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The Reception of Evidence of Opinion : A Reappraisal of Traditional Attitudes

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I. The Exclusionary Canons of Evidentiary Law

The law of evidence contains a general rule excluding testimony as to opinion, subject to a series of established exceptions. The exclusionary principle is that a witness may not give his opinion on matters which the court considers call for the special skill or knowledge of an expert unless he is an expert in such matters, and that he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the ascertainment of the truth.[1]

The rationale of the principle excluding evidence of opinion is that, where the facts on which the opinion is based are capable of being communicated to the tribunal so that the tribunal itself is able to draw an inference from the facts, no useful purpose is served by allowing the witness to state his opinion. An expression of opinion by the witness is, at best, redundant, and there is the further disadvantage that proceedings may be unnecessarily complicated or prolonged in consequence of the admission of evidence of opinion.

The exclusion of evidence of opinion rests on two major premises: (a) that a realistic distinction can generally be drawn between inferences and the facts from which they are derived; and (b) that, barring matters in regard to which expert opinion may be received legitimately, a witness is no better equipped than the jury to reason from perceived data.

The exclusionary canon has the effect of ruling out evidence in two contexts : (i) Where the issues arising for decision in a case do not call for expertise, evidence of opinion may not be received at all. Thus, the intentions of a normal man,[2] the meaning of ordinary words,[3] the question

1. *Sherrard* v. *Jacob* (1965) N.I. 151 at pages 157 – 158, per Lord Macdermott.
2. R. *v. Chard* (1971) 56 Cr. App. Rep. 268
3. R. *v. Anderson* (1972) 1 Q. B. 304; R. v. *Stamford* (1972) 2 Q. B. 391

whether the behaviour of the accused in a commonplace situation was deliberate or accidental[4] and standards of honourable conduct not involving professional etiquette[5] are matters in respect of which the jury is in as good a position as a witness to form an opinion. (ii) Where expertise is called for, the opinion of a non-expert is excluded. When the sanity of the accused is in issue, the opinion of a witness who is neither an expert nor an intimate friend of the accused may not be received.[6]

II. Expert Opinion

(a) *The Rationale Underlying the Exception*

The opinions of experts constitute an exception to the exclusionary rule regarding evidence of opinion. The basis of the exception is that the opinion is expressed by a person having special qualifications or experience, the benefit of which is not available to the jury or the court.

As early as the middle of the sixteenth century an English court observed : "If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation."[7] At this time, however, the expert was a member of the jury, so that no question arose as to the expression of an opinion by a witness relating to a matter calling for expertise. The latter situation began to be provided for comprehensively in the eighteenth century.[8]

The Evidence Ordinance of Sri Lanka[9] provides that "When the court has to form an opinion as to foreign law, or of science or art, or as to the identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinion upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, are relevant facts. Such person are called experts."[10]

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4. R. v. *Kusmack* (1955) 20 C. R. 365
5. *Ramadge* v. *Ryan* (1832) 9 Bing. 333; but see *Greville* v. *Chapman* (1844) 5 Q. B. 731
6. R. v. *Loake* (1911) 7 Cr. App. Rep. 71
7. *Buckley* v. *Rice - Thomas* (1554) 1 Plowd. 118 at p. 124 *per* Saunders. J.
8. See, for example, *Folkes* v. *Chadd* (1782) 3 Doug. K. B. 187.
9. No. 14 of 1895.
10. Section 45.

(b) The Scope of Expertise in the Setting of the Opinion Rule

The matters in respect of which expert opinion is admissible in Sri Lanka are explicitly enumerated. They encompass any one or more of the following matters: foreign law; science; art; the identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions [11]

The crucial requirement of an "art" or "science", in this context, is that the opinion expressed should be founded on a discipline the rules of which are adequately developed, and can be accepted as both reliable and verifiable. The limits of these concepts are suggested by the Sri Lankan case of *R. v. Pinhamy*.[12] In a trial for murder the Judicial Medical Officer of Colombo expressed the opinion that the skull produced in the case was that of the deceased. He based his opinion entirely on the examination of a superimposition of an enlarged photograph of the deceased's head on a photograph of his skull. The Court of Criminal Appeal held that this opinion could not be received in evidence for several reasons, one of which was that it had not been established that identification of deceased persons by superimposition of photographs was a "science" or "art" within the meaning of the relevant provision of law. The basis of the decision seems to have been that the discipline relied upon was in an embryonic stage and that its principles were largely speculative and conjectural.

In England the terms "science" and "art" which are used in authoritative formulations[13] of the qualification to the rule excluding evidence of opinion, have been held to cover fields like obstetrics,[14] psychiatry,[15] accountancy,[16] public health,[17] forestry,[18] natural history, [19] the authenticity and value of works of art [20] engineering,[21] military practice,[22] postmarks,[23] shipbuilding[34] and marine surveying[25]. In addition to these

