS AND BEST PRACTICE

I. Instruction/Appointment of experts

1. The Task Force supports the steps which are being taken by the Forensic Science Regulator and others[65] to assess the best means of managing and regulating the accreditation of expert witnesses.[66]

2. The Task Force suggests that the Regulator gives consideration to the creation of a central database which will hold comprehensive details in respect of expert witnesses (including qualifications; when and where he or she has previously given evidence or submitted a report in proceedings; and any adjudications made against him or her by any professional body).

3. The Task Force emphasises the need for continued quality control by those instructing expert witnesses. It suggests that prosecuting authorities and the Legal Services Commission may wish to consider some means of encouraging practitioners to register with an appropriate body; this might include a provision making registration one of the criteria to be taken into account when an expert is selected. However, in these circumstances, registration should not rule out the use of an unregistered expert, provided sufficient justification can be demonstrated.

4. The Task Force urges the Regulator to consider how best to guard against the possibility of an expert or other service provider putting commercial interests before his or her overriding duty to the court and the interests of justice.

5. Furthermore, the Task Force observes that in the emerging marketplace of forensic science provision for the Criminal Justice System, the Regulator should play a vital role, *inter alia*, by emphasising the need for suppliers to

[65] Other bodies contributing to the review process include United Kingdom Accreditation Service (UKAS), National Police Improvements Agency (NPIA) and Skills for Justice.
[66] See summary prepared by the Forensic Regulator December 2008 – reproduced at Annex I

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adhere to appropriate high standards when demonstrating provenance, and providing clear audit trails, in respect of any scientific analysis they conduct.

II. Disclosure

1. The Task force encourages professional bodies to set out area-specific guidance as to the material which should generally be provided to an expert in order to enable him or her to provide an opinion within that particular area of expertise. It is hoped that this guidance will assist in providing clarity for instructing solicitors and funding bodies as to the material it is necessary for the expert to access and consider in order to provide an opinion.

III. Funding

1. The Task Force encourages the Legal Services Commission to keep the rates payable to expert witnesses under continual review so as to ensure that they are set at an appropriate level, thereby enabling the instruction of suitably qualified and competent experts.

IV. Admissibility, Exclusion and weight

1. The parties should be encouraged to indicate at the earliest possible stage the areas of agreement and disagreement as regards the expert evidence which is to be relied on at trial. To this end, the Task Force encourages practitioners at all times to comply with the provisions of the Criminal Case Management Framework and the Criminal Procedure Rules, in order to facilitate effective pre-trial agreement.

2. The Task Force encourages advance indication (where appropriate) both generally, and particularly under s.6 A Criminal Procedure and Investigations Act 1996, of the matters of fact which are relevant to the expert evidence in the case, in advance of any tests or examinations which are to be undertaken by the prosecution. This will enable consideration of those aspects of

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relevance to the defence case at an early stage of proceedings and help prevent the unnecessary repetition of forensic tests or examinations.

3. The Task Force further encourages the preparation of an agreed summary of the expert evidence presented during the trial which, with the leave of the judge, can be provided to the jury upon their retirement.

4. Generally, the Task Force emphasises the important role of an active judiciary in ensuring the effective implementation of the above matters.

ANNEX I

Summary prepared by the Forensic Science Regulator

Forensic Science Regulator

The principle role of the Regulator is to set and monitor quality standards for the use of forensic science in the criminal justice system.

The vision is to establish certainty and reliability for science used in the investigation of crime and the prosecution of offenders. The route to achieving this is to:

- produce a set of high level 'industry specific' standards covering all parts of the forensic process – UK Gold Standard;
- establish testing but affordable standards compliance assessment through accreditation by the United Kingdom Accreditation Service;
- use assessments of standards covering the: organisational level (commercial and non-commercial organisations providing forensic services); individual practitioners; methods (forensic techniques); and training. This will replace the current single dimension approach of practitioner registration;
- embed the National Occupational Standards developed by Skills for Justice (the skills council for the criminal justice sector) across all practitioner roles; and
- work with delivery partners to assess and manage risks to achieving the vision.

The Regulator will identify where specific lower level standards are needed; commission new or revised standards; assign priorities; monitor effectiveness, performance and compliance. The scope of regulation spans the whole investigative and judicial process from the supply and use of suitable materials, through the crime scene, collection and analysis of forensic exhibits, to the presentation of evidence in court. It will encompass the independent accreditation of providers, the competence, development and registration of practitioners and the validation of methods.

The Regulator cannot undertake his work alone and is dependent on the active involvement and support of delivery partners. Specialist groups drawn from delivery partner and stakeholder groups have been set up to develop standards and to advise the Regulator based on the extensive scientific and technical expertise of the groups. The ‘end user’ group advises on the outcome expected of forensic activity from the perspective of the courts.

Andrew Rennison
Forensic Science Regulator
9 December 2008

ANNEX II

COURT CASES RAISING ISSUES RELATED TO FORENSIC SCIENCE

This schedule prepared by the Crown Prosecution Service provides an overview of issues raised by cases involving the use of expert evidence within England & Wales over an extended period. It further provides a thematic case study analysis of those questions most relevant to the subject matter of this report and where appropriate includes excerpts of guidance provided by the courts.

Year	Court	Class	Case	Comment
1954	CoS	S	Davie v Edinburgh Magistrates [1953] SC 34	Duty of the expert witness
1983	CoA		R. v. Abadom (1983) 76 Cr.App.R. 48	Use of assistants or other information – referred to in Jackson
1990	CoA		R. v. Francis (1990) 91 Cr.App.R. 271	Use of assistants or other information – referred to in Jackson
1991	CoA		Robb (1991) 93 CAR 161	Status as expert – referred to in Barnes
1993	CoA	D	R v Ward, [1993] 1 WLR 619, 96 Cr App Rep 1, [1993] 2 All ER 577	Disclosure obligations
1995	CoA		Clarke [1995] 2 Cr App R 425	Admissibility of expert evidence – referred to in Dallagher
1996	CoA		Jackson, R v [1996] EWCA Crim 414	Use of assistants or other information
1996	CoA	E	Doheny & Anor, R v [1996] EWCA Crim 728	Effect of the prosecutors fallacy
1996	CoA	E	Adams, R v [1996] EWCA Crim 222 (26th April, 1996)	Use of statistics in court
1997	CoA	E	Newman-Williams, R v [1997] EWCA Crim 2995 (20th November, 1997)	Issues expert should not express opinion on
1997	CoA	E	Adams, R v [1997] EWCA Crim 2474 (16th October, 1997)	Use of statistics in court
1998	CoA	E	Cooper, R v [1998] EWCA Crim 2258 (8th July, 1998)	Issues expert should not express opinion on
2000	CoA	A	Gilfoyle, R v [2000] EWCA Crim 81	Admissibility of evidence
2001	CoA		Edwards, R v [2001] EWCA Crim 2185	Status as expert
2002	CoA	A	Dallagher [2002] EWCA Crim 1903	Admissibility of expert evidence and interpretation
2003	CoA	A	Kempster, R. v [2003] EWCA Crim 3555	Earprint evidence – Dallagher does not automatically undermine conviction
2003	CoA	D	Clark, R v [2003] EWCA Crim 1020	Disclosure obligations
2003	CoA	E	Nugent & Anor, R v [2003] EWCA Crim 3434 (28 November 2003)	Requirement for scientific basis
2004	HCJ	E	Kelly, Re Reference By Scottish Criminal Cases Review Commission [2004] ScotHC 47 (06 August 2004)	Cross contamination in DNA case
2004	CoA	A	Luttrell & Ors, R v [2004] EWCA Crim 1344	Requirement for admissibility of expert evidence and disclosure re quality of witness

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2004	HoL		LS, R (on application of) v South Yorkshire Police (Consolidated Appeals) [2004] UKHL 39	ECHR and fingerprints/DNA
2005	CoA	A	Barnes, R v [2005] EWCA Crim 1158	Status as expert and admissibility
2005	CoA	S	Puaca, R v [2005] EWCA Crim 3001	Standards expected of forensic pathologists
2005	CoA	S A	Harris & Ors, R v [2005] EWCA Crim 1980	Obligations on expert witnesses
2005	CoA	T	Momodou, R v [2005] EWCA Crim 177	Witness training/coaching
2006	CoA		Bates, R. v [2006] EWCA Crim 1395	Interpretation of evidence
2006	CoA	E	Shillibier v R [2006] EWCA Crim 793 (06 April 2006)	Wording of conclusions
2006	CoA	S	Bowman, R v [2006] EWCA Crim 417	Clarification of responsibilities of experts set out in R v Harris & Others
2006	CoA	S	General Medical Council v Meadow [2006] EWCA Civ 1390 (26 October 2006)	Responsibilities of expert witnesses

Class indicates the section, below, in which the relevant text is reproduced.

S Standards/Obligations
A Admissibility
D Disclosure
E Evidence – ie. issues raised with specific types of evidence

STANDARDS/OBLIGATIONS RELATED TO EXPERT WITNESSES

General Medical Council v Meadow [2006] EWCA Civ 1390 (26 October 2006)
Note – Civil case

The role and responsibilities of the expert witness

21. In paragraph 20 of his judgment the judge quoted what are now well-known principles identified by Cresswell J in National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyd's Rep 68, 81-82. Those principles were approved by Otton LJ in Stanton v Callaghan and are now accepted and understood throughout what may be called the expert witness community. Cresswell J put them thus:

"The duties and responsibilities of expert witnesses in civil cases include the following: 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v Jordan [1981] 1 WLR 246, 256, per Lord Wilberforce). 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd v Commercial Union Assurance Co plc [1987] 1 Lloyd's Rep 379, 386, per Garland J and In re J [1990] FCR 193, per Cazalet J). An expert witness in the High Court should never assume the role of an advocate. 3. An expert witness should state the facts or assumptions upon which his

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opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (In re J). 4. An expert witness should make it clear when a particular question or issue falls outside his expertise. 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (In re J). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co Ltd v Weldon The Times, 9 November 1990, per Staughton LJ). 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court. 7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."

