Admissibility of Opinion Evidence*

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Abstract
The law relating to the admissibility of opinion evidence, and particularly expert opinion evidence, continues to be expressed as an exclusionary rule subject to exceptions. Recent writings have doubted the rule and the distinction between fact and opinion. The rule and the exceptions are considered in terms of their efficacy in the trial process. It is suggested that the law is, by and large, sensibly based. The real problem lies in testing, assessing and evaluating such evidence once admitted.

Background
It is said that as a general rule evidence consisting of an opinion is not admitable. Early writers on the law of evidence asserted as much in no uncertain terms. In his Digest Of The Law Of Evidence, Sir James Fitzjames Stephen stated:

"The fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter."

There followed six articles comprising the exceptions to this rule. Apart from expert opinion, the exceptions are of limited scope. More recent authorities support the continued existence of the rule, but indicate that there are significant exceptions to it.

However, a reading of the burgeoning writing on the topic fills one with doubt. The rule excluding opinion evidence, it is suggested, may be a rule that does not exist. Worse than that, the existence of a distinction between fact and opinion has been doubted. The distinction, assuming it to exist, has proved difficult to draw, and has been the subject of recent judicial consideration.

One cannot help being cautious in approaching a rule of evidence the subject of so much recent comment yet subject to uncertainty as to both its existence and subject-matter.

The rules and case-law relating to the admissibility of opinion evidence, and expert evidence in particular, have been closely examined in recent times.

I do not propose to cover the same ground in any detail. A summary of the relevant principles should suffice. My object is the limited one of providing a framework within which the cross-examination of experts and the assessment and use to be made of their evidence can be considered.

There seems to be no widespread call for a significant relaxation of the rules relating to the admissibility of opinion evidence. Nor, I think, is there a strong case for expressing the rules relating to admissibility more strictly. When examined, they seem reasonable in terms of their effect. The controls which they impose generally make sense. Nor does the question of admissibility in practice give rise to too many problems. A clear and concise statement of the rules is difficult, but by and large judges and counsel are able to apply them satisfactorily.

The Use of Expert Evidence
The problem lies much more in the area of the attitude to, and use made of, opinion evidence, particularly when admitted as expert opinion.

The cases and textbooks abound in disparaging and cautionary remarks about expert opinion evidence. One of the standard texts of the last century was A Treatise on the Law of Evidence.

1 [9th ed., 1914], art. 48.
Evidence by Taylor, where the author states, in terms characteristic of his and later times:*

"Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak, not to facts but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them."

In Lord Abinger v. Ashton* Sir George Jessel M.R. said:

"...in matters of opinion I very much distrust expert evidence, for several reasons."

One reason was the difficulty of indicting an expert for perjury, "because it is only evidence as to a matter of opinion". Another was the bias arising from the payment made to the expert.

Modern writers are more circumspect, but the same caution is there.

These days there is frequent consideration of the role of the expert witness in litigation, marked by frequent comments on the need for a change of approach to such evidence. Various changes are suggested as to the manner in which experts should be used in the trial process. Regular suggestions include requiring full disclosure of experts' materials and reports before trial (already provided for in civil trials in a number of jurisdictions); ensuring that the limits of an expert's expertise and the scope of evidence given are understood by the court; removing the partisan tag by educating experts in their proper role as witnesses; altering the role of the expert and removing him from the arena by creating panels of court approved and appointed experts, or by having expert testimony called by the judge or by having an expert "assessor" sit with and advise the judge.

It is beyond the scope of this paper to deal with the attitude of counsel and judges towards expert opinion evidence, likewise with the need for change in treatment of such evidence.

What is surprising is that despite the sceptical attitude of some, the restraints on admissibility and the frequent questioning of the proper role of the expert, expert evidence is used so much. One might think that these apparent barriers to the use and acceptance of expert evidence would ensure that, when used, expert evidence would be given little weight. We know, however, that in fact a disturbing feature of expert evidence is, to the contrary, the real danger of judges and juries giving too much credence to such evidence, despite the supposedly sceptical attitude of the legal system.