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11. *ibid.*
12. (1955) 57 N.L.R. 169
13. S. L. Phipson, *The Law of Evidence* (12th edition, 1976, by J. H. Buzzard, R. May and M. N. Howard), section 1229, p. 499
14. *Gaskill* v. *Gaskill* (1921) p. 425; *Preston – Jones* v. *Preston – Jones* (1951) A. C. 391
15. *Lowery* v. *R.* (1974) A. C. 85
16. *Rowley* v. *London & N. W. Railway* (1873) L. R. 8 Ex. 221
17. *Metropolitan Asylum* v. *Hill* (1882) 47 L. T. 29
18. *Weld—Blundell* v. *Wolseley* (1903) 2 Ch. 664
19. *Cottrill* v. Myrick (1853) 3 Fairf. 222
20. *Belt* v. *Lawes, The Times*, December 12 – 16, 1882; *Huntington* v. *Lewis, The Times*, May 16 - 24, 1917
21. *Folkes* v. *Chadd* (1782) 3 Dong. K. C. 157; *Beckwith* v. *Sydebotham* (1807) 1 Camp. 116
22. *Bradley* v. *Arthur* (1825) 4 B. & C. 292
23. *Abbey* v. *Lill* (1829) 5 Bing. 299
24. *The Robin* (1829) P. 95
25. *ibid.*; but see *United States Shipping Board* v. *The St. Albans* (1931) A. C. 623

areas, the English courts have admitted expert testimony in regard to such matters as the meaning of technical terms,[26] the commercial value of goods,[27] handwriting,[28] foreign law[29] and the obscene or innocuous character of a publication addressed to a special audience.[30] On the other hand, experts are debarred in England from stating their opinion as to the construction of documents,[31] professional conduct except in so far as it may be necessary to elucidate the rules of a particular profession[32] and English law.[33]

In Sri Lanka expert opinion has been received readily in spheres like handwriting[34] and evidence pertaining to fingerprints[35] and footprints.[36]

In both jurisdictions the discretion of the court in regard to demarcation of the range of subjects calling for expertise, is extensive. If the court comes to the conclusion that the subject of investigation does not require a sufficient degree of specialized knowledge to call for the testimony of an expert, evidence of opinion will generally be excluded.[37]

(c) The Credentials of an Expert

The law of Sri Lanka requires that the person offering the opinion should be "specially skilled"[38] in the relevant field.

This requirement may be further analyzed as follows:

(i) Whether a person is "specially skilled" within the meaning of the relevant provision of the Evidence Ordinance is a question of fact to be decided by the court.[39] If the court is not satisfied that the witness possesses special skill in the relevant area, his opinion should be excluded.[40]

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26. *Re Cliff* (1892) 2 Ch. 229; *Harding* v. *Hayes* (1974) Crim. L. R. 712
27. *McFadden* v. *Murdock* (1857) Ir. R. 1 C. L. 211
28. *Birch* v. *Ridgway* (1853) 1 F. & F. 270; *Cresswell* v. *Jackson* (1860) 2 F & F. 24; *Wilson* v. *Thornbury* (1874) L. R. 27 Exch. 517.
29. *R.* v. *Governor of Brixton Prison, ex parte Shuter* (1960) 2 Q. B. 89
30. *R.* v. *Anderson* (1972) 1 Q. B. 304
31. *Camden* v. *Commissioners of Inland Revenue* (1914) 1 K. B. 641 *Gold* v. *Patman and Fotheringham Ltd.* (1953) 1 W. L. R. 697.
32. S. L. Phipson, *op. cit.*, section 1238, p. 505
33. *ibid.*
34. *Herath Sinno* v. *Appuhami* (1920) 22 N·L·R· 361, *Selvaguru* v. *Thoialpagar* (1952) 54 N·L·R· 361, *Samayakone* v. *Public Trustee* (1960) 65 N·L·R· 100, *R.* v. *Gratiaen Perera* (1960) 61 N·L·R· 522
35. *Bandeppuhamy* v. *Ekanayake* (1957) 61 N·L·R· 187, *R.* v. *Wijehamy* (1938) 62 N·L·R· 42.
36. *R* v. *Cornelis* (1933) 35 N·L·R· 401, *R.* v. *Singho Appu* (1944) 46 N·L·R· 49
37. R. Cross, *Evidence* (4th edition 1974), p. 38, cf *Transport Publishing Co. Pty. Ltd* v. *Literature Board of Review* (1975) 99 C.L.R. 111.
38. Evidence Ordinance, Section 45.
39. *Charles Perera* v. *Mutha* (1951) 65 N·L·R· 294 at p. 295, *per* Basnayake, C·J·
40. *ibid*

(ii) When an expert is called to state his opinion, the duty devolves on the side calling the witness to elicit from him his qualifications and experience in order to establish to the satisfaction of the court that he is a person specially skilled in the science on which he is called to give expert testimony.[41] It has been pointed out that "By a failure to prove the competency of a person a party calls into the witness box as an expert, a serious and very real risk is being run of the evidence of such a person being ruled out as irrelevant."[42] Thus, the mere reference to a medical witness as "Judicial Medical Officer, Colombo" is insufficient for the purpose of rendering his opinion relevant in regard to matters other than those properly falling within the purview of a medical practitioner.[43]

(iii) It is not essential, according to the better view, that a person should be proved to have had the benefit of a professional training before he can be recognized as an "expert" whose opinion is relevant. The practical knowledge and experience of a person who is not a professional analyst may be sufficient in some circumstances to qualify him as "specially skilled" on a question of science involving the examination or analysis of a physical substance. In *Solicitor – General* v. *Victoria Fernando*,[44] a prosecution under the Excise Ordinance, the issue was whether the liquid claimed to have been found in the possession of the accused was fermented toddy. On this question T. S. Fernando, J. regarded as relevant the opinion of an excise inspector who had more than ten years' experience in the detection of excise offences relating to fermented toddy.

A decision to the contrary is that of Basnayake, C. J. in *Mitradasa Fernando* v. *Sub–Inspector of Police, Kalubovila*.[45] The charge was one of possession of unlawfully manufactured liquor. The prosecution relied on the evidence of a sub–inspector of police who had undergone a special course of training in the Excise Department to identify excisable articles. The Court of Criminal Appeal ruled out as irrelevant the opinion of this witness on the ground that the evidence did not show that he was "specially skilled" in any art or science which qualified him, as in the case of the Government Analyst, to express an opinion on the question whether the liquor seized was Government arrack or illegally manufactured arrack.