The judge added at the end of that quotation that in addition to those considerations, the expert witness will know that he must give evidence honestly and in good faith and must not deliberately mislead the court. He will not expect to receive protection if he is dishonest or malicious or deliberately misleading.

22. Those principles have recently been reflected and expanded in an important document entitled "Protocol for the Instruction of Experts to give evidence in civil claims", which was prepared in the light of work done by the EWI and the Academy of Experts and others and which was approved by Lord Phillips as Master of the Rolls. Paragraph 4 of the protocol is entitled "Duties of experts" and includes the following:

"4.1 Experts always owe a duty to exercise reasonable skill and care to those instructing, and to comply with any relevant professional code of ethics. However when they are instructed to give or prepare evidence for the purpose of civil proceedings in England and Wales they have an overriding duty to help the court in matters within their expertise (CPR 35.3). This duty overrides any obligations to the person instructing them or paying them. Experts must not serve the exclusive interests of those who retain them" (my italics).

23. The Attorney General also drew our attention to Harmony Shipping Co SA v Orri [1979] 1 WLR 1380, where it was held that there is no property in an expert witness (in that case a handwriting expert) and that any contract purporting to impose an obligation to give evidence for only one side in a dispute would be contrary to public policy (see per Lord Denning at 1385F-G). Lord Denning also said (at page 1386H):

"There being no such property in a witness, it is the duty of a witness to come to court and give his evidence in so far as he is directed by the judge to do so."

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………..

203. There may be tensions between what is sought from an expert witness and seemingly legally admissible and what he can say having regard to the limits of his professional expertise. Questions of relevance, as a matter of logic and, hence, legal admissibility, as well as of professional propriety in proffering sought evidence on the border of, or outside, a witness's expertise may be in play. Depending on the vigilance of the lawyers and of the medical expert in the forensic interplay of the courtroom, each may complement or distract the other from the respective high professional standards demanded of them. It seems to me that the latter was the case here.

204. An expert, who is called to give, and gives evidence, of opinion or otherwise, on matters within his own professional knowledge and experience has an "overriding duty" to the court to assist it objectively on matters within his expertise. He is also bound both by the ethical code and generally accepted standards of his profession. The former is expressly acknowledged in civil matters in Rule 35.3 of the Civil Procedure Rules, and has been usefully elaborated by Cresswell J in his much cited analysis in The Ikarian Reefer [1993] 2 Lloyds Rep 68, at 81-82. The same or similar principles have been applied for many years in criminal and family cases. There is clearly much overlap in the two categories of obligation, but, in the hurly-burly of the trial process, especially seen through the eyes of the expert witness they may not, in practice, always complement each other.

Bowman, R v [2006] EWCA Crim 417 (02 March 2006)

Experts

174. In *R v Harris and* Others [2006] 1 Cr App. R.5 this court gave guidance in respect of expert evidence given in criminal trials (see page 55). The way that the expert reports have been prepared and presented for this appeal leads us to believe *that* it would be helpful to give some further guidance in order to underline the necessity for expert reports to be prepared with the greatest care.

175. On 14 February 2006 the Attorney General, announcing the outcome of his review of Shaken Baby Syndrome cases published three papers including a booklet entitled "Disclosure: Expert's Evidence and Unused Material- Guidance Booklet for Experts". The instructions contained in this booklet were "designed to provide a practical guide to disclosure for expert witnesses instructed by the Prosecution Team". The booklet sets out three key obligations arising for an expert as an investigation progresses. The relevant steps are described as to retain, to record and to reveal. No doubt any expert instructed by the prosecution will, of course, comply with these guidelines. What follows applies equally to experts instructed by the prosecution and defence.

176. We desire to emphasise the duties of an expert witness in a criminal trial, whether instructed by the prosecution or defence, are those set out in

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Harris. We emphasise that these duties are owed to the court and override any obligation to the person from whom the expert has received instructions or by whom the expert is paid. It is hardly necessary to say that experts should maintain professional objectivity and impartiality at all times.

177. In addition to the specific factors referred to by Cresswell J in the *Ikarian Reefer* [1993] 2 Lloyds Rep 68 set out in *Harris* we add the following as necessary inclusions in an expert report:

1. Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.

2. A statement setting out the substance of all the instructions received (with written or oral), questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based.

3. Information relating to who has carried out measurements, examinations, tests etc and the methodology used, and whether or not such measurements etc were carried out under the expert's supervision.

4. Where there is a range of opinion in the matters dealt with in the report a summary of the range of opinion and the reasons for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinions expressed should be set out.

5. Relevant extracts of literature or any other material which might assist the court.

6. A statement to the effect that the expert has complied with his/her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an acknowledgment that the expert will inform all parties and where appropriate the court in the event that his/her opinion changes on any material issues.

7. Where on an exchange of experts' reports matters arise which require a further or supplemental report the above guidelines should, of course, be complied with.

178. In this case, at times, some of the experts expressed to the court for the first time opinions which had not featured in their reports. A number of additional reports were also supplied at a late stage. Mr Martin-Sperry explained forcefully the funding constraints and difficulties faced by those representing the appellant in approaching and obtaining experts' reports. We are mindful of these difficulties and aware of the constraints placed on the appellant's advisers in this appeal but they do not wholly explain why some of the material placed before the court was not included in the relevant expert's initial report. They also do not explain or excuse the failure to refer to the instructions given and material provided before the

reports were written. Failure to adhere to the guidelines can cause considerable difficulties and some delay in the conduct of the proceedings. These remarks are designed to help build up a culture of good practice rather than to be seen as critical of the experts in this case. We should add that it may be that some of the difficulties experienced by the experts were caused by late supply to them of information, from whatever source.

Puaca, R v [2005] EWCA Crim 3001 (24 November 2005)

31. Dr Heath has also been criticised for his failure to refer to the absence of findings which would have provided support for his theory, even though their absence is not conclusive against it. They include petechiae in the face, eyelids, whites of the eyes and mouth, fibres in mouth, injury to mouth or tongue and bruises or contact/pressure marks on the back and arms. It is said that Dr Heath should, have set out the reasons which could tend to show that his theory was wrong. That would not have prevented him from giving reasons (as he was to do in part later) why the absence of these findings was not inconsistent with his theory. He should also have drawn the attention to the significance of the absence of any pathological indication that there had been a violent struggle other than the damage to the muscles.

32. We agree with these criticisms. In our view this unusual case called for a properly reasoned post-mortem report from Dr Heath. A post-mortem report fulfils a number of functions. It guides the police in their investigations. It is likely that it will be considered in pre-trial proceedings and applications such as an application for bail or legal assistance. It is the basis of the expert's evidence at trial. As such the opinion of the pathologist must, as the Practice Guidelines of the Policy Advisory Board for Forensic Pathology make clear, be "objectively reached" and have "scientific validity". The duty of all pathologists, whoever instructs them, is, in our view, to comply with the obligations imposed on expert witnesses from the start. It is wholly wrong for a pathologist carrying out the first post-mortem at the request of the police or Coroner merely to leave it to the defence to instruct a pathologist to prepare a report setting out contrary arguments. The case law as to the duties and responsibilities of experts is clear. As Cresswell J said in a much cited passage in National Justice Compania Naviera SA v. Prudential Assurance Co Ltd (The "Ikarian Reefer") [1993] 2 Lloyd's Rep. 68:

> "3. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion."

……….

41 We turn now to the evidence given by Dr Heath during the course of the trial. Before looking at the detail we set out our strong criticism of the way in which his evidence was given. We shall see that over and over again Dr Heath said that various post-mortem findings were consistent

with, or were signs of, asphyxia. He was cross-examined about his evidence, often vehemently. That challenge continued before us. What unfortunately was not made clear during most of his evidence was whether Dr Heath was referring to asphyxia generally or asphyxia by upper airway obstruction. We return to that later. What gives us even greater concern is a concession which was made by Dr Heath in re-examination (although the answer was anticipated in cross-examination). In re-examination he said that the findings which he described as consistent with, or signs of, asphyxia (other than the muscle damage) were also consistent with the cause of death being an overdose (Transcript 14 November 2002, pages 84-85). In the light of that answer, the evidence about his findings, excluding the evidence of damage to the muscles, was, in our view, largely irrelevant. It could have been relevant to a rigor mortis theory of the cause of the injuries to the muscles advanced tentatively by Dr Carey, but no more. If before the start of the evidence, Mr Coker had known the answer which Dr Heath was to give during the course of re-examination, a great deal of time would have been saved and the risk of jury confusion would have been substantially reduced. This is another very troubling feature of this case.

42 Mr Coker submitted that an expert is entitled to say what he has found is consistent with something and that has probative value. Whereas "inconsistency" is often probative, the fact of consistency is quite often of no probative value at all. In this case his evidence of consistency had no probative value, assuming the correctness of this answer in re-examination. We consider that there is a very real danger in adducing before a jury dealing with a case such as the present evidence of matters which are "consistent" with a conclusion, at least unless it is to be made very clear to them that such matters do not help them to reach the conclusion. If it is introduced in evidence, and particularly if it is given some emphasis, a jury may well think that it assists them in reaching a conclusion : for why otherwise are they being told about it? We are also not convinced that the summing-up was as clear as it could have been on this point (see pages 29-30).