One obvious danger is that of the trial becoming a search, not for proof of relevant facts but for the more impressive expert opinion. Another danger is that reasonable doubt will be overlooked when an apparently reliable opinion is expressed. There is the problem of comprehension in technical scientific matters. Finally, the problem which has emerged, particularly in recent years, of trials overwhelmed by a mass of conflicting expert evidence, often in areas of doubtful expertise or, at best, areas of knowledge peripheral to recognised bodies of expert knowledge.

Suffice it to say that the case-law contains regular reminders of the dangers (as well as the advantages) of the use of expert opinion evidence.

For that reason the rules relating to the admissibility of such evidence should not be seen as an area of interesting but harmless debate. The rules can, and should, assist courts to receive opinion evidence when appropriate, but likewise to confine its reception. More difficult is the testing, use and assessment of the evidence once admitted. That is beyond the scope of the paper and relatively unregulated by the law of evidence.

Thus, the focus of this paper is on those rules which control what material gets before the court and their practical justification.

Fact and Opinion

Fundamental to the issue is the distinction between fact and opinion. It is said that it is for witnesses to depose to facts and for the judge or jury to draw inferences or form opinions from those facts.

A moment's reflection will disclose, however, that at times the distinction is far from clear. The most widely accepted view is that an opinion is an inference drawn from observed data. But even simple propositions, such as that

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* [3rd ed., 1858], p. 69.
* [1873] L.R. 17 Eq. Cas. 358 at 373.
the day is hot, a man is unusually tall, or a motor car was travelling very fast, contain elements of opinion. They are not simply statements of fact.

In R. v. Perry* Cox J. took a different view. His Honour approved of the following proposition:*

"The essential idea of opinion seems to be that it is a matter about which doubt can reasonably exist, as to which two persons can, without absurdity, think differently.""

Whatever the problems of distinguishing fact and opinion, it is, with respect, doubtful whether this approach will lessen the problems in this area.

In truth, as others have said, the distinction between fact and opinion is one of degree. By and large judges are able to draw the distinction. As long as the elusive nature of the distinction is remembered, it should be unnecessary to pursue it further for present purposes.

Opinions By Non-experts

Opinion evidence is not the sole province of the expert. I have suggested above that apparent factual statements may contain elements of opinion. Quite apart from the difficulty at times in distinguishing fact and opinion, it seems that the courts in practice admit opinion evidence from non-experts when it is not possible to separate opinion from fact and the witness's opinion is as to a relevant matter, for example, evidence that a motor car was travelling at a fast speed. On the other hand, if the primary facts can reasonably be expected to be stated separately, the witness will be confined to them because then his opinion is of no assistance to the court and (presumably for that reason) not admissible. If the opinion assumes a degree of precision, some degree of experience or expertise may be required. Thus, an estimate of the speed of a car, as distinct from the use of terms such as "fast" or "very fast", may not be admitted unless the witness has some experience in making such estimates.

In truth there is an extensive area of non-expert opinion or judgment evidence which courts accommodate without difficulty.

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* Supra, n. 3, at 126.

Expert Opinion Evidence

It should be evident from the above that the admission of opinion evidence from experts is not as exceptional as sometimes suggested. It also must be remembered that for much of his evidence an expert will be giving evidence of facts to provide a basis for the opinion which he is to express.

It may be that the focus of discussion has been too much on the exceptional nature of the receipt of opinion evidence. It is suggested that it would make little difference if the rules, to which I now turn, were seen simply as determining when a witness is qualified to give a particular type of opinion (one requiring expertise) and what restraints there are upon the admissibility of the opinion (other than relevance) apart from the fact of it being opinion and not fact.

Field of Expertise

The first requirement for the admission of expert evidence is that a relevant field of expertise should exist.

A field of expertise has been described as an organised branch of knowledge. In the end this is a question of fact. In cases requiring evidence outside recognised fields of expertise, such as medicine, accounting, engineering, the witness will himself have to establish the existence of the field of expertise.