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41. R. v. *Pinhamy* (1955) 57 N·L·R 169 at p. 171, *per* Basnayake, A·C·J·
42. B*andappuhamy* v. *Ekanayake* (1957) 61 N·L·R· 187 at p. 189, *per* T· S· Fernando J·
43. See the case cited at note 41, *supra*
44. (1965) 67 N·L·R 159·
45. (1961) 63 N·L·R· 422.

In this conflict of the Sri Lanka authorities, it is submitted that the view of T. S. Fernando, J. is preferable in principle and is supported by a preponderance of judicial authority in other jurisdictions. The Privy Council, in its opinion delivered on an appeal in a West African case,[46] held that the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a question of foreign law. The English courts have admitted, under the head of "expert testimony", the opinions of unqualified practitioners, hospital students and dressers;[47] but not the opinion of a research student in toxicology on a point of medicine.[48] Similarly, it has been held in England that a solicitor might be treated as an expert in handwriting even if he had acquired his knowledge as an amateur[49] and in Scotland that a stenographer who had familiarized herself with the contents of a tape recording may be treated as a temporary expert.[50]

The ambit of this principle, however, has to be contained appropriately. Experience in driving does not make a bombardier an expert on the subject of the capabilities of someone charged with drunken driving,[51] nor does a police officer's experience in investigating traffic accidents make him an expert for the purpose of reconstructing a particular motor accident.[52]

(iv) The burden imposed on the side calling an expert witness to elicit material pertaining to his qualifications and experience does not exclude the duty cast on the court to satisfy itself that the witness is specially skilled in the subject on which he is invited to testify. *The Solicitor General* v. *Podisara*[53] provides an example of a case where the side calling the witness had not discharged its duty sufficiently, so that the court was called upon to probe the skill of the witness independently before treating his opinion as relevant. Manicavasagar, J. declared: "The witness should have been questioned in regard to his experience, the special skill which he claimed to have acquired, the number of instances where he had given his opinion as an expert in court or elsewhere, the number of cases and the period during which he had testified in court, and whether there were any cases where his opinion had not been accepted."[54]

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46. *Said Ajami* v. *Controller of Customs* (1954) 1 W.L.R. 1405.
47. S.L. Phipson, op. cit., section 1229, p. 499.
48. *Nightingale* v. *Biffen* (1925) 18 B. W. C. C. 358.
49. *R.* v. *Silverlock* (1894) 2 Q.B. 766. cf. *R.* v. *Bannis* (1964) 50 W.W.R. 422.
50. *Hopes and Lavery* v. *H. M. Advocate* 1960 S.C. (J) 104, cf. R. v, *Somers* (1963) 3 All E.R. 808
51. R. Cross, *op. cit.*, p. 386, *R.* v. *Davies* (1962) 3 All E.R. 97.
52. *Nickisson* v. *R.* (1963) W.A.R. 114.
53. (1965) 67 N.L.R. 502.
54. At p. 503.

(v) Where there is a conflict between the opinion of a general practitioner and the opinion of a specialist in regard to a medical matter falling within the purview of the latter's expertise, the opinion of the specialist would generally be preferred. In *Chissel* v. *Chapman*[55] H. N. G. Fernando, A. J., discussing the conflict of medical evidence, observed: "There is no need to determine, and indeed no means of determining, which (of the doctors) is right and which wrong, but in the face of the disagreement on this point between the plaintiff's witnesses, it is obvious that for the purpose of a judicial decision on the question of negligence the opinions of the specialist must be preferred."[56]

(vi) In cases of doubt the court will lean towards the conclusion that the opinion of an expert has been expressed honestly. But this is merely a matter of practice and is not analogous to a presumption. In *Ganapathy* v. *Ramasamy*[57] a medical certificate which was submitted on the plaintiff's behalf in support of an application for postponement of the hearing of evidence was in conflict with the report of the medical practitioner who examined him the next day on a commission issued by the court at the defendant's instance. Pulle, J. held that the medical certificate should not be rejected unless there was clear evidence that the medical practitioner who issued it had conspired with the plaintiff to conceal the true facts.

(d) *Restriction of Opinion to Matters Within the Range of the Witness's Expertise*

It is a principle of fundamental importance that an expert should be allowed to state his opinion only on matters in respect of which he possesses special knowledge or skill. In R. v. *Kularatne*[58] the Court of Criminal Appeal of Sri Lanka remarked: "Witnesses like doctors and analysts usually preface their evidence with a list of their qualifications and experience, and there is the danger that a jury would look upon anything said by them as based on expert knowledge. Such a witness should not be permitted to express an opinion on any matter in a field where he has no expert knowledge, and if such an opinion has been expressed before it is found that it is outside his sphere of specialized knowledge, the trial judge should give a clear direction to the jury categorically to disregard that opinion altogether."[59]

55. (1954) 56 N·L·R· 121
56. At p. 141.
57. (1954) 56 N L·R· 495.
58. (1968) 71 N·L·R· 529.
59. At p. 542.

For practical reasons the English and the American courts have consistently acted in accordance with this rule. "If a cardinal of the Roman Catholic church is testifying before a jury mainly composed of Catholics, and states that, in his opinion, the defendant was driving negligently, it can hardly be supposed that the verdict would be other than for the plaintiff."[60]

(e) *The Danger Inherent in the Hypothetical Foundation of Expert Opinion*

This difficulty arises from the fact that, in the vast majority of cases, the expert witnesses will not have perceived the occurrences with which the case is concerned.[61] It is vital, therefore, that the reception of expert opinion should not become a vehicle for the insidious introduction of hearsay evidence.

