Skilled witnesses and expert evidence

Law

See generally; *Renton & Brown: Criminal Procedure*, paragraph 24-162.1; *Walker on Evidence* (3rd edn) chapter 16; Field & Raitt: *Evidence*, chapter 16; Davidson, *Evidence*; Sheldon: *Evidence*, chapter 10; *Stair Memorial Encyclopedia Reissue*: Evidence, paragraphs 170 to 179.

1. For expert evidence to be admissible, its subject matter must fall outwith matters/areas of understanding that are within normal human knowledge and experience and be based on a recognised branch of knowledge. The evidence must not usurp the function of the jury.

The evidence of a skilled or expert witness must also, to be admissible, be necessary for the proper resolution of the matter at issue, such that the jury would be unable to reach a sound verdict without it. That will occur only where there are special features relating to the witness or their evidence that are likely to be outwith the jury's knowledge or experience (*Gage v HM Advocate* [2011] HCJAC 40, 2012 SCCR 161; *Wilson v HM Advocate* [2021] HCJAC 12, 2021 SCCR 141 at paragraph [49]).

2. It is essential that expert witnesses have the relevant qualifications, competence, expertise and experience to speak to the matters they have been invited to give evidence on. These matters require to be clearly defined so that the competence of the witness to speak to that matter is readily identified and confirmed. The court requires to be satisfied that the expert witness has sufficient relevant expertise to assist the court. If such expertise is not established then the evidence of the expert witness is inadmissible whether or not any objection is taken. Questions of competence and experience of an expert witness are for the judge to determine.

3. In the event that during the course of a trial it becomes apparent that an expert witness does not have the prerequisite competence and experience, the jury requires to be directed to disregard the evidence from the expert on matters upon which the witness does not have the necessary competence and expertise. However, provided the witness has such competence and expertise, issues as to whether the evidence from such a witness is discredited is a matter for the jury to determine (for more detail see paragraph [49] of *Hainey v HM Advocate* [2013] HCJAC 47, 2014 JC 33. See also *Graham v HM Advocate* [2018] HCJAC 57, 2018 SCCR 347, at paragraph [124]).

4. Care should be taken to avoid placing too much emphasis on the notion that science is "developing". The jury must reach a decision on the current state of scientific knowledge, and to consider how matters might develop in future is mere speculation. The most that can be said is that, if rapid developments have taken place, the certainty of current knowledge is perhaps lessened (*Carroll v HM Advocate* [2015] HCJAC 75).

5. Expert evidence must be relevant to that issue (and so not concerned solely with collateral issues (*Wilson v HM Advocate* [2021] HCJAC 12, 2021 SCCR 141 at paragraphs [49] and [50]), and it must be based on a recognised and developed academic discipline. It must proceed on theories which have been tested (both by academic review and in practice) and found to have a practical and measurable consequence in real life. It must follow a developed methodology which is explicable and open to possible challenge, and it must produce a result which is capable of being assessed and given more or less weight in light of all the evidence before the finder of fact. If the evidence does not meet these criteria, it will not assist the finder of fact in the proper determination of the issue.

6. The court will not admit evidence from a "man of skill" or an "expert" unless satisfied that the evidence is sufficiently reliable that it will assist the finder of fact in the proper determination of the issue before it (*Young v HM Advocate* [2013] HCJAC 145, 2014 SLT 21. See also the commentary to the decision in 2014 SCL 98). Jury trials proceed on the basis that jurors, as persons of ordinary intelligence and experience, are capable of assessing the credibility and reliability of witnesses without expert assistance.

7. In *Young v HM Advocate,* Lord Menzies giving the opinion of the Appeal Court said at paragraphs [54] and [55]:

> "[54] Evidence about relevant matters which are not within the knowledge of everyday life reasonably to be imputed to a jury or other finder of fact may be admissible if it is likely to assist the jury or finder of fact in the proper determination of the issue before it. The expert evidence must be relevant to that issue (and so not concerned solely with collateral issues), and it must be based on a recognised and developed academic discipline. It must proceed on theories which have been tested (both by academic review and in practice) and found to have a practical and measurable consequence in real life. It must follow a developed methodology which is explicable and open to possible

challenge, and it must produce a result which is capable of being assessed and given more or less weight in light of all the evidence before the finder of fact. If the evidence does not meet these criteria, it will not assist the finder of fact in the proper determination of the issue; rather, it will risk confusing or distracting the finder of fact, or, worse still, cause the finder of fact to determine the crucial issue on the basis of unreliable or erroneous evidence. For this reason, the court will not admit evidence from a "man of skill" or an "expert" unless satisfied that the evidence is sufficiently reliable that it will assist the finder of fact in the proper determination of the issue before it. We agree with, and adopt, the general observations of the court with regard to evidence from a person claiming specialist knowledge and expertise which were made by the court in *Hainey v HM Advocate* [2013] HCJAC 47, particularly at paragraph [49].