Whether a field of expertise will be recognised if it is not the subject of relatively formal and organised study remains unclear. This becomes important when opinion evidence is sought to be given based on extensive practical experience of a matter not itself the subject of formal study or analysis. In Clark v. Ryan the members of the High Court expressed themselves in terms sufficiently varied for one to be able to find supporters for the relatively generous view that specialised knowledge acquired by experience would suffice for a field of expertise and also for the view that something akin to an academic field of expertise was required. In Weal v. Bottom evidence was given by witnesses experienced in driving semi-articulated vehicles that in certain circum-

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11 (1960) 103 C.L.R. 486.
12 See, e.g., Dixon C.J. at 491; contrast Menzies J. at 502.
stances such a vehicle had a tendency to swing out when rounding a curve. The evidence was held admissible as evidence of fact, not opinion. The majority view was expressed by Barwick C.J. It was that while such evidence could be given

"... by an expert properly so-called, that is to say, by a person who by study and instruction in some relevant scientific or specialised field was able to express an opinion, founded on scientific or specialised knowledge thus acquired. ... But it could also be established by the evidence of a person who had had actual experience of or had observed such behaviour. ... In truth the evidence of such a person is not the expression of an opinion nor is he strictly within the category of an expert, though there is a tendency to refer to such evidence compendiously as expert evidence."

Although the judgment is expressed in terms of expertise of the witness rather than of fields of expertise, it does suggest that purely practical knowledge cannot be the subject of a field of expertise. Some organised system of study or knowledge is required.

It is suggested, however, that the distinction is slight, if not illusory. The evidence was admitted. It was not given simply as everyday experience within the competence of any witness. It was, in effect, an opinion as to the possible behaviour of the vehicle on the occasion in question, the opinion being based on experience of the behaviour of similar vehicles in similar situations. The evidence was in fact given not as evidence of specific past experiences and facts (leaving it to the jury to draw an inference), but as evidence of what would be likely to happen under the relevant circumstances, of the tendency of such vehicles under such circumstances. It was on that very ground that Menzies J. dissented. This was not evidence "... by reference to some organised branch of knowledge". The "... expert knowledge — such as it was — was not scientific ...".

Thus, there remains some uncertainty as to the nature of a field of expertise.

It is clear that, subject to this, a field of expertise requires a field or area of knowledge in which are applied established or accepted principles or methods or knowledge, capable of being stated and explained with a reasonable degree of precision.

With the expansion of human knowledge the number of fields of expertise must also expand.

In the end the requirement of a field of expertise is a salutary one. Inevitably it focuses attention not just on the witness's qualifications and knowledge and experience. It directs the court's attention to a quite separate matter — the subject-matter of his evidence. Applied sensibly it should ensure that admitted experts do not give pseudo-expert evidence. Not only should it confine the expert to his particular field, it should also help to exclude what is, in the end, no more than opinion based on intuition, personal experience, unscientific reasoning or insufficiently established theories.

**Expert Qualifications**

Not only must a field of expertise exist, the witness must be adequately qualified in it. The obvious qualifications are formal academic or professional qualifications. But assuming that a field of expertise is established, it should not matter in principle how the witness acquires his expertise in it. In practice, that seems to be the case. The immediately preceding discussion suggests some caution, however. The judgment of Barwick C.J. could be used to support an argument that formal training or qualifications were required before expert evidence could be given.

This requirement for the giving of evidence is an obvious one and needs no comment on its utility.

**Factual Basis of Opinion**

The object in calling an expert is usually to have him express an opinion.

In part, that opinion will be based on facts ascertained by him or put before him as a basis for his opinion. Normally, he will disclose those facts before being permitted to express his opinion. Those facts must be proved by the party who calls him by admissible evidence. Otherwise, the opinion must be excluded or rejected, unless the variance between the posited facts and the facts ultimately proved does not deprive the opinion of its basis, or does

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14 Ibid., at 438.
15 See, ibid., at 443-446.
16 See Gillies, op. cit., at 603; ALRC, Vol. 2, par. 98.
no more than weaken the force or weight of the opinion. ¹⁷

The opinion will also, in all probability, be based upon the application of principles or data or tables which are commonly used in the relevant field of expertise. Much of this material the expert himself could not verify. This clearly does not render his opinion inadmissible.