The reality of this apprehension is illustrated by the Sri Lankan case of *R. v. Rathinam*[62] which involved a charge of murder. A ballistics expert expressed the opinion that the spread of bullets on the body of the deceased corresponded to a firing distance of approximately forty feet from a sixteen bore no. 4 cartridge fired from a gun of average barrel dimensions. He stated that he was shown the position of the car from which the shooting was alleged to have taken place and that, considering the spread and distribution of the waddings, he thought the shot could have been fired from the position indicated with a no. 4 cartridge from a gun with a short barrel. Alles, J., delivering the judgment of the Court of Criminal Appeal, held that the assumptions in regard to the position of the car, the distance at which the shot was fired and the length of the barrel derived from hearsay evidence and substantially vitiated the effect of the ballistics expert's opinion.

The courts have gone to great lengths to ensure that an expert does not incorporate hearsay evidence in his opinion. Thus, the High Court of Australia has held that a doctor may not state what a patient told him about his past symptoms as evidence of the existence of those symptoms, but that he may say what the patient told him so as to explain the grounds for his opinion of the patient's condition.[63] However, this rule has not been easy to observe, especially in valuation cases, where it is often impractical for the expert to state explicitly the facts on which his opinion is based. The English

60. P. A. Landon reviewing King and Pillinger, *Opinion Evidence in Illinois* in 60 L.Q.R. 201 at p. 202.
61. R. Cross, *op. cit.*, p. 384
62. (1971) 74 N.L.R. 327.
63. *Ramsay v. Watson* (1961) 108 C.L.R. 642; J. D. Heydon, *Cases and Materials on Evidence* (1975), p. 371.

courts have recently confirmed the view that an expert valuer could express his opinion on values even though substantial contributions to the formation of the opinion were made by hearsay, but that he could not give hearsay evidence as to the facts of transactions lying outside his personal knowledge.[64]

Since it is the function of the court to determine which party's version of the occurrences in issue is to be accepted, a contingency to be avoided at any cost is an invitation to the expert to give an opinion on the veracity of the ordinary witnesses in the case or the validity of any inference concerning the existence of a disputed fact.[65] This renders necessary the framing of a series of hypothetical questions.

(f) Necessary Precautions in Regard to the Identity of the Objects to be Identified or Analyzed

Where, for instance, the prosecution relies on the evidence of the accused's palm print as incriminating the accused, it is essential that evidence be expressly adduced to show that the fingerprint slip alleged to have been taken by an expert for examination did in fact contain the palm prints of the accused. Any doubt in this regard would naturally destroy the value of the expert's opinion and necessitate a direction to the jury that the opinion formed by the expert should not be taken into acount by them.

In *Bandappuhamy* v. *Ekanayake*[66] a police sergeant gave evidence that, on the orders of the court, he obtained the finger and palm prints of the accused in open court and that the prints so taken were sent through the court to the Registrar of Fingerprints. However, the sergeant did not purport to identify the fingerprint slip or to refer to it by any identifying number. The conviction was set aside in appeal on the ground that the case had been left in the magistrate's court without proof as to the identity of the person whose finger and palm prints were found on the document used by the expert for purposes of comparison.[67] The objection taken on this point by counsel for the accused was held to go to "the root of the whole case"[68] presented by the prosecution.

64. *English Exporters (London) Ltd.* v. *Eldonwall* (1973) Ch. 415
65. R. Cross, *op. cit.*, p. 384.
66. (1957) 61 N·L·R· 187.
67. At p. 188.
68. At p. 189.

In *R. v. Wijehamy*[69] the Court of Criminal Appeal insisted that, when the prosecution relies on the report of a fingerprint expert to the effect that the fingerprints said to have been found at the scene of the crime were those of the accused person, there must be direct evidence that the accused's fingerprints were handed over to the expert for comparison. It is necessary in such a case that the prints should be listed among the documents specified in the indictment and produced at the trial.[70] Sansoni, J. commented that evidence should not have been elicited from the expert as to the opinion he formed from a comparison of photographs of the prints, when the photographs were not productions in the case.

The Solicitor-General v. *Podisara*[71] concerned an alleged offence under the Excise Ordinance. In order to prove the identity of the excisable article, the prosecution relied on a statement by the Preventive Officer that he had examined the contents of the bottle and that he was of opinion that it contained Goverment arrack. Manicavasagar, J. held in appeal that this did not constitute sufficient proof as to the identity of the excisable article.[72]

The Court of Criminal Appeal has recently emphasized that the identity of productions in a criminal case must be accurately proved by the direct evidence available and not by way of inference.[73]

(g) The Value of Expert Opinion

The reception of expert evidence must not be allowed to obscure the principle that the primary responsibility of deciding the matter in dispute is that of the jury. This principle has received consistent emphasis in Sri Lanka: "The judges of our courts have made it clear that it is the function of the court, with the assistance of an expert, to decide on the similarity of handwriting and that it is not proper to act solely on the opinion of an expert. A court cannot, of course, without the assistance of an expert, come to an opinion on so difficult a question. At the same time, the decision being the judge's, he should not delegate his function to the expert. The opinion

69. (1958) 62 N·L·R· 425
70. At p. 428.
71. (1965) 67 N·L·R· 502.
72. At p. 504.
73. R. v. *Kularatne* (1968) 71 N. L. R. 529 at p. 546

of the expert is relevant, but the decision must nevertheless be the judge's."[74] "Under section 45 of the Evidence Ordinance it is for the court to form an opinion as to the identity of finger and palm impressions, assisted by the opinion of an expert."[75]