Harris & Ors, R v [2005] EWCA Crim 1980 (21 July 2005)

271. It may be helpful for judges, practitioners and experts to be reminded of the obligations of an expert witness summarised by Cresswell J in the Ikerian Reefer [1993] 2 Lloyds Rep. 68 at p 81. Cresswell J pointed out amongst other factors the following, which we summarise as follows:

(1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.

(3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.

(4) An expert should make it clear when a particular question or issue falls outside his expertise.

(5) If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.

(6) If after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate to the court.

272. Wall J, as he then was, sitting in the Family Division also gave helpful guidance for experts giving evidence involving children (see Re AB (Child Abuse: Expert Witnesses) 1995 1 FLR 181). Wall J pointed out that there will be cases in which 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. He added (see page 192):

"Where that occurs, the jury will have to resolve the issue which is raised. Two points must be made. In my view, the expert who advances such a hypothesis owes a very heavy duty to explain to the court that what he is advancing is a hypothesis, that it is controversial (if it is) and placed before the court all material which contradicts the hypothesis. Secondly, he must make all his material available to the other experts in the case. It is the common experience of the courts that the better the experts the more limited their areas of disagreement, and in the forensic context of a contested case relating to children, the objective of the lawyers and the experts should always be to limit the ambit of disagreement on medical issues to the minimum."

273. We have substituted the word jury for judge in the above passage.

274. In our judgment the guidance given by both Cresswell J and Wall J are very relevant to criminal proceedings and should be kept well in mind by both prosecution and defence. The new Criminal Procedure Rules provide wide powers of case management to the Court. Rule 24 and Paragraph 15 of the Plea and Case Management form make provision for experts to consult together and, if possible, agree points of agreement or disagreement with a summary of reasons. In cases involving allegations of child abuse the judge should be prepared to give directions in respect of expert evidence taking into account the guidance to which we have just referred. If this guidance is borne in mind and the directions made are clear and adhered to, it ought to be possible to narrow the areas of dispute before trial and limit the volume of expert evidence which the jury will have to consider.

275. We see nothing new in the above observations.

Davie v Edinburgh Magistrates [1953] SC 34

Note – Scottish case – but cited with approval in English cases – see Luttrell

> Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.

DISCLOSURE

Clark, R v [2003] EWCA Crim 1020 (11 April 2003)

166. The only answer that we have, therefore, from Dr Williams was contained in a statement dated 5 September 2002. In that he said:

    "It is not my practice to refer to additional results in my post mortem unless they are relevant to the cause of death, as the specimens were referred to another consultant."

167. We find that explanation wholly unacceptable. If it does correctly state Dr Williams' practice, then on the evidence available to us his practice is completely out of line with the practice accepted by other pathologists to be the standard. It is likely to mislead others, who may work on the same case and who will be denied the opportunity of considering the material in the way that Dr Williams explained that he found necessary, in reaching their own properly informed conclusions. It runs a significant risk of a miscarriage of justice. It is tantamount to saying "If I can discount it, nobody else need consider it". As an approach it only has to be voiced for the inherent danger to be obvious.

168. In so far as Dr Williams seems to suggest that the onus was on the defence experts to ask questions of him that would have revealed the existence of this information, we reject his contention. The evidence from the doctors quoted above shows the extent to which doctors reviewing the matter at a later stage are dependent upon the pathologist who conducted the original post-mortem to draw to their attention not only any material which justifies the original pathologist's conclusion but also any which reveals any abnormality that might need to be considered before being discounted. Where tests have been carried out and reported upon to the pathologist, his responsibility to make that material available for consideration by others is a clear one and his failure to do so may well mislead them into thinking that there have been negative findings when that is not the case.

R v Ward, [1993] 1 WLR 619, 96 Cr App Rep 1, [1993] 2 All ER 577

> What the rules do not say in terms is that if an expert witness has carried out experiments or tests which tend to disprove or cast doubt upon the opinion he is expressing, or if such experiments or tests have been carried out in his laboratory and are known to him, the party calling him must also disclose the record of such experiments or tests. In our view the rules

do not state this in terms because they can only be read as requiring the record of all relevant experiments and tests to be disclosed. It follows that an expert witness who has carried out or knows of experiments or tests which tend to cast doubt on the opinion he is expressing is in our view under a clear obligation to bring the records of such experiments and tests to the attention of the solicitor who is instructing him so that it may be disclosed to the other party. No doubt this process can often be simplified by the expert for one party (usually the prosecution) supplying his results, and any necessary working papers, to the expert advising the other party (the defence) directly.

(v) It is true that public interest immunity provides an exception to the general duty of disclosure. For present purposes it is not necessary to attempt to analyse the requirements of public interest immunity. But in argument the question arose whether, if in a criminal case the prosecution wished to claim public interest immunity for documents helpful to the defence, the prosecution is in law obliged to give notice to the defence of the asserted right to withhold the documents so that, if necessary, the court can be asked to rule on the legitimacy of the prosecution's asserted claim. Mr Mansfield's position was simple and readily comprehensible. He submitted that there was such a duty, and that it admitted of no qualification or exception. Moreover, he contended that it would be incompatible with a defendant's absolute right to a fair trial to allow the prosecution, who occupy an adversarial position in criminal proceedings, to be judge in their own cause on the asserted claim to immunity. Unfortunately, and despite repeated questions by the court, the Crown's position on this vital issue remained opaque to the end. We are fully persuaded by Mr Mansfield's reasoning on this point. It seems to us that he was right to remind us that when the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. These considerations therefore powerfully reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence. If, in a wholly exceptional case, the prosecution are not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned.

ADMISSIBILITY

This section relates to quality scientific issues related to admissibility not the legal issues.

Harris & Ors, R v [2005] EWCA Crim 1980 (21 July 2005)

270 As to expert evidence generally, the evidential rules as to admissibility are clear (see for example R v Bonython [1984] 38 SASR 45 and R v Clarke (RL) [1995] 2 Cr. App. R. 425 (facial mapping)). We see no reason for

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special rules where medical experts are involved. There is no single test which can provide a threshold for admissibility in all cases. As Clarke demonstrates developments in scientific thinking and techniques should not be kept from the Court. Further, in our judgment, developments in scientific thinking should not be kept from the Court, simply because they remain at the stage of a hypothesis. Obviously, it is of the first importance that the true status of the expert's evidence is frankly indicated to the court.

Barnes, R v [2005] EWCA Crim 1158 (10 May 2005)

42. The relevant principles regarding expert evidence were not in issue before us. In Robb (1991) 93 CAR 161, 165 Bingham LJ said that:

"the two relevant questions are whether study and experience will give a witness's opinion an authority which the opinion of one not so qualified will lack, and (if so) whether the witness in question is skilled and has adequate knowledge. If these conditions are met the evidence of the witness is in law admissible, although the weight to be attached to his opinion must of course be assessed by the tribunal of fact."

The question in that case was whether it was the defendant who had made ransom demands and given a cab instructions which were captured on a tape recording which the Crown sought to compare with a control video tape containing the defendant's voice. The expert called by the Crown was a phonetician who was "well qualified by academic training and practical experience to express a view on voice identification". The court considered that

"his judgment, based on close attention to voice quality, voice pitch and the pronunciation of vowels and consonants would have a value significantly greater than that of the ordinary untutored layman, as the judgment of a hand-writing expert is superior to that of the man in the street".

43. In Clarke [1995] 2 CAR 425, a robber had been filmed on CCTV, from which stills were made. These were sent to Dr Vanezis, a pathologist and director of the Facial Identification Centre at Charing Cross Hospital, who compared the stills with police identification photographs using the then new technique of video superimposition. The court said this:

"It is essential that our criminal justice system should take into account modern methods of crime detection. It is no surprise, therefore, that tape recordings, photographs and films are regularly placed before juries. Sometimes that is done without expert evidence, but, of course, if that real evidence is not sufficiently intelligible to the jury without expert evidence, it has always been accepted that it is possible to place before the jury the opinion of an expert in order to assist them in their interpretation of the real evidence. The leading case on that point is Turner (1975) 60 Cr.App.R 80, [1975] Q.B. 834. We would add this. There are no closed categories where such evidence may be placed before a jury. It would be

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entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and new advances in science.

. An illustration is to be found in the case of Stockwell (1993) 97 Cr.App.R. 260. That case also involved a bank robbery. The robber was disguised. The prosecution tendered facial mapping evidence through an expert. The principal point on the appeal was whether the judge had rightly permitted that expert evidence to be adduced. The Court referred to the decision on Turner and then remarked as follows at pp. 263-264:

'Where, for example, there is a clear photograph and no suggestion that the subject has changed his appearance, a jury could usually reach a conclusion without help. Where, as here, however, it is admitted that the appellant had grown a beard shortly before his arrest, and it is suggested further that the robber may have been wearing clear spectacles and a wig for disguise, a comparison of the photograph and defendant may not be straightforward. In such circumstances we can see no reason why expert evidence, if it can provide the jury with information and assistance they would otherwise lack, should not be given. In each case it must be for the judge to decide whether the issue is one on which the jury could be assisted by expert evidence, and whether the expert tendered has the expertise to provide such evidence.'