[55] There are countless examples of evidence about such matters which are routinely regarded as based on sufficiently developed theories, which have sufficiently developed and certifiable methodologies, and produce results which have a practical effect and which may be weighed and assessed by a finder of fact that such evidence is admissible in court. So, scientific evidence about DNA comparisons, fingerprint evidence, evidence of medical practitioners or pathologists is evidence based on a sufficiently clear and reliable basis that it may assist the finder of fact, and will be admitted as evidence for the finder of fact to consider. It does not of course follow that the finder of fact will accept the evidence, in whole or in part —there may be conflicting evidence, or the finder of fact may not be satisfied by the evidence. But in order to be admissible, the evidence must have a sufficiently reliable foundation to be capable of assisting the finder of fact in the proper determination of the issue before it."

8. Although the decision of the Supreme Court in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, 2016 SC (UKSC) 59 is often cited care should be taken as it was delivered in the context of civil litigation. It could be said that it's four-part test (Firstly, would the skilled evidence assist the court? Secondly, did the witness have the necessary knowledge and experience? Thirdly, did the witness display impartiality in presentation and assessment? Finally, did a reliable body of knowledge or experience underpin the evidence of the expert?) summarises the dicta in Young. However, in an appeal under section 74(1) by *Christie v HM Advocate* [2025] HCJAC

52 the Lord Justice Clerk (Lady Dorrian) stressed the need to follow the chain of criminal authority:

> "[22] The temporary judge relied on *Kennedy v Cordia Services LLP* 2016 UKSC 6, which is of course a civil case. In *Kennedy*, the Supreme Court noticed the requirement of necessity in Scots law of evidence in criminal cases. They were at pains to point out that this was not within their jurisdiction; paragraph 37. There is a well-established line of criminal jurisprudence as to the role of an expert witness, especially in the context of a jury trial, and these should be the first port of call when considering such an issue. In this case the judge concluded that there was a reliable body of knowledge or experience underlying the expert's evidence, under reference to biomechanics as a recognised discipline. **However, in doing so, he failed entirely to address the equally important question whether the evidence had a sufficiently satisfactory factual basis and whether the application of biomechanics to the circumstances in question was an appropriate utilisation of the discipline.** In doing so he misdirected himself and wrongly considered the evidence to be admissible" [emphasis added].

9. In *Christie* the court held that the expert (an ergonomist) views on biomechanics were not based on any underlying, objectively verifiable status. The appeal court compared such evidence to that of a road traffic collision expert whose expert opinion is based on measurements and other objectively verifiable facts:

> "[21] The result is entirely speculative and theoretical, and standing the wholly uncertain basis of fact, no reliance can be placed on it. The temporary judge sought to draw an analogy with reconstruction evidence in a road traffic evidence, but in such a case the reconstruction is based to a large extent on objectively verifiable measurements, such as the location, length and direction of skid marks, the ultimate position of the body, the nature, degree and location of injury on the body, pedestrian projection distance, the damage to the vehicle, the shape and mass of the vehicle and so on. The role of the expert is to assess these factors against known, accepted and well-researched norms to offer evidence about the nature of the collision, but the critical point is that much of the underlying factual basis is objectively verifiable. The analogy is thus a false one, the present case being one where such an underlying, objectively verifiable state of facts is entirely absent."

The court again confirmed that a jury only require assistance with the task facing them should the subject matter fall outwith ordinary knowledge or experiences. Where the jury were asked to assess an account of the mechanics of how an injury may have been caused the court confirmed "It is well within the competence of an ordinary juror to assess the evidence and reach a verdict without requiring evidence of the kind offered by [the purported skilled witness]" (at paragraph [24]). They also commented on the inclusion of statements made on probability and complex statistics which risked complicating and confusing the jury's task (at paragraph [26]).