Since the ultimate decision is that of the court, the expert should give reasons for his opinion, so that the court will have the opportunity of evaluating the reasons and assessing their validity. In Scotland the functions of expert witnesses have been defined as follows: "Their 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."[76] In Sri Lanka it has been pointed out that "The expert should draw the attention of the court to the details which influenced him in reaching his decision, so that the court could independently, but with the expert's assistance, form its own opinion."[77]

It is not sufficient for an expert who compares two specimens of handwriting to state baldly that there is similarity in quality, capability, slope, speed, spacing, size, alignment and in a series of characteristic features. He should point to the particular characteristic features and explain in respect of which letter or letters he has discovered striking similarities.[78] "The expert generally gives his reasons in detail in support of his conclusion, and the court, with the help of photographic enlargements, is able to verify the details referred to and arrive at a decision."[79] The court or jury ought not to action "the nude opinion"[80] of an expert but the expert's evidence should be tested by questions as to the basis on which his opinion was formed. If this is not done, "the court would be surrendering its fundamental duty of satisfying itself on a matter of which the burden of proof lies on the prosecutor."[81]

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74. R. v. *Gratiaen Perera* (1960) 61 N. L. R. 522 at p. 524, *per* Sinnetamby, J.
75. R. v. *Wijehamy* (1958) 62 N. L. R. 425 at p. 428, per Sansoni, J.
76. *Davie* v. *Edinburgh Magistrates* (1953) S.C. 34 at p. 40, *per* Lord Cooper.
77. R. v. *Gratiaen Perera* (1960) 61 N.L.R. 522 at p. 524.
78. R. v. *Gratien Perera* (1960) 61 N.L.R. 522 at p. 524.
79. *ibid*
80. *The Solictor-General* v. *Podisara* (1965) 67 N, L. R. 502 at p. 504.
81. *ibid*

It would seem, then, that a critical appraisal of the expert's reasons for the opinion he expresses, so far as this is practicable, is enjoined upon the court. In *R.* v. *Kularatne*[82] the evidence of a Professor of Forensic Medicine and of an Assistant Government Analyst was led by the prosecution in an effort to prove that there was potassium arsenite in the stomach of the deceased. These experts gave their opinion on the basis of criteria, an important part of which they themselves considered unworthy of recommendation as a scientific fact. In these circumstances, in the view of the Court of Criminal Appeal, the duty of the trial judge was to have given a clear direction to the jury to disregard the opinion of the experts altogether.

The fact that the expert's opinion is not conclusive, has been stressed in the Sri Lanka decisions. In *R.* v. *Pinhamy*[83] it was said that "The medical witness's evidence alone is not conclusive of the identity of the deceased. It can only be taken as an item in the chain of evidence that was led to establish his identity."[84] In *Charles Perera* v. *Motha*[85] Basnayake, C. J. observed: "The expert's opinion is only a relevant fact to be taken into account in forming the opinion of the court. Cases which have come up before us in appeal indicate a tendency on the part of judges to regard the opinion of persons who describe themselves as handwriting experts as conclusive on the question of identity or genuineness of the handwriting in question. A court should guard against that tendency."[86]

On the other hand, the trial judge is not justified in brushing aside the expert's opinion lightly, without adequate consideration. In *Selvaguru* v. *Thaia'pagar*[87] the District Judge had issued a commission to a handwriting expert to examine the signature on three disputed documents, in comparison with the admittedly genuine signatures on four other documents. The expert's duty was to report whether, in his opinion, the signatures on the three disputed documents were written by the person who had signed the four other documents. The expert stated his opinion that the three disputed signatures were forgeries and gave his reasons in full. No other expert was called, but the District

82. (1968) 71 N.L.R. 529.
83. (1955) 57 N.L.R. 169.
84. At pages 171–172.
85. (1961) 65 N.L.R. 294.
86. At. p. 295.
87. (1952) 54 N.L.R. 361.

Judge preferred his own view of the documents to that of the expert and held that the signatures were genuine. Lord Morton of Henryton, delivering the opinion of the Privy Council, agreed with the Supreme Court that the expert's opinion had been disregarded by the trial judge without justification. In *Cader Saibo* v. *Ahamadu*[88] the court strongly deprecated any attempt on the part of a judge to come to a decision on a technical matter of this nature without the help of an expert.

But this does not imply that the trial judge is prevented from bringing an independent mind to bear on the question. In *Cader Saibo*'s case the District Judge had formed the opinion that a document was a forgery on a comparison made by him, unaided by an expert, of the signature on it with the admittedly genuine signatures which had been produced. By contrast, in *Samarakone* v. *Public Trustee*,[89] the trial judge had before him the opinion expressed by an expert regarding the purported signature and the reasons for that opinion. In *Samarakone*'s case Weerasooriya, J. remarked: "I do not think that the judge was precluded from himself making comparisons between the impugned signature and the genuine signatures and photographic enlargements for the purpose of deciding whether the reasons given by the expert were acceptable or not. Indeed, it was incumbent on the judge to make these comparisons."[90]

The legitimate value of expert opinion has sometimes resolved itself into the question whether the expert's opinion is sufficient to establish the case of the side calling him, or whether the expert's testimony should be accepted only if it is supported by independent evidence.

In *Soysa* v. *Sanmugam*[91] Hutchinson, C. J. observed that he had known too many instances in which an expert's opinion as to identity turned out to be mistaken, with the result that he was inclined to treat the expert's opinion as "nothing more than slight corroboration of a conclusion arrived at independently–in any event, never so strong as to turn the scale against a person charged with a criminal act if the other evidence is not conclusive".[92] This attitude was endorsed by Jayewardene, A. J. in *R.* v. *Perera*[93] where attention was drawn to the danger of acting on the unsupported testimony of an expert.