After dealing with the evidence of facial mapping the Lord Chief Justice observed that the judge described it as "breaking new ground", and then quoted with approval the observation by the trial judge (at p. 264):

"One should not set one's face against fresh developments, provided they have a proper foundation…"

There are, of course, differences between the case of Stockwell and the more developed technique used here. But for our part we regard those differences as raising no issue of principle whatever. Indeed, what is involved here is simply an extension of the technique used in Stockwell. We are far from saying that such evidence may not be flawed. It is, of course, essential that expert evidence, going to issues of identity, should be carefully scrutinised. Such evidence could be flawed. It could be flawed just as much as the evidence of a fingerprint expert could be flawed. But it does not seem to us that there is any objection in principle."

44. Most recently in Dallagher [2002] EWCA Crim 1903; [2003] 1 CAR 12, the Crown relied on a comparison by two experts (Mr Van Der Lugt, a Dutch police officer who had specialised in ear print comparison for over a decade and, once again, Prof. Vanezis) of ear print marks found on a window with control prints provided by the defendant and others. After conviction, new evidence emerged about the misgivings that some forensic experts had about the extent to which ear print evidence alone could, in the present state of knowledge, safely be used to identify a suspect. The Court set aside the verdict and ordered a retrial. It cited Bingham LJ's words in Robb regarding the need both for study and experience to give a witness's opinion an authority which the opinion of one not so qualified will lack and for skill and adequate knowledge. It said in relation to the case before it that it would not have been possible to

exclude the evidence about the finding of the ear prints and their comparison by Mr Van Der Lugt and Prof. Vanezis, but that the issue was as to the value of their conclusion, or in other words weight. The Court concluded that the fresh evidence threw doubt on this and so on the safety of the verdict.

Conclusions

45. In all these cases, the making of the relevant comparison was itself treated as a matter to be undertaken by an appropriately qualified and skilled expert. Here, we are satisfied that Mr Murat has no experience or expertise in the relevant comparison; and indeed, as we have observed, Mr Kamlish does not put him forward as having this. Mr Murat does have expertise in identifying woodgrain in wood, including veneer, and also in doing so despite or making allowances for the presence of varnish. But he has no expertise in the interpretation of lifts, or in the identification of wood-grain on lifts. He himself said that he was relying on a fingerprint expert for an assumption that the striations in lift 6 reflected wood-grain. However, we are prepared to accept and to proceed on the basis that the striations which can be seen on lift 6 do derive from wood-grain. But the completeness and precision of the reflection depends on factors such as the quantity of powder and pressure used and the extent of any grease or other contaminants lifted. Mr Murat has no experience or expertise to enable him to judge the extent to which the striations which show on the lift are complete or do or may completely or precisely reflect the wood-grain evident on the door; we have already indicated why it appears that the striations are not and do not.

46. In those circumstances, we do not consider that any expert evidence that it is said that Mr Murat could give could afford any ground for regarding the jury's verdict as unsafe or therefore for allowing an appeal (cf s.23(2)(b)). However, Mr Kamlish submits that Mr Murat's exercise in comparison is one which could have been admitted at trial as a matter of observation. He asks rhetorically: how else is the appellant to be able to challenge his conviction, in the apparent absence of (demonstrated by the appellant's lawyers' strenuous but unsuccessful attempts to locate) any other relevant expert? The interests of justice in Mr Kamlish's submission justify the admission of Mr Murat's comparison. Even if we were to accept this submission, however, we would have to consider what weight might attach to the exercise which Mr Murat undertook. This consideration arises both when considering under s.23(2)(b) whether the evidence "may afford any ground for allowing the appeal" and, if we treat the evidence as having been admitted, when considering whether the verdict is unsafe. For reasons which we have already given, we consider that, quite apart from the technical issue whether Mr Murat's evidence is admissible, his evidence regarding the comparison he made lacks any substantial force. We refer to his lack of knowledge regarding the taking of lifts and the significance and interpretation of features appearing in them, his lack of any significant experience of prior comparisons, and the absence of any

record of the exercise which he undertook. Further, although unnecessary to rely on, there are positive indications in the evidence of Mrs Newman (which we found convincing on this point) that the exercise was, although clearly well-intentioned, haphazard and random. If we pose to ourselves the question whether the jury's verdict in this case might reasonably have been affected by Mr Murat's evidence as we have heard and seen it, we would answer that question in the negative.

Luttrell & Ors, R v [2004] EWCA Crim 1344 (28 May 2004)

32. For expert evidence to be admissible, two conditions must be satisfied: first, that study or experience will give a witness's opinion an authority which the opinion of one not so qualified will lack; and secondly the witness must be so qualified to express the opinion. The first was elucidated in Bonython (1984) 38 SASR 45, where King CJ (at p.46) said that the question "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 organised or recognised 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."

33. If these two conditions are met the evidence of the witness is admissible, although the weight to be attached to his opinion must of course be assessed by the tribunal of fact: Robb (1991) 93 Cr App R 161, 165; Dallagher [2002] EWCA 1903 [2003] 1 Cr App R 12 para 23. (We use the term "opinion" when referring to the evidence of experts, although, as observed in Phipson on Evidence (15th Ed. para 37-01 and emphasised by Mr Guthrie, its use is simply one of convenient terminology, and sometimes, as in this case and as is reflected in s.30(4) of the Criminal Justice Act 1986, the expert's evidence can readily be regarded as evidence of fact.) It might be added that, as with any evidence, expert testimony will not be admitted unless it is relevant in the sense that "it is logically probative or disprobative of some matter that requires proof": per Lord Simon in Kilbourne, [1973] AC 729, 756D.

34. As we have indicated, the appellants argued that evidence should not be admitted unless it passes a further test, that the evidence can be seen to be reliable because the methods used are sufficiently explained to be tested in cross-examination and so to be verifiable or falsifiable. Where, as here, the Crown is seeking to adduce the evidence in a criminal trial, this could properly be considered by the court when deciding whether to refuse to allow the evidence, under s.78 of the Police and Criminal Evidence Act 1984 or otherwise, in order to ensure a fair trial. We cannot accept that this is a requirement of admissibility. In established fields of science, the court may take the view that expert evidence would fall beyond the recognised limits of the field or that methods are too unconventional to be

regarded as subject to the scientific discipline. But a skill or expertise can be recognised and respected, and thus satisfy the conditions for admissible expert evidence, although the discipline is not susceptible to this sort of scientific discipline. Thus, in In re Pinion decd., [1965] Ch 85 the court was willing, indeed felt obliged, to hear expert evidence on the question whether a collection of paintings and other objects had aesthetic worth so that their display would be of educational value and for the public benefit, notwithstanding, as Harman LJ observed, "de gustibus non est disputandum".

35. In some cases, the reliability of the evidence might be relevant to whether the conditions of admissibility are satisfied. Thus in Gilfoyle, [2001] 2 Cr App R 5 at para 25, it was observed that English law will not consider expert evidence properly admissible if it is "based on a developing new brand of science or medicine….until it is accepted by the scientific community as being able to provide accurate and reliable opinion". In Robb (cit sup), a case concerning the admissibility of evidence of voice identification, which was acknowledged to be "an expert field", the court had to decide whether the particular witness's techniques were insufficiently recognised within his profession for him to be properly qualified to give expert evidence. Similarly, evidence might be so lacking in "prima facie reliability" that it has no probative force or its probative force is too slight to influence a decision: Clarke, [1995] 2 Cr App R 425, 432.

36. However, while reliability of evidence can be relevant to whether the conditions of admissibility are met, in itself reliability goes to its weight. In the Scottish case of Davie v Magistrates of Edinburgh, (1953) SC 34, to which Mr Guthrie referred, Lord Cooper, President, rejecting a submission that the court was bound to accept the evidence of an expert witness in the absence of contrary evidence, put it as follows (at p.40):

"[Expert witnesses'] duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury. In particular the bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert. "

37. Lip-reading evidence from a video, like facial mapping is, in our view, a species of real evidence (see per Steyn LJ in Clarke at 429). Although at one time a more conservative approach had been adopted, the policy of the English courts has been to be flexible in admitting expert evidence and to enjoy "the advantages to be gained from new techniques and new advances in science": Clarke, at p.430. (It appears that there has been a similar trend elsewhere: see Cross and Tapper on Evidence (9th Ed)

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p.523, but cf Ormerod, "Sounding out Expert Voice Identification", [2002] Crim LR 771 at p.774, about the position in the USA) The preferred view, and in our judgment the proper view, is "that so long as a field is sufficiently well-established to pass the ordinary tests of relevance and reliability, then no enhanced test of admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere": Cross and Tapper (loc cit).