10. In *Jones v HM Advocate* [2016] HCJAC 65, 2016 SCCR 381 paragraphs [7] and [12], the appeal court upheld a sheriff's decision regarding the admissibility of the evidence from STOP officers in drugs trials under reference to the decision in *Kennedy v Cordia (Services) LLP*. The function of such a witness is to help the jury consider the situation as presented in the evidence by explaining matters which were within the experience of the witness, but which were likely to be outwith the experience of the jury. By doing so the witness enables the jury to form their own independent judgment by an application of that explanation to the facts proved in evidence. It is not for the witness to consider matters and provide a concluded judgment.

11. Accordingly, a jury requires to be directed that it is their decision to make and not the witness. The content of such a direction will depend upon the nature of the expert evidence, the extent and basis of any challenge, the issues to which the evidence is relevant, and the ways in which the parties seek to use it to address such issues. This is likely to involve an explanation of the witness' special knowledge and experience upon matters of which the jury may be unfamiliar in order to assist the jury in assessing the primary evidence led. Further the expert should be treated in the same way as any other witness. It was for the jury to assess the credibility and reliability of that witness. The directions will normally explain that because of that experience, the witness could be asked for an opinion but that the jury were free to accept or reject that opinion. The jury should be reminded that the decision was ultimately theirs to make (*Mitchell v HM Advocate* [2017] HCJAC 60, 2018 JC 67).

12. Because credibility and reliability are matters for the jury, the general rule is that expert evidence led assessing or affecting the credibility of a witness is not admissible, unless it is also relevant to a fact in issue (*Walker on Evidence* (2nd edn) at paragraph 1.6.2.). Such evidence is admissible however where there is evidence that the witness suffered from a relevant mental illness. Thus in *Green v HM Advocate*

1983 SCCR 42, additional evidence was allowed, at appeal, which showed inter alia that the complainer in a rape case was suffering from a psychiatric disorder which caused her to fantasise and have delusions.

13. Section 275C of the Criminal Procedure (Scotland) Act 1995 allows expert psychiatric or psychological evidence relating to any post-incident behaviour or statement of a complainer to be led, presumably by the Crown, in relevant sexual cases, for the purpose of rebutting any adverse inference on credibility or reliability of the complainer that might otherwise be drawn from that behaviour or statement. It permits the leading of evidence showing why, in sex abuse cases for example, victims may behave in a particular way.

14. There are also certain circumstances in which expert evidence may competently be led by the defence. Its purpose is to assist the jury in assessing the quality of witness's evidence. Thus, in a child abuse case evidence can be led as to the general behaviour, reliability and susceptibility to manipulation of young children giving accounts of such abuse (*E v HM Advocate* 2002 JC 215 at paragraph [23] of Lord McCluskey's opinion. In that case the absence of such evidence at trial supported a successful appeal based on defective representation). Where there is evidence of the complainer suffering from a medical condition evidence about the truthfulness or otherwise of statements by that particular witness would have been admissible (*McBrearty v HM Advocate* 2004 JC 122 again confirmed that in the usual course the assessment of the truthfulness of a witnesses' s evidence is a matter for the jury not an expert. However, at paragraph [49], "The proposed defence evidence in this case was different in kind. It was not evidence that KM was not telling the truth. It was evidence of the existence of an objective medical condition, namely that KM was a pathological liar. … Such evidence was relevant to the question of KM's ability to give truthful and reliable evidence).

15. It is not competent to lead evidence from someone, who is not an expert, to the effect that a child complainer has a tendency to tell lies (*MacKay v HM Advocate* 2005 1 JC 24 at paragraph [9]).

16. Expert evidence about the unlikelihood of police officers remembering an accused's statement *verbatim*, in virtually the same terms, in the absence of any comparison of their notes has been held admissible (*Campbell v HM Advocate* 2004 SLT 397 at paragraph [51]).

17. Expert evidence about the alleged unreliability of eyewitness identification was ruled inadmissible in *Gage v HM Advocate (No.1)* [2011] HCJAC 40, 2012 SCCR 161.