88. (1948) 50 N·L·R· 304.
89. (1960) 65 N·L·R· 100.
90. At p. 115.
91. (1907) 10 N·L·R·355.
92. At p. 359
93. (1930) 31 N·L·R· 450.

At the other extreme is the ruling by the Supreme Court in *R. v. Singho Appu*[94]. On an indictment for housebreaking and theft, the only evidence against the accused was that of a footprint found on a table at the scene of the offence. This was identified as a footprint of the accused by an expert who gave adequate reasons for his opinion. Howard, C. J. held that the accused could be properly convicted on the evidence of the footprint, although it constituted the sole ground of identification.[95]

Particularly in criminal cases, this view would seldom be adopted.[96] However, as the science of identifying fingerprints and footprints progressively becomes more advanced, there would naturally be less reluctance on the part of the courts to convict on the unsupported evidence of expert witnesses.

There is no warrant, generally, for treating the expert's opinion as conclusive. But it would appear to go too far to suggest, as Akbar,J. did in *Mendis v. Jayasuriya*,[97] that the expert's opinion creates some kind of suspicion but does not go beyond it.

An intermediary view which appears sound in principle was expressed by Sinnetamby, J. in *R. v. Gratiaen Perera*[98]: "While I would not go to the extent of saying that an expert's evidence would only afford 'some slight corroboration of a conclusion arrived at independently', I would hesitate to act solely upon it. If there is other independent evidence in support of the conclusion reached, recourse need not be had at all to the expert's evidence. I think the modern view is to accept the expert's testimony if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct; provided, of course, the court, independently of the expert's opinion, but with his assistance, is able to conclude that the writing is a forgery."[99] In *Samarakone v. Public Trustee*[100] Weerasooriya, J. expressed approval of this approach to the value of expert opinion.

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94. (1944) 46 N.L.R. 49.
95. At p. 53 *ad fin.*
96. *Doole v. Charles* (1928) 6 C.L.W. 79.
97. (1930) 12 C.L.R. 44.
98. (1960) 61 N.L.R. 522.
99. At p. 524
100. (1960) 65 N. L. R. 100 at p. 114.

There is no uniform yardstick by reference to which the value of an expert's opinion can be assessed. As Basnayake, C. J. pointed out in *Charles Perera* v. *Motha*,[101] "The weight to be attached to (expert opinion) would depend on the circumstances of each case. The standing of the expert, his skill and experience, the amount and nature of the materials available for comparison, the care and discrimination with which he has approached the question on which he is expressing his opinion, and the extent to which he has called in aid the advances of modern science to demonstrate to the court the soundness of his opinion, are all matters which will assist the court in assessing the weight to be attached to the fact of his opinion."[102]

(h) Facts Having a Bearing on the Opinion of Experts

The law of Sri Lanka contains explicit provision that "Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant."[103] Thus, where the question is whether A was poisoned by a certain poison, the fact that other persons who were poisoned by that poison exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.[104] This provision enables the opinion of an expert to be strengthened or challenged by proof of other circumstances.

III. Non-Expert Opinion

There are several contexts in which non-expert opinion is received in modern law.

One such area pertains to opinion as to handwriting. The Evidence Ordinance of Sri Lanka provides that "When the court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact."[105] The explanation is attached that "A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him."[106]

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101. (1961) 65 N. L. R. 294.
102. At p. 296.
103. Evidence Ordinance, section 46.
104. Evidence Ordinance, section 46, illustration (a)
105. Evidence Ordinance, section 47.
106. Evidence Ordinance, section 47, explanation.

A comparable principle is recognized by English law. "The clerk who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing though he never saw me write or received a letter from me."[107] It is unnecessary, therefore, that the witness who states his opinion should have seen the person whose writing is in question write at all, for it will be sufficient if he has received documents purporting to be written or signed by him,[108] and the capacity in which he has done so is immaterial.[109]

On a similar footing opinions as to sanity[110] or drunkenness[111] may be received from persons who are not "experts", in the traditional sense. The Courts Martial Appeal Court has held that, on a charge of drunken driving, a non-medical witness might state that he formed the impression that the accused had been drinking but that he must state the facts on which his opinion is based.[112] The English Court of Criminal Appeal has allowed the value of a plate glass window to be proved by the statement of an assistant superintendent of the post office that the window was worth more than five pounds.[113] There is South Australian authority to a similar effect.[114]

It is important to note that, in these cases, non-expert evidence is received as a "compendious mode of ascertaining the result of the actual observation of the witness" [115] rather than as a statement of opinion.

Outside this area, the legal principles applicable are based on a rigid distinction between fact and opinion. The traditional attitude of the law is that it is the function of a witness to state facts, not opinion[116]. However, the tenuous nature of the dividing line between assertions of fact and statements of opinion has been recognized both in the decided cases and in