The opinion may also be based in part on a kind of 'general knowledge' acquired by mixing with and talking with professional colleagues and reading what they have established or ascertained. In principle this material also may be used although not capable of verification by the expert. Expertise is not confined to what is written down. Caution must be exercised, however. There will come a point at which the expert is using hearsay or unproved assertions of fact as distinct from knowledge part of and accepted within his expertise.

Inevitably questions of degree arise. In R. v. Abadon¹⁸ the charge was robbery. The Crown case rested on evidence that the fragments of glass found on the clothing of the accused came from a broken window at the site of the robbery. An expert witness gave evidence that glass from the window and the fragments had an identical refractive index. The same witness gave evidence that he had consulted statistics compiled by the Home Office Central Research Establishment and had found that the particular refractive index occurred in only 4 per cent of all glass samples investigated. He expressed the opinion that there was a very strong likelihood that the glass from the clothing originated from the window. On appeal, it was argued that the opinion expressed on the basis of the statistics was hearsay because the expert witness had not personal knowledge of the analysis upon which the statistics were based.

This contention was rejected. The Court of Appeal said:

'... when an expert has to consider the likelihood or unlikelihood of some occurrence or factual association in reaching his conclusion, ... the statistical results of the works of others in the same field must inevitably form an important ingredient in the cogency or probative value of his own conclusion in the particular case, ... .

Once the primary facts on which their opinion is based have been proved by admissible evidence, they are entitled to draw on the work of others as part of the process of arriving at their conclusion. However, where they have done so, they should refer to this material in their evidence so that the cogency and probative value of their conclusion can be tested and evaluated by reference to it.'

Great care by the court is required here. Views might easily differ on the correctness of the decision in R. v. Abadon. But once again the rules as to admissibility have a sound practical basis. No expert can verify all of the principles of his field of expertise. But once he moves from applying accepted knowledge and principles and practices to using what are [at least at the time] individual views or assertions, a significant line has been crossed. Efficiency requires the use of the former material. Its status within the expertise gives a sufficient (not absolute) assurance of reliability to permit its use. Individual knowledge not part of the accepted body of knowledge lacks that assurance and so should be proved; likewise specific facts (and especially contested facts) not part of the body of expert knowledge.

Difficult cases will arise, but the principles are sound.

Common Knowledge

Expert opinion evidence is admitted, it is said, to

'furnish the court with scientific information which is likely to be outside the experience or knowledge of a judge or jury'¹⁹.

It follows that if the subject-matter is one on which the average man is capable of forming an opinion unaided by expert evidence, then the expert evidence is inadmissible. In the area of common knowledge there are no degrees of expertise. The test seems to be, not whether the opinion of the expert would assist, but whether the judge or jury is capable of forming an opinion. ²⁰

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¹⁸ [1983] 1 All E.R. 364 at 367b and 368h.
¹⁹ R. v. Turner [1975] 1 Q.B. 834 at 841 per Lawton L.J.
The cases on this point are not easy to reconcile. It might be said that once one moves into the area of common knowledge one must have left the field of expertise. There is clearly an element of truth in that. In part, it must be a question of whether a recognised field of expertise has been made out. Some of the cases may be explicable in terms of a refusal to accept the existence of a field of expertise, for example, the behaviour of a normal man when provoked, the behaviour of an ordinary man under police questioning. Yet is it not odd that a psychiatrist will readily be accepted on the workings of the abnormal mind, but not on the workings of the normal mind? How can one analyse the former but by first having a full understanding of the latter? But some cases do proceed on the basis that within the area of common knowledge, on matters within the province of the jury, even seemingly admissible opinion will be excluded simply because the jury is competent to decide. There is clearly some such rule.