38. When these principles are applied in the present cases, we are entirely satisfied that lip-reading evidence as to the contents of a videoed conversation is capable of passing the ordinary tests of relevance and reliability and therefore being potentially admissible in evidence. Lip-reading is a well recognised skill and lip-reading from video footage is no more than an application of that skill. It may increase the difficulty of the task, as may the speaker's facial features and the angle of the observation, but the nature of the skill remains the same. Furthermore, the judge in Luttrell and others and the Recorder in Dawson and Hamberger were entitled to conclude on the evidence which they had heard on the voir dire that the evidence of Miss Rees, and of Miss Hadfield in Dawson and Hamberger's case, was admissible. They were also entitled, in the exercise of their discretion at common law and under s78 of PACE, to admit that evidence. It does not of course follow that, in every case where lip-reading evidence is tendered, it will be admissible. The decision in each case is likely to be highly fact sensitive. For example, a video may be of such poor quality or the view of the speaker's face so poor that no reliable interpretation is possible. There may also be cases where the interpreting witness is not sufficiently skilled. A judge may properly take into account: whether consistency with extrinsic facts confirms or inconsistency casts doubt on the reliability of an interpretation; whether information provided to the lip-reader might have coloured the reading; and whether the probative effect of the evidence depends on the interpretation of a single word or phrase or on the whole thrust of the conversation. In the light of such considerations, (which are not intended to be exhaustive) a judge may well rule on the voire dire that any lip- reading evidence proffered should not be admitted before the jury. As to the skill of such a witness, we have been told that there are presently only four witnesses in this country (including Miss Rees and Miss Hadfield) who undertake this kind of forensic work. As and when new witnesses appear, it will be entirely appropriate, when they first give evidence, for their expertise to be challenged and tested by reference, in appropriate cases, to disclosed material bearing on their skill or lack of it. But, so far as Miss Rees and Miss Hadfield are concerned, if they give evidence in future cases, we would not expect a trial judge to permit extensive trawling through their past "successes" and "failures". As we have indicated, the material before us establishes conclusively that Miss Rees is one of the very best lip-readers. And, although her background and experience differs, nothing in this case leads us to believe that Miss Hadfield is other than skilled for the purpose of giving lip-reading evidence

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Kempster, R. v [2003] EWCA Crim 3555 (11 December 2003)

28. (1) Had Professor Champod given evidence at the appellant's trial, Miss McGowan would still have given her evidence and expressed her opinions in exactly the same robust terms as she in fact did. Nothing in the decision of this Court in Dallagher would have prevented her from doing so.

(2) Dr. Champod would not have been able to tell the jury of the results of any comparison that he had made. He would have had to accept that there were corresponding features between the ear-print found on the window and the ear impression provided by the appellant. He would not have been able to point to any differences. He would have accepted that Miss McGowan was entitled to say at least that there was a match. There would still have been no direct challenge to the findings of Miss McGowan, though we accept that Dr. Champod would have been able to give evidence in general terms about the significance of such findings.

(3) In Dallagher, the defendant denied that the ear-print on the window was his, and, as we understand the report of the judgment of the Court, denied that he had ever previously been to the premises concerned. In the instant case, the appellant accepted that he had previously been to the relevant premises, and never denied that the ear-print was his. That much is clear from the cross-examination of Miss McGowan on his behalf, his interviews with the police and his evidence at the trial to which we have referred. Indeed, at one point of his evidence he positively accepted that the ear-print was his. In any event, the thrust of his case was that if his ear-print had been found on the window, there were innocent explanations for its presence.

(4) Whereas we accept that both in Dallagher and in the appellant's case the jury could not have convicted unless they were sure that the ear-print on the window was that of the defendant concerned, in our judgment there was significantly more supporting evidence against the appellant than against Dallagher. To begin with, the appellant knew the premises concerned and of the age and infirmity of the occupier. There was evidence from which the jury could conclude that the windows of 119, Satchell Lane had been cleaned only some two weeks or so before the burglary; and that, given the argument the appellant had had with Mrs. Hooker over money matters in February, 2000 he would not have returned to the premises to do more work at a later stage. There was also evidence from which the jury were entitled to conclude that the appellant had lied when interviewed on 19th June, 2000 in saying that he had never been to the premises; had lied again, to provide an explanation for the ear-print of which he was then aware, when saying in his interview of 5th July, 2000 that he had been to the premises, but at or about the beginning of June, 2000; had lied yet again in evidence when being aware that the police had the receipt of 12th February, 2000 to which we have referred, by saying that he had been to the premises both in February and in June, 2000; and had lied once more when presenting in evidence a detailed alibi, having said when interviewed on 19th June, 2000, some two weeks after the offence, that he did not know where he had been at the relevant time, though he had probably been at home.

Dallagher [2002] EWCA Crim 1903 (25th July, 2002)

22. As we have indicated, Mr Clegg's first ground of appeal is that in English law the evidence of Mr Van Der Lugt and Professor Vanezis is and should be held to have been inadmissible. He submits that if Mr Hatton had been equipped with the fresh evidence now relied upon he could and would have made that submission to the trial judge, and that his submission should have been accepted.

23. Before we go any further it is worth considering precisely what evidence it is contended should be excluded. It is accepted that there is no basis for excluding evidence of what was found at the scene, including the evidence of the ear prints on the glass. When the appellant was arrested he provided ear prints which, having been anonymised, were put with other prints and compared with the prints found at the scene. It is difficult to see on what basis it would be possible to exclude the evidence of those steps having been taken as part of the investigatory process, or the evidence of the conclusion reached by the examiner. What matters, as it seems to us, is the value of the conclusion. In Robb (1991) 93 Cr App R 161 a phonetician had identified the appellant's voice using an auditory technique which was regarded by orthodox professional opinion as unreliable unless supplemented and verified by acoustic analysis, but this court refused to hold that the expert evidence was inadmissible. Having referred to Silverlock [1894] 2 QB 766 Bingham LJ said at 165 that the two essential questions are whether study and experience will give a witness's opinion an authority which the opinion of one not so qualified will lack, and (if so) whether the witness in question is skilled and has adequate knowledge. He continued –

"If these conditions are met the evidence of the witness is in law admissible, although the weight to be attached to his opinion must of course be assessed by the tribunal of fact."

24. The principled approach to admissibility set out in Robb is not in any way affected by the fact that, as indicated in the recent Northern Ireland case of O'Doherty (19th April 2002 reference NICB 3173), technology has moved on, so that at least in Northern Ireland the expert's technique relied upon in Robb would no longer be regarded as adequate.

25. In Stockwell (1993) 97 Cr App R 260 a facial mapping expert was called to assist the jury as to whether the defendant's face appeared on video films taken during two separate incidents, a robbery and an attempted robbery. Lord Taylor CJ referred to what had been said about expert evidence in Turner (1975) 60 Cr App R 80, and continued that where there may have been a disguise a comparison of photograph and defendant may not be straightforward. The same could be said of a comparison of ear prints. Lord Taylor said at 264 –

"In such circumstances we can see no reason why expert evidence, if it can provide the jury with information and assistance they would otherwise lack, should not be given. In each case it must be for the judge to decide whether the issue is one on which the jury could be assisted by expert

evidence, and whether the expert tendered has the expertise to provide such evidence."

Facial mapping was a relatively new technique, and this court agreed with the trial judge that "one should not set one's face against fresh developments, provided that they have a proper foundation."

26. In Strudwick and Merry (1994) 99 Cr App R 326 a mother and her co-habitee were convicted of manslaughter and cruelty, the victim being a young child. The trial judge had excluded psychological evidence which counsel for the female defendant wanted to adduce, and this court held that he was right to do so because the evidence was not likely to afford to the jury the kind of help without which they would be unable to do justice in her case.

27. Clarke [1995] 2 Cr App R 425 was another case concerned with facial mapping. By means of video superimposition a bank photograph of the defendant was compared with photographs taken at the scene of a robbery. This court upheld the decision of the trial judge that the evidence was admissible. At 429 Steyn LJ said –

"It is essential that our criminal justice system should take into account modern methods of crime detection. It is no surprise, therefore, that tape recordings, photographs and films are regularly placed before juries. Sometimes that is done without expert evidence, but, of course, if that real evidence is not sufficiently intelligible to the jury without expert evidence, it has always been accepted that it is possible to place before the jury the opinion of an expert in order to assist them in their interpretation of the real evidence. The leading case on that point is Turner (1975) 60 Cr App R 80, [1975] Q.B. 834. We would add this. There are no closed categories where such evidence may be placed before a jury. It would be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and new advances in science."

Reference was then made to Stockwell and Steyn LJ went on to say –

"We are far from saying that such evidence may not be flawed. It is, of course, essential that expert evidence, going to issues of identity, should be carefully scrutinised. Such evidence could be flawed. It could be flawed just as much as the evidence of a fingerprint expert could be flawed. But it does not seem to us that there is any objection in principle."

Counsel for the appellant had contended that expert evidence was not necessary and ought not to have been admitted because the jurors could see for themselves the photographs as partly enhanced on the video. The court rejected that submission, saying at 431 –

"This is clearly a case like Stockwell where the comparison was not an entirely straight forward one."

It added –

"The probative value of such evidence depends on the reliability of the scientific technique (and that is a matter of fact), and it is one fit for debate and for exploration in evidence."

The court then turned to the second ground of appeal which asserted that the evidence should have been excluded because the technique was "too dangerous". That had been explored at a voire dire during which the trial judge heard expert evidence and concluded that the evidence did have probative value.

28. That brings us to Gilfoyle (No 2) [2001] 2 Cr App R 57 on which Mr Clegg places some reliance. The appellant in that case was convicted of the murder of his pregnant wife, and on a reference by the Criminal Cases Review Commission this court agreed with the trial judge's decision not to admit evidence from a psychologist as to the deceased's state of mind. Six reasons were given for that conclusion, the fifth of which was that there is English, Canadian and United States authority which points against the admission of such evidence. Having referred to some authorities in all three jurisdictions Rose LJ said at 68 –

"The guiding principle in the United States appears to be (as stated in Frye v United States 293F.1013 (1923) that evidence based on a developing new brand of science or medicine is not admissible until accepted by the scientific community as being able to provide accurate and reliable opinion. This accords with the English approach as reflected in Strudwick and Merry (1993) 99 Cr App R 326."