107. *Doe* v. *Suckermore* (1837) 5 Ad. and El. 703 at p. 750, *per* Lord Denman, C. J.
108. *Harrington* v. *Fry* (1824) 1 C. & P. 289.
109. R. Cross, *op. cit.*, p. 528.
110. R. Cross, *op. cit.*, p. 387.
111. See the cases cited at note 112, *infra.*
112. R. v. *Davies* (1962) 3 All E.R. 97; for Commonwealth law, *Burrows* v. *Hanlin* (1930) S.A.S.R. 54; R. v. *German* (1947) 4 D.L.R. 68; R. v. *McKimmie* (1957) V.L.R 93; R. v. *Spooner* (1958) V.L.R. 540; R v. *Kelly* (1958) V.L.R. 412; *Blackiev . Police* (1966) N.Z.L.R. 910.
113. R. v. *Beckett* (1913) 8 Cr. App. Rep. 204
114. *Wise* v. *Musolino* (1936) S.A.S.R. 447.
115. R. Cross, *op. cit.*,, p. 387
116. Z. Cowen and P. B. Carter, *Essays on the Law of Evidence* (1956), p. 162

academic writing. As the American writer, Maguire, put it, "Our whole conscious life is a process of forming working beliefs or opinions from the evidence of our senses, few of them exactly accurate, most of them near enough correct for practical use, some of them seriously erroneous. Every assertion involves the expression of one or more of these opinions. A rule of evidence which called for the exclusion of opinion in this broad sense would therefore make trials quite impossible"[117]. Thayer pointed out, in similar vein, that "In a sense all testimony to matter of fact is opinion evidence; i.e. it is a conclusion formed from phenomena and mental impressions."[118] The pragmatic consideration which has impelled the courts to admit non-expert opinion in appropriate contexts is that "unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe."[119]

In cases of identification,[120] in particular, statements of fact and opinion are not easily disentangled. A witness called for purposes of identification "is not simply narrating what he has perceived in the past; but the perception on which his statements are founded cannot be conveyed to the jury in the same way that the premises for and against an inference of negligence can be narrated."[121] As Parke, B. has observed, "In the identification of person you compare in your mind the man you have seen with the man you see at the trial. The same rule belongs to every species of identification."[122] Likewise, fact and opinion are often inextricably intermingled in questions concerning age,[123] speed[124] and weather.[125]

IV. The Expression of Opinion on Ultimate Issues

The traditional approach of the law has been that witnesses, both expert and non-expert, should be discouraged from expressing an opinion on the ultimate issue or the question which the court or the jury is called upon to determine.

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117. J. M. Maguire, *Evidence — Common Sense and Common Law* (1947), p. 24.
118. J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), p. 524.
119. Seventeenth Report of the English Law Revision Committee, paragraph 3.
120. See *Fryer* v. *Gathercole* (1849) 13 Jur: 542, *R* v. *Tolson* (1864) 4 F. & F. 103, *Lucas* v *Williams & Sons* (1892) 2 Q. B. 113.
121. R. Cross, *op. cit*, p. 387
122. *Fryer* v. *Gathercole*, *supra arguendo*.
123. *R.* v. *Cox* (1898) 1 Q.B. 179, *Wallworth* v. *Balmer* (1966) 1 W.L.R. 16
124. See the English Road Traffic Act, 1960, section 4 (2)
125. R. Cross' *op.cit.*, p. 387.

Nevertheless, in the present century, there are numerous instances in which this principle has been departed from. This has been so especially in regard to the testimony of expert witnesses. Where, for instance, the defence to a charge of murder was that the deceased had committed suicide, a doctor who had heard the evidence was allowed to answer the question whether it was his opinion that the fatal wound had been inflicted by someone other than the deceased.[126] It has been held that a doctor called in support of the accused's plea of insanity might be asked in cross-examination whether the accused's conduct after the crime indicated that he knew the nature of his act and that it was wrong.[127]

A doctor who had examined a motorist charged with drunken driving has been allowed to state whether, in his opinion, the accused was so drunk as not to have proper control of his car.[128]

This trend is reflected strikingly in a recent decision of the Privy Council.[129] Lowery and King were convicted of the murder of a girl of fifteen. Each admitted that he was present at the killing but alleged that it was done by the other. It was held on Lowery's appeal that the Victorian trial judge had acted properly in allowing King to call a clinical psychiatrist who had interviewed both accused to swear that King was immature and emotionally shallow and that Lowery was the aggressive personality, more likely than King to have committed the crime.[130] A different view seems to have been taken in Canada.[131]

However, there is no general rule that, in the absence of mental illness, psychiatric evidence is admissible to prove that the defendant is likely to be speaking the truth. In a recent English case[131a] the defendant, who was charged with murder, admitted that he had killed his girl friend by hitting her with a hammer but pleaded that he had been provoked by her statement that she had had affairs with other men and that he was not the father of her expected child. The defence sought to call a psychiatrist to give his opinion, based on information from medical records, the defendant, his family and friends, that the defendant was not suffering from a mental illness, that he was not violent by nature but that his personality was such

126. *R. v. Mason* (1911) 7 Cr. App. Rep. 67.
127. *Holmes v. R.* (1953) 2 All E. R. 324; cf. *Bleta v. R.* (1964) S. C. R. 561.
128. *R. v. Davies* (1962) 3 All E.R. 97
129. *Lowery v. R.* (1974) A.C. 85.
130. R. Cross, *op. cit.*, p. 389
131. *Lupien v. R.* (1970) 9 D.L.R. (3d) 1.
131a. *R. v. Turner* (1975) 2 W.L.R. 56.

that he could have been provoked in the circumstances and that he was likely to be telling the truth. The judge ruled the psychiatric evidence inadmissible. The Court of Appeal, affirming the conviction, held that, since the question whether the defendant was suffering from a mental illness was not in issue, the psychiatric evidence that the defendant was not suffering from a mental illness, was irrelevant and had been rightly excluded. Lawton, L.J., said: "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; but there is a danger that they may think it does."[131b] The basis of the decision was that the matters in regard to which expert opinion was sought to be introduced, were "well within ordinary human experience",[131c] so that the jury did not require the guidance of an expert.[131d] The court applied the rule that evidence can be led to impugn the credibility of a witness but not, in general, to reinforce it.[131e]

A comparable note of caution pervades a recent judgment of the Appellate Division of South Africa[131f]. Rumpff, C.J., emphasized that it is the duty of an expert on mental conditions in a criminal case not merely to express general opinions, which in the medical field can perhaps be regarded as well-founded, but to give his opinions with a proper appreciation of what the task of a trial court is in the application of the criminal law and particularly in the imposition of criminal responsibility. It was declared to be essential that any expert who expresses an opinion concerning the criminal liability of a sufferer from Huntington's chorea, should at least connect the mental condition of such a person with the full particulars of the crime which he has committed.