Complex scientific and medical evidence

18. Particular care is required in cases in which the determination of guilt turns on complex scientific or medical evidence. For example, in cases involving the deaths of infants at the hands of a carer, in many instances there is no direct evidence as to alleged criminal conduct. The case is largely founded upon inferences to be drawn from medical evidence. If guilt is to be established, it is necessary for the jury to exclude not only any natural explanations for the death suggested in the evidence, but also any realistic possibility of there being an unknown cause for the death of the child. If there is evidence of a realistic possibility of the death being caused by an unknown cause, the jury should be reminded that such a possibility requires to be excluded before they can convict. Likewise, they would require to be reminded that a conviction can only follow the exclusion of any natural cause of death suggested in evidence. This requires to be undertaken even although the defence may have declined to do so (*Younas v HM Advocate* [2014] HCJAC 114, 2015 JC 180 at paragraph [59]).

19. In these particular cases, which can be described as unusual and complicated, the trial judge requires to provide a succinct balanced review of the central factual matters for the jury's determination, not a summary of the evidence given (*Younas v HM Advocate* at paragraph [59]). The trial judge does not, however, require to conduct an independent audit of the evidence in order to extract all the main points which he considers might be regarded by the jury as favouring one verdict or another (*Younas v HM Advocate* at paragraph [56], see also *Ramzan v HM Advocate* [2015] HCJAC 9). Where natural causes for the death are suggested in evidence, it is recommended to remind the jury of these including a brief explanation of the evidential basis for each. Thereafter the jury should be directed that if they consider such to be a cause of the death or it raises a reasonable doubt, then the accused requires to be acquitted.

20. Where it is relevant to do so, the jury should be reminded that today's scientific orthodoxy may become tomorrow's outdated learning and in cases where developing medical science is relevant, they should be instructed that special caution is needed where expert opinion evidence is fundamental to the prosecution.

21. To leave complex technical evidence at large for the jury is likely to amount to a misdirection. The judge should identify and describe the principal positions of both sets of experts and provide a framework which allows the jury to proceed to a verdict by a reasoned process.

22. However, care must be taken to avoid being condescending or patronising to juries by rehearsing evidence they have heard and require to assess, particularly in circumstances in which, albeit there is considerable expert evidence, the case does not have the intricacy or complexity of *Liehne v HM Advocate* [2011] HCJAC 51, 2011 SLT 1114; or *Hainey v HM Advocate* at paragraph [52] (*Younas v HM Advocate* at paragraph [67]). *Liehne* and *Hainey* were both unusual and complicated with little or no direct evidence and a myriad of different experts. In *Younas* the court repeated what had been said in *D'Arcy* [2013] HCJAC 173 that it was only where resolution of the central issue required consideration of competing technical evidence of a complex nature that the observations in *Lienhe* and *Hainey* applied: the mere fact that medical evidence had been given at some length did not mean that a jury had been presented with complex testimony of a technical nature requiring special direction by the trial judge (paragraphs [55], and [57] to [59]). The court took the opportunity, emphatically, to repeat that there was no general requirement on a judge in most cases to rehearse or summarise the evidence in the charge (paragraphs [55] and [56]). The risk of inducing boredom and thus promoting a lack of concentration should not be underestimated.

23. It is important that not only the judge but also the parties attempt to restrict their expositions of the issues within such bounds as the jury might reasonably be expected to operate. The jury must be able to grasp the issues and take an informed decision upon them without being overloaded with repetitive technical detail (*Geddes v HM Advocate* [2015] HCJAC 10, 2015 JC 229 at paragraph [100]):

> "The issues in relation to the medical evidence were not that complex. The doctors may have expressed differing opinions. They may have had difficulty in reaching them. That does not make the resolution of the issues of fact a matter of intricacy requiring high-level mental processing. Ultimately, even in the context of medical evidence, the jury were being asked to consider issues about which they might be expected to have some understanding. These included how a particular injury might have been sustained; how a laceration or a bruise might have been caused. They were being asked to consider what injuries might, or might not, have been sustained as a result of a violent

> compression to the nose and mouth as distinct from a fall down the stairs, or a blow to the face or head. Medical evidence was, no doubt, necessary to assist the jury in that regard, especially in relation to the internal findings post mortem, but issues such as the causation of wounds are put to juries on an almost daily basis and resolved without any significant perceptible difficulty."

24. Where relevant, the jury should be asked to consider whether the expert has, in the course of their evidence, assumed the role of an advocate, whether they have stepped outside their area of expertise, whether they were able to point to a recognised peer-reviewed source for their opinion, and whether their clinical experience is up to date and equal to that of others whose opinions they seek to contradict (*Liehne v HM Advocate*; *Hainey v HM Advocate* at paragraph [52]).