29. It is clear from Daubet 509 US 579 (1993), to which it seems that this court in Gilfoyle was only indirectly referred, that Frye does not represent the guiding principle in the United States. It was superseded by the adoption of the Federal Rules of Evidence which do not require that a scientific technique be regarded as inadmissible unless the technique is generally accepted as reliable in the relevant scientific community. Rule 702 provides –

"If scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

As to the English approach we have found it necessary to refer not only to Strudwick and Merry but also to a number of other decisions, especially Clarke, from which, as it seems to us, the analogy with Rule 702 is clear. As is said in the current ninth edition of Cross and Tapper on Evidence at 523 after a reference to Frye –

"The better, and now more widely accepted, view is that so long as the field is sufficiently well-established to pass the ordinary tests of relevance and reliability, then no enhanced test of admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere."

We are satisfied that if a submission had been made to the trial judge that the expert evidence upon which the Crown proposed to rely was inadmissible, and if that evidence had been deployed on a voire dire, whether with or without expert evidence called on behalf of the defence, the trial judge could not possibly have concluded that the Crown's expert

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evidence was irrelevant, or so unreliable that it should be excluded. Accordingly in our judgment the first ground of appeal fails.

Gilfoyle, R v [2000] EWCA Crim 81 (20th December, 2000)

24. In our judgment, the trial judge was correct to exclude Professor Canter's views at trial and they are, as a matter of law, inadmissible before us. In Turner 60 Cr App R 80 at page 83 Lawton LJ said:

"An expert's opinion is admissible to furnish the court with scientific 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...... the fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; there is a danger that they think it does...Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life".

We accept that there may be mental conditions other than mental illness in relation to which a jury might require expert assistance (see per Farquharson LJ in Strudwick & Merry 99 Cr App R 326 at 332) But expert witnesses must furnish the court:

"with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence"

(per Lord President Cooper in Davie v Edinburgh Magistrates 1953 SC34 at 40;

and see, also, the discussion at pages 521 to 523 in Cross and Tapper on Evidence 9th Edition).

25. In our judgment, although Professor Canter is clearly an expert in his field, the evidence tendered from him was not expert evidence of a kind properly to be placed before the court for a number of reasons. First, although this alone would not necessarily be fatal to the admissibility of his evidence, he had never previously embarked on the task which he set himself in this case. Secondly, his reports identify no criteria by reference to which the court could test the quality of his opinions: there is no data base comparing real and questionable suicides and there is no substantial body of academic writing approving his methodology. As Professor Canter says himself in a draft article on psychological autopsy at page 34...

"It has taken off and been used before it has reached the maturity needed to be allowed safely out of the careful confines of its professional birthplace"

At page 27 he says:

"there is very little detailed empirical evidence available on many topics that are relevant to preparing psychological autopsies.. The scientific literature also indicates the lack of a comprehensive assessment and evaluation of the nature and validity of those investigations which have been carried out......It is therefore most appropriate to consider the psychological autopsy as a relatively unstructured technique".

The American Psychology Association Panel has recommended that psychologists conducting a psychological autopsy state in their report that the conclusions drawn are based on a speculative view of events. In our view unstructured and speculative conclusions are not the stuff of which admissible expert evidence is made. Thirdly, Professor Canter's views are based on one-sided information, in particular from the appellant, and his family who have never given evidence. Professor Canter wanted to, but did not, interview the deceased's family, presumably because they would have information material to his conclusions. Fourthly, we very much doubt whether assessing levels of happiness or unhappiness is a task for an expert rather than jurors and none of the points which he makes about the "suicide" notes is outwith the experience of a jury. Fifthly, there is English, Canadian and United States authority which points against the admission of such evidence. In Chard 56 Cr App R 268 it was held that a psychologist may not give evidence of how someone's mind operated at the time of the alleged offence, save in cases of insanity or diminished responsibility. In Weightman 92 Cr App R 291 the evidence of a psychiatrist was held inadmissible when its purpose was to tell the jury how someone not suffering from mental illness is liable to react to the stresses and strains of life. In R v Valley 26 Canadian Criminal Cases (3rd) 207 the Ontario Court of Appeal concluded that psychiatric or psychological evidence was inadmissible in a murder trial to show that the deceased had sado-masochistic tendencies. Martin J at page 237 said that as the doctor:

"had never examined the deceased any opinion he might give was conjectural and was necessarily based on such things as the deceased's apparel and his association with the persons involved in sado masochism".

The doctor was in no better position to draw an inference on these facts than the jury. In R v Mackintosh 117 CCC (3rd) 385 the Ontario Court of Appeal in 1997 held inadmissible psychiatric or psychological evidence, in an identification case, as to witnesses having difficulty in perception and recall of circumstances that are stressful and brief. In the United States, in Thompson v Mayes 707 SW 2nd 951 the Texas Court of Appeal upheld a trial judge's ruling excluding evidence of a psychological autopsy in relation to the state of mind of the donee under a will who was said to have killed the donor and then committed suicide: the evidence was tendered to establish that the donee was not responsible for the donor's death. So far as is known, there have been seventeen occasions in the United States when criminal trial judges have admitted evidence of psychological profiling: in each case the decision has been overturned on appeal. The guiding principle in the United States appears to be (as stated in Frye v United States 1923 293 F1013) that evidence based on a developing new brand of science or medicine is not admissible until

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accepted by the scientific community as being able to provide accurate and reliable opinion. This accords with the English approach as reflected in Strudwick & Merry. Sixthly, Mr Mansfield accepted that, if evidence of this kind were admissible in relation to the deceased, there could be no difference in principle in relation to evidence psychologically profiling a defendant. In our judgment, the roads of enquiry thus opened up would be unending and of little or no help to a jury. The use of psychological profiling as an aid to police investigation is one thing, but its use as a means of proof in court is another. Psychiatric evidence as to the state of mind of a defendant, witness or deceased falling short of mental illness may, of course, as we have said, be admissible in some cases when based for example, on medical records and/or recognised criteria (see e.g. McCann, unreported, CACD transcript 28th November 2000 and the authorities such as Ahluwalia 96 Cr App R 133 in relation to battered wife syndrome). But the present academic status of psychological autopsies is not, in our judgment, such as to permit them to be admitted as a basis for expert opinion before a jury.

26. As to Dr Weir, he prepared a report dated 7th June 1997 with corrections on 6th June 1998 and an appendix dated 2nd November 1998. He expressed the opinion that the deceased "was phobic about labour". He identified four instances of her referring to apprehension about the birth: first, to a friend at work, because she was an old mother and wouldn't know what to do whereupon she was re-assured and "always seemed happy with that": secondly, in a chatty letter to a friend in March 1992, when she expressed nervousness about all the blood etc, in case she did not know what to do; thirdly, to the appellant's sister at the end of April 1992 when she said she was frightened of actually having it; and, fourthly, to the appellant's brother to whom, on two occasions, she said she was frightened about having the baby. We understand phobia to be an irrational fear. Dr Weir did not seek to explain how these four comments could lead to a psychiatric diagnosis of phobia. Bearing in mind that this was to be the deceased's first child, it seemed to us that it would have been wholly extraordinary if she had not expressed fear about the birth. We certainly saw nothing irrational in her doing so. There was, in our judgment, nothing in this part of Dr Weir's report to substantiate his diagnosis in relation to someone whom he had not seen. His comments on the "suicide" notes were, as it seemed to us, in no sense scientific and contained nothing which would not have been apparent to a jury. Furthermore they were made in the context of his acceptance of the appellant's highly questionable account that the marriage was failing from June 1991. In these circumstances, we did not receive Dr Weir's evidence because it was not of an expert character which could have assisted a court and it would not, in any event, have afforded any ground for regarding the jury's verdict as unsafe.

TRAINING

Momodou, R v [2005] EWCA Crim 177 (02 February 2005)

61. There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See Richardson [1971] CAR 244; Arif, unreported, 22nd June 1993; Skinner [1994] 99 CAR 212; and Shaw [2002] EWCA Crim 3004.) The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

62. This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a

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specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it.

63. In the context of an anticipated criminal trial, if arrangements are made for witness familiarisation by outside agencies, not, for example, that routinely performed by or through the Witness Service, the following broad guidance should be followed. In relation to prosecution witnesses, the Crown Prosecution Service should be informed in advance of any proposal for familiarisation. If appropriate after obtaining police input, the Crown Prosecution Service should be invited to comment in advance on the proposals. If relevant information comes to the police, the police should inform the Crown Prosecution Service. The proposals for the intended familiarisation programme should be reduced into writing, rather than left to informal conversations. If, having examined them, the Crown Prosecution Service suggests that the programme may be breaching the permitted limits, it should be amended. If the defence engages in the process, it would in our judgment be extremely wise for counsel's advice to be sought, again in advance, and again with written information about the nature and extent of the training. In any event, it is in our judgment a matter of professional duty on counsel and solicitors to ensure that the trial judge is informed of any familiarisation process organised by the defence using outside agencies, and it will follow that the Crown Prosecution Service will be made aware of what has happened.

64. This familiarisation process should normally be supervised or conducted by a solicitor or barrister, or someone who is responsible to a solicitor or barrister with experience of the criminal justice process, and preferably by an organisation accredited for the purpose by the Bar Council and Law Society. None of those involved should have any personal knowledge of the matters in issue. Records should be maintained of all those present and the identity of those responsible for the familiarisation process, whenever it takes place. The programme should be retained, together with all the written material (or appropriate copies) used during the familiarisation sessions. None of the material should bear any similarity whatever to the issues in the criminal proceedings to be attended by the witnesses, and nothing in it should play on or trigger the witness's recollection of events. As already indicated, the document quoted in paragraph 41, if used, would have been utterly flawed. If discussion of the instant criminal proceedings begins, as it almost inevitably will, it must be stopped. And advice given about precisely why it is impermissible, with a warning against the danger of evidence contamination and the risk that the course of justice may be perverted. Note should be made if and when any such warning is given.