It may be that in this area the rules are too restrictive. But on the other hand, might it not be that the acknowledged dangers of expert evidence warrant its use only when essential and its exclusion when not essential, albeit of some value? To allow expert opinion evidence on matters of common knowledge, either on the basis that such evidence would assist the trier of fact or on the basis that without it a fully informed decision would not be reached, is likely to result in an excess of evidence of limited weight. I incline to the view that a restrictive approach is preferable, but that a rigid exclusion of expert evidence on matters falling within the area of common knowledge is too restrictive.

The Ultimate Issue

It is widely accepted that a witness may not testify as to the very question or fact which the court must determine. There is no logical reason why this should be so.

The justifications for the rule are pragmatic. The usual one is that to allow the witness to do so is to allow him to usurp the role of the trier of fact. As a statement of fact, this is wrong. The justification would seem rather to be the danger of the trier of fact abdicating in favour of the expert. But surely judges are capable of avoiding that pitfall in directing themselves or juries?

The exceptions to the rule cast doubt on the rationale. There is not space here to analyse the cases. In Samuels v. Flavel Bray C.J. summarised the position as follows:

"Such evidence is probably still strictly inadmissible though it is, in fact, often admitted without objection and there may be cases where it must be admitted, such as cases of insanity within the M'Naghten Rules, because it is impossible for the opinion of the expert to be conveyed in any other form."

A commentator has suggested that the true position is that such evidence will be admitted:

"... where the evidence of the witness will obviously be incomplete or useless in a situation where the witness, because of his or her knowledge of facts which cannot adequately be proven in court, or his or her expertise, is in a position to express an opinion which genuinely adds something of value to the evidential materials available to the tribunal of facts.""  

Thus, a witness who has experience in dealing with drunks will be permitted not only to describe what he observed but to express an opinion on the sobriety of the accused, although the charge (and ultimate fact) is drunkenness. On a plea of insanity, it seems that the courts do allow psychiatrists to express an opinion in terms of the M'Naghten Rules or indistinguishably close to them.

The suggested limitation is of uncertain extent. The concept of an ultimate fact or ultimate facts is unclear. At times it seems to embrace the main matters to be decided. At other times to be limited to the truly ultimate factual question.

The limitation leads to distinctions almost without a difference. In a medical negligence case a doctor may not opine that the defendant was negligent, but may say that he omitted to follow procedures observed by competent members of the profession.

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24 Gillies, op. cit., at 608.
In a thorough discussion of this topic it has been suggested that the true position is that there is no such separate exclusionary rule. The true position is that

"An expert cannot be permitted to express an opinion upon an ultimate issue, if its determination depends upon the application of some legal standard".

There is, I suggest, much to be said for that view, although in my opinion two qualifications are required. The first is that where the expert can adequately convey his opinion without deposing to the very issue to be decided he will probably not be permitted to do so. The second is that even when a legal standard is involved he may be permitted to depose in terms of that standard as long as he makes clear his interpretation of the standard, for example, a valuer deposing to the "unimproved value" of a property.

Undoubtedly the rule is thought to exist, but is applied in a relaxed fashion. To the extent that it excludes needless or embarrassing opinion evidence it serves a useful function. But the rule should not be permitted to stand in the way of the sensible expounding of a qualified opinion.

Conclusions

Subject to certain criticisms it is suggested that the rules as to the admission of opinion evidence, and in particular expert opinion evidence, work satisfactorily in practice and are directed towards a sensible objective.

This is not to deny that problems exist. It may be that most of the problems are not attributable to unduly restrictive or lenient rules of inadmissibility but to difficulty in assessing the evidence once admitted. It is true, as some suggest, that our adversarial system has objectives inconsistent with those of the true man of science. The adversarial system adjudicates upon the respective merits of cases. The scientist is concerned with absolute truth or fact. But this merely demonstrates the importance of a proper professional approach on the part of the witness. The problem lies not in the scientific approach but in the danger of the legal approach distorting the former and producing advocacy disguised as expertise, be that a result of the permissible process of selecting favourable opinion and discarding the unfavourable, counsel's tendentious presentation of the evidence or the unconscious bias referred to in Lord Abinger v. Ashton.


See Mason, op. cit., n. 7, at 8.