Possible form of direction on expert evidence as to credibility and reliability

"The defence say this statement by (X)/evidence from (X) should be disregarded by you. It relies on the views of Dr (Y). Put shortly, he said (outline general findings). So the defence are saying for these reasons (X's) interview/evidence/ statement cannot be relied on.

I want to say something about the role of the expert witness in a matter of this sort, and how you should deal with an expert's evidence. It is important to have this in context. Depending on what you think of it, Dr (Y's) evidence may have a bearing on how you view (X's) evidence.

As I have already said, you should treat an expert's evidence in the same way that you treat the evidence of any other witness in the case. Put generally, the expert's function is simply to guide you through a specialist area which lies outwith our normal day-to-day experience. That specialist knowledge is simply offered to you for your consideration, in your assessment of (X's) evidence. You can apply it to that assessment, or not. That is a matter for you.

In this case Dr (Y's) function is to inform you generally:

- about what the effects of this psychiatric disorder/mental condition/ personality disorder may be on a person's abilities to recall and recount/to tell the truth

- about the effects that being exposed to the sort of conduct said to have happened in this case may have on how information about it is disclosed
- about the susceptibilities of persons exposed to the sort of conduct said to have happened in this case to being influenced or manipulated
- about the capacities and capabilities or otherwise of those with learning difficulties
- about his examination of the accused/witness
- about his views on the interview and the basis for his conclusions.

If you do not accept the information Dr (Y) has given you, you disregard it in assessing the interview evidence/statement of (X). If you accept it, you can take it into consideration in assessing (X's) interview/evidence/statement, but you are not bound by his conclusions. You can use this information to form your own conclusions about (X's) evidence. You can use his evidence to help you:

- to assess conflicting pieces of evidence
- to decide whether or not the interview was fair
- to decide whether the statement/the witness is a reliable or an unreliable source of evidence.

If you thought (X's) interview/evidence/statement is unreliable you should exclude it from your consideration. On the other hand, if you thought it was credible and reliable, you then have to assess its significance."

Possible form of direction where conflicting expert opinion has been given

"In this case you've heard evidence from experts called by each side, (X) on behalf of the Crown, and (Y) on behalf of the defence. It's quite common to have evidence of that sort in cases like this. We often encounter expert evidence on the effects of physical injuries, of poisons, of explosions, of mental disabilities, or about engineering, accountancy, or handwriting.

I want to say something about the role of the expert witness in a matter of this sort, and how you should deal with experts' evidence. It's important you see this evidence in its proper perspective, and place it in its correct context. Put generally, the expert's

function is to guide you through a specialist area which lies outwith our normal day-to-day experience. Remember the expert's evidence relates only to one aspect of the case. You still have to consider the rest of the evidence.

Evidence like this is led to help you to decide on one particular aspect of this case, namely (X). It's been led to enable you to form your own judgment about that particular matter, and the conclusions you should draw from it.

You should treat an expert's evidence in the same way as you treat the evidence of any other witness in the case. His specialist knowledge is simply offered for your consideration. You can choose to accept it, or not. If there are reasons that persuade you it should be accepted, you can take it into account. If there are reasons that persuade you not to accept it, you can ignore it.

Here there are two experts putting forward contrary views. It's for you to decide whose opinion, if any, you accept."

With handwriting cases in particular

"One particular word of warning. I've already said you have to decide this case on the basis of the evidence you've heard from the witnesses. You don't make any investigations of your own. So you don't make any comparisons of the handwriting yourselves. You have to decide the issue that arises about the handwriting on the basis of the expert evidence you accept."

In infant death cases

"In this case you have heard no direct evidence of any alleged criminal actions on the part of the accused. Your verdict depends largely upon what inferences you can draw from the evidence you have heard from the various doctors who have been called as witnesses. (The trial judge requires to provide a succinct balanced review of the central factual matters for the jury's determination.) If you are to convict the accused you require to exclude not only any natural explanations for the death which have been suggested in the evidence, but also any realistic possibility of there being an unknown cause for the death of the child. If you cannot do that then you require to acquit the accused. (Where natural causes for the death are suggested in evidence, it is recommended to remind the jury of these including a brief explanation of the evidential basis for each.) If you consider such to be a cause of the death or it raises a reasonable doubt, then the accused requires to be acquitted."