65. All documents used in the process should be retained, and if relevant to prosecution witnesses, handed to the Crown Prosecution Service as a matter of course, and in relation to defence witnesses, produced to the court. None should be destroyed. It should be a matter of professional

obligation for barristers and solicitors involved in these processes, or indeed the trial itself, to see that this guidance is followed.

EVIDENCE

Shillibier v R [2006] EWCA Crim 793 (06 April 2006)

86 Fourthly, in the course of his oral submissions Mr Glen took a point which did not feature in the further ground of appeal or in his skeleton argument, to the effect that Professor Pye should not have been permitted to give in evidence his subjective assessment of the degree of match as 8 out of 10. He based this on observations made by the court in R v Gray [2003] EWCA Crim 1001 (as quoted in R v Gardner [2004] EWCA Crim 1639 at para 44) doubting whether expert witnesses in the field of facial mapping or imaging should ever express subjective opinions as to the degree of support that comparison of facial characteristics provided for the identification of a defendant as the offender. Those observations, however, were based on the absence, in the particular field of facial mapping or imaging, of any database or accepted mathematical formula from which such conclusions could safely be drawn. The court was not laying down any general rule against the giving of opinions of this kind by expert witnesses, though such opinions must of course always have a proper factual basis to them and must be presented in a way that does not mislead the jury or cause undue weight to be attached to them. We note that in the present case Dr Moncrieff himself refers to the use of a scale as "a necessary measure when presenting technical issues to a jury", though he would prefer the use of a phrase rather than a number, and that he indicates where on Professor Pye's scale he considers the degree of match to fall. Whether Professor Pye had a proper factual basis for his scale does not raise an issue of principle but brings us back to the facts of the case and to the status of the further evidence.

Kelly, Re Reference By Scottish Criminal Cases Review Commission [2004] ScotHC 47 (06 August 2004)

Note – Scottish case

21. As we have already noted, it was not suggested that there is evidence positively indicating that cross-contamination did, or may have, occurred. On the basis of the evidence tendered by the appellant, it is maintained, on the other hand, that there was a risk of cross-contamination arising from the practice at that time of using adjoining wells for DNA samples from the crime scene and the suspect, and of such cross-contamination being undetected. It was not in controversy that it was possible for there to be leakage between adjoining wells or for DNA material to fall accidentally into a well next to the one for which it was intended. Up to a point the evidence of Dr. Debenham and Mrs. Howes as to the procedures which were followed, and the special care which was taken, countered the risk

that such a mishap would in practice occur or be undetected. However, such evidence does not in our view provide a complete answer. In particular there was, on the evidence, a risk that the leakage of DNA from the well for the suspect's reference sample to the adjoining well which already held the crime scene sample would not be detected. It was, of course, a low risk, but it was of sufficient importance to be recognised by experts, including those who contributed to the 1992 report of the National Research Council to which we have referred.

22. We have considered the evidence which Dr. Debenham and Mr. Knibb gave as to the significance of a band which was interpreted as representing partially digested DNA. However, that evidence is not so overwhelming that no reasonable jury could have regarded it as not excluding cross-contamination. As we have already indicated, not only the value, but also the validity of that evidence was questioned. In our opinion there is evidence which is capable of being regarded as credible and reliable as to the existence of a risk of cross-contamination occurring without it being detected. The risk was a low risk. It may be that in other circumstances the fact that the jury did not hear such evidence would not lead to the conclusion that there had been a miscarriage of justice. However, in the present case it is otherwise since the DNA evidence was plainly of critical importance for the conviction of the appellant. If the jury had rejected that evidence there would, in our view, have been insufficient evidence to convict the appellant. Accordingly, while the evidence related to a low risk of cross-contamination, the magnitude of the implications for the case against the appellant were substantial. For these reasons we have come to the conclusion that the appellant has established the existence of evidence which is of such significance that the fact that it was not heard by the jury constituted a miscarriage of justice.

Nugent & Anor, R v [2003] EWCA Crim 3434 (28 November 2003)

47 In Gray the court took the opportunity to make general observations about the use of facial imaging and mapping expert evidence of a reliable kind and, in particular, use of opinion evidence like that which had been given by Mr Harrow in Gray to the effect that comparison of particular facial characteristics in a given case provided "strong support for the identification of the robber as the appellant". The court observed that in the absence of any national database of facial characteristics or any accepted mathematical formula as in the case of fingerprint comparison, any estimate of probabilities and expression of the degree of support provided by particular facial characteristics or combinations of such characteristics could only be the subjective opinion of the facial imaging or mapping witness. At para 16 of the judgment in Gray, the court observed:

"There is no means of determining objectively whether or not such an opinion is justified. Consequently, unless and until a national database or agreed formula or some other such objective measure is established, this court doubts whether such opinions should ever be expressed by facial imaging or mapping witnesses. The evidence of such witnesses, including

opinion evidence, is of course both admissible and frequently of value to demonstrate to a jury with, if necessary, enhancement techniques afforded by specialist equipment, of particular characteristics or combinations of such characteristics so as to permit the jury to reach its own conclusion – see Attorney General's Reference No.2 of 2002 [2002] EWCA Crim 2373; but on the state of the evidence in this case, and if this court's understanding of the current position is correct in other cases too, such evidence should stop there."

…

51 Second, evidence of the exercise of photographic enhancement which Mr Harrow had been asked to perform by the prosecution was well within the ambit of what was said by this court in Gray to be legitimate. It was evidence, including opinion evidence, recognised to be "admissible and frequently of value to demonstrate to a jury with, if necessary, enhancement techniques afforded by specialist equipment, particular characteristics so as to permit the jury to reach its own conclusion". Furthermore, Mr Harrow was not asked to give, nor did he state, his opinion on the strength of support which such evidence afforded for the identification of Savva. That was left entirely as a matter for the jury

Cooper, R v [1998] EWCA Crim 2258 (8th July, 1998)

Miss Ong has referred us in her written submissions to a number of authorities where the admissibility of expert evidence has been considered by this or other appellate courts. She points out that it has been said that there are no closed categories where expert evidence may be put before the jury, and that it may be wrong in a particular case to deny the advantages to be gained from evidence based on new techniques and new advances in science. In a proper case evidence from a psychiatrist or psychologist may be admissible to show that a witness is unreliable. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and the knowledge of a judge or jury. If, on the other hand, on the proven facts or on the nature of the evidence, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. Judges and jurors do not need such evidence to help them decide whether the evidence of a witness who is not mentally disordered is reliable, generally speaking.

However, in two recent cases, G v. DPP (1997) 2 Cr.App.R. 78, and Davis and Others , unreported, 3rd November 1995, the Divisional Court and this Court, differently constituted, distinguished between a situation where failure to observe the Cleveland Guidelines and the Memorandum of Good Practice in relation to the interviewing of young children arose, saying that in those situations it might be legitimate for expert evidence to be called, although even then the expert witness could not express an opinion on whether a particular witness was reliable or truthful, which was precisely the province of the jury in a criminal case.

The admission of expert evidence of the kind contemplated in this case has to be ruled upon by the trial judge in the light of the precise evidence contemplated in the context of the particular case.

Having considered all the points so helpfully and thoroughly made by Miss Ong in her extensive perfected grounds of appeal and her short supplementary submissions today, we see three unsurmountable difficulties in the way of her proposed ground of appeal. Firstly, the basis upon which the trial judge was asked to rule upon the admissibility of the evidence of the psychologist was that they would give evidence of whether the complainant was telling the truth or not, either directly or indirectly. Secondly, the evidence of Mrs Luow, which falls into the first category which we have described, clearly covered points which, in our view, the jury could decide, using its own experience, common sense and judgment, without any need for any expert evidence. Thirdly, whatever may be the position in other cases in relation to the calling of expert psychological evidence as to the potential effect on a young child interviewed on video film of failures or alleged failures to observe the Cleveland Guidelines or the Code of Practice, the matters which would have been relied upon by Mrs Luow in this case, in her second category of evidence, were matters which were particularly for the jury's own judgment and which did not require any scientific or expert help from Mrs Luow or any other psychologist in order for the jury to reach a considered, sensible and safe decision as to the complainant's reliability.

Newman-Williams, R v [1997] EWCA Crim 2995 (20th November, 1997)

The judge also distinguished R v Stockwell (1993) 97 Cr App R 260, which was relied on by the defence. That was, in our judgement correct, because in this case, as we have said, Mr Goldstein in giving the evidence he sought to give would not have been giving the jury information on the basis of which they could form a view, but would have been usurping their role as a tribunal of fact. The judge in his ruling said at page 4H:

"In my judgment, what the expert in this case seeks to do is to pass judgment on the truthfulness and reliability of the witness on matters where the jury are just as capable of forming a view as he is. The evidence he gives, for the most part, is not in my view expert evidence at all. He is simply usurping the function of the jury and his report is laced with speculation and is to some extent based on information which does not come from any independent source, but comes from the defendant."

We agree with those observations, and more particularly with the judge's observation that, however it might be viewed, the thrust of this part of Mr Goldstein's evidence would undoubtedly have been to usurp the role of the jury. It is for that reason that in our judgement the complaint about the exclusion about this part of Mr Goldstein's evidence is misconceived.

Adams, R v [1997] EWCA Crim 2474 (16th October, 1997)

This brings us to the first of the three submissions which we summarised. It appears to us that there can be no possible ground of objection in principle to the leading of DNA evidence by the Crown, based as it is or should be on empirical statistical data, the data and the deductions drawn from it being available for the defence to criticise and challenge. The more difficult question is whether the fact that the prosecution are permitted to adduce evidence of that kind should lead to the conclusion that the defence should be at liberty to deploy evidence in support of the Bayesian approach to non-scientific, non-DNA evidence, as was done in this case.

We are bound to observe that this is not the first time in which this question has come before the courts. The matter was the subject of consideration, as already mentioned, when the first appeal in this case occurred. The judgment of the court given by Rose LJ turns to this aspect of the matter at page 480G. In a long passage ending on page 482E reasons are given for the court's conclusion that such evidence is inadmissible and ought not to have been admitted. It is unnecessary to read that passage, which speaks for itself and which it would not be easy to improve on as a statement of the difficulties and problems which would arise if reliance on such evidence in cases of this kind became common form.

We have also had our attention directed to a passage in R v Doheny and Adams [1997] 1 Cr App R 369, 374G, where Phillips LJ giving the judgment of the court said:

"It has been suggested that it may be appropriate for the statistician to expound to the jury a statistical approach to evaluating the likelihood that the defendant left the crime stain, using a formula which gives a numerical probability weighting to other pieces of evidence which bear on that question. This approach uses what is known as the Bayes Theorem. In the case of Adams (Denis) [1996] 2 Cr App R 467 this Court deprecated this exercise in these terms at p482:

'To introduce Bayes Theorem, or any similar method, into a criminal trial plunges the jury into inappropriate and unnecessary realms of theory and complexity deflecting them from their proper task.'

We would strongly endorse that comment."

We note that the judgment given in this case on 26 April 1996 has been the subject of consideration in [1996] Crim LR 898, where the court's observations find favour with the commentator.

In the light of the previous rulings on this matter in this court, and having had the opportunity of considering the evidence in this case, we regard the reliance on evidence of this kind in such cases as a recipe for confusion, misunderstanding and misjudgment, possibly even among counsel, but very probably among judges and, as we conclude, almost certainly among jurors.

Doheny & Anor, R v [1996] EWCA Crim 728 (31st July, 1996)

Mr Alistair Webster QC, on behalf of Doheny, has made the following suggestions as to the procedure which should be followed in relation to DNA evidence:

1. The scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio.

2. Whenever such evidence is to be adduced, the Crown should serve upon the Defence details as to how the calculations have been carried out which are sufficient for the defence to scrutinise the basis of the calculations.

3. The Forensic Science Service ("FSS") should make available to a defence expert, if requested, the databases upon which the calculations have been based.

It seems to us that these suggestions are sound, and we would endorse them. We would add that it is important that any issue of expert evidence should be identified and, if possible, resolved before trial and this area should be explored by the Court in the pre-trial review.

When the scientist gives evidence it is important that he should not overstep the line which separates his province from that of the Jury.

He will properly explain to the Jury the nature of the match ("the matching DNA characteristics") between the DNA in the crime stain and the DNA in the blood sample taken from the Defendant. He will properly, on the basis of empirical statistical data, give the Jury the random occurrence ratio - the frequency with which the matching DNA characteristics are likely to be found in the population at large. Provided that he has the necessary data, and the statistical expertise, it may be appropriate for him then to say how many people with the matching characteristics are likely to be found in the United Kingdom - or perhaps in a more limited relevant sub group, such as, for instance, the Caucasian sexually active males in the Manchester area. This will often be the limit of the evidence which he can properly and usefully give. It will then be for the Jury to decide, having regard to all the relevant evidence, whether they are sure that it was the Defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics.

The scientist should not be asked his opinion on the likelihood that it was the Defendant who left the crime stain, nor when giving evidence should he use terminology which may lead the Jury to believe that he is expressing such an opinion.

It has been suggested that it may be appropriate for the statistician to expound to the Jury a statistical approach to evaluating the likelihood that the Defendant left the crime stain, using a formula which gives a numerical probability weighting to other pieces of evidence which bear on that question. This approach uses what is known as the Bayes Theorem. In the case of Dennis John Adams (Transcript 26th April 1996) this Court deprecated this exercise in these terms at p.30:

"To introduce Bayes Theorem, or any similar method, into a criminal trial plunges the Jury into inappropriate and unnecessary realms of theory and complexity deflecting them from their proper task."

We would strongly endorse that comment.

Adams, R v [1996] EWCA Crim 222 (26th April, 1996)

It seems to us that the difficulties which arise in the present case stem from the fact that, at trial, the defence were permitted to lead before the jury evidence of the Bayes theorem. No objection was taken by the prosecution. No argument on this point has been addressed to this court. It would therefore be inappropriate for us to express a concluded view on the matter. But we have very grave doubt as to whether that evidence was properly admissible, because it trespasses on an area peculiarly and exclusively within the province of the jury, namely the way in which they evaluate the relationship between one piece of evidence and another. The Bayes theorem may be an appropriate and useful tool for statisticians and other experts seeking to establish a mathematical assessment of probability. Even then, however, as the extracts from Professor Donnelly's evidence cited above demonstrate, the theorem can only operate by giving to each separate piece of evidence a numerical percentage representing the ratio between probability of circumstance A and the probability of circumstance B granted the existence of that evidence. The percentages chosen are matters of judgment: that is inevitable. But the apparently objective numerical figures used in the theorem may conceal the element of judgment on which it entirely depends. More importantly for present purposes, however, whatever the merits or demerits of the Bayes theorem in mathematical or statistical assessments of probability, it seems to us that it is not appropriate for use in jury trials, or as a means to assist the jury in their task. In the first place, the theorem's methodology requires, as we have described, that items of evidence be assessed separately according to their bearing on the accused's guilt, before being combined in the overall formula. That in our view is far too rigid an approach to evidence of the type that a jury characteristically has to assess, where the cogency of (for instance) identification evidence may have to be assessed, at least in part, in the light of the strength of the chain of evidence in which it forms part. More fundamentally, however, the attempt to determine guilt or innocence on the basis of a mathematical formula, applied to each separate piece of evidence, is simply inappropriate to the jury's task. Jurors evaluate evidence and reach a conclusion not by means of a formula, mathematical or otherwise, but by the joint application of their individual common sense and knowledge of the world to the evidence before them. It is common for them to have to evaluate scientific evidence, both as to its quality and as to its relationship with other evidence. Scientific evidence tendered as proof of a particular fact may establish that fact to an extent which, in any particular case, may vary between slight possibility and virtual certainty. For example, different blood spots on an accused's clothing may, on testing, reveal a range of conclusions from 'human blood' via 'possibly the victim's blood' to 'highly

likely to be the victim's blood'. Such evidence is susceptible to challenge as to methodology and otherwise, which may weaken or even, in some cases, strengthen the impact of the evidence. But we have never heard it suggested that a jury should consider the relationship between such scientific evidence and other evidence by reference to probability formulas. That such a course would in any event be impossible of sensible achievement by a jury, at least so far as the use of the Bayes theorem is concerned, is demonstrated by the practical application of the stage of that theorem's methodology that involves numerical assessment of the various items of evidence. Individual jurors might differ greatly not only according to how cogent they found a particular piece of evidence (which would be a matter for discussion and debate between the jury as a whole), but also on the question of what percentage figure for probability should be placed on that evidence. Since, as we have pointed out, the translation of an assessment of cogency into a percentage probability of guilt is entirely a matter of judgment and the conferring of a percentage probability of guilt upon one item of evidence taken in isolation is an essentially artificial operation, different jurors might well wish to select different numerical figures even when they were broadly agreed on the weight of the evidence in question. They could, presumably, only resolve any such difference by taking an average, which would truly reflect neither party's view; and this point leaves aside the even greater difficulty of how twelve jurors, applying Bayes as a single jury, are to reconcile, under the mathematics of that formula, differing individual views about the cogency of particular pieces of evidence. Quite apart from these general objections, as the present case graphically demonstrates, to introduce Bayes theorem, or any similar method, into a criminal trial plunges the jury into inappropriate and unnecessary realms of theory and complexity deflecting them from their proper task.

It is these considerations which lead us to the provisional conclusion, uninformed, as we have indicated, by argument, that evidence about the Bayes theorem ought not to have been admitted, without objection. The judge was led into error in that, no doubt, he felt obliged to seek to sum up the evidence to the jury.

That being so, it was, as it seems to us, incumbent upon him to direct the jury both as to the substance of that evidence and as to the way it which it was open to them to use that evidence. It seems to us that, in a summing-up which was otherwise impeccable, he failed in these respects. Because of his conscientious desire to try to ensure that the jury grasped what was, it has to be remembered, the defence argument based on Bayes theorem, he concentrated his directions on that theorem, without indicating to the jury the more commonsense and basic ways in which it would have been open to them to weigh up the relative weight of the DNA evidence. The jury were not properly directed as to the meaning and implications for the prosecution case of an approach based on Bayes. If, as seems entirely possible, the jury abandoned the struggle to understand and apply Bayes, they were left by the summing-up with no other sufficient guidance as to how to evaluate the prosecution case (based as it was entirely on the DNA

evidence), in the light of the other non-DNA evidence in the case. This means that their verdict cannot be regarded as safe

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ANNEX III

MEMBERS OF THE TASK FORCE OF ENGLAND & WALES

Mr Justice Fulford

Louise Hodges, Kingsley Napley Solicitors, Partner ***(Chair of the Task Force)***

Mike Allen, Forensic practitioner ***(Representative of the Council for the Registration of Forensic Practitioners – consultant and former EC member)***

Anand Doobay, Peters & Peters Solicitors, Partner ***(Bar Association representative)***

Karen Squibb-Williams, Strategic Policy Adviser, The Crown Prosecution Service

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