The recent English and South African authorities which exclude expert opinion on the grounds, respectively, that the matters testified to by the expert are clearly within the competence of the jury and that the opinion of the expert has been expressed in general terms without reference to the circumstances of the particular case, do not detract from the validity of the submission that expert opinion characterized by a sufficiently high degree of legal relevance should not be excluded today merely on the basis that it pertains directly to an ultimate issue in the case.

131b. At p. 60.
131c. At p. 61.
131d. See also *Glinski* v. *Mc Iver* (1962) A.C. 726 at pages 780–781, per Lord Devlin; cf. *Myers* v. *Director of Public Prosecutions* (1965) A.C. 1001 at pages 1021–1022, *per* Lord Reid.
131e. (1975) 2 W.L.R. 56 at p. 61, *per* Lawton, L. J.
131f. *State* v. *Loubscher* 1979 (3) S.A. 47.

Non-expert opinion bearing on ultimate issues has also been received by the modern courts, but this has been subject, naturally, to greater circumspection. An opinion as to whether an act would have been done, had some circumstance been different, has been allowed.[132] In several cases the question has arisen whether a non-expert witness may state his opinion (a) whether the accused had taken drink, and (b) whether he was unfit to drive through drink. In England[133] and Northern Ireland[134] non-expert opinion has been admitted on the first point but not on the second, since the latter question "involved the very point the court had to decide."[135] In Eire,[136] by contrast, a non-expert has been permitted to answer both questions.

It is submitted that the approach of the courts of Eire is more logical. "As in the case of the inference that a person is under the influence of drink, the inference that the same person was incapable of having proper control may depend on the whole picture, on the conjoint effect of numerous facts and circumstances, which lead to a sound conclusion but cannot be faithfully or completely reproduced in evidence."[137] However, the attitude adopted in the English and Northern Irish judgments exemplifies the lingering reluctance of the courts to allow witnesses to answer the very question which represents the ultimate issue in the proceedings. The conventional view is that "The admission of the opinion of eminent experts upon the issues leads to the balancing of opinions and tends to shift responsibility from the bench or the jury to the witness box."[138]

V. Contemporary Innovations

(a) *Expert Opinion*

In early times there were three primary reasons for the strictness which was a feature of the rules governing the reception of expert opinion.

Firstly, the lack of education of the average member of a jury was a circumstance which weighed with the court in deciding whether or not to admit evidence which may appear to dispense with the need for the jury to make up their own minds. Prior to the nineteenth century there was, on the whole, little confidence on the part of judges in the capacity for dispass-

132. *Mansell* v. *Clements* (1874) L.R. 9 C.P. 139
133. R. v. *Davies* (1962) 3 All E.R. 97
134. *Sherrard* v. *Jacob* (1965) N.I. 151.
135. R. Cross, *op. cit.*, p. 390 *ad. fin.*
136. *Attorney—General (Rudely)* v. *Kenny* (1960) 94 I.L.T.R. 185.
137. *Sherrard* v. *Jacob* (1465) N.I. 151 at p. 163, *per* Lord Macdermott, (dissenting)
138. *Joseph Crosfield Sons Ltd.* v. *Technochemical Laboratories, Ltd.* (1913) 29 T.L.R. 378 at p. 379,

ionate judgment and accurate reasoning possessed by juries. This attitude underwent a significant change with the spread of education. The tendency of the contemporary law is to adopt a broad approach to the admissibility of evidence. The gradual change of attitude is reflected in the observation by an English court about the middle of the last century: "People were formerly frightened out of their wits about admitting evidence lest juries should go wrong. In modern times we admit the evidence and discuss its weight."[139] This is especially true of the admission of evidence of expert opinion.

Secondly, judicial attitudes and predelictions were generally hostile to expert opinion until quite recently, because of suspicion regarding the bias of the expert in favour of the side calling him. Fifty years ago Taylor denigrated expert opinion in scathing terms: "It is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view that, even when conscientiously disposed, they are incapable of forming an independent opinion."[140] Equally emphatic is the comment by Lord Campbell: "Hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked."[141]

Thirdly, the lack of development of the disciplines in regard to which expert opinion was entertained detracted from the confidence with which the accuracy of the conclusions reached by persons claiming expertise in these disciplines could be accepted. Best's lament was that "there can be no doubt that testimony is daily received in our courts as 'scientific evidence' to which it is almost profanation to apply the term as being revolting to common sense."[142]

These inhibitions which drastically circumscribed the basis of admissibility of expert opinion no longer have force. The rapid advance of science and technology has rendered the findings of experts far easier to accept in judicial proceedings, in view of their demonstrable precision and verifiability. Prevailing codes of professional ethics have been conducive to greatly enhanced probity and integrity among members of the learned professions

139. R. v. *Birmingham Overseers* (1861) 1 B. & S. 763 at p. 767, *per* Cockburn, C.J.
140. P. Taylor, *Treatise on the Law of Evidence* (12th edition, 1931). p. 59.
141. *Tracy Peerage* (1843) 10 Cl. & Fin. 154 at p. 191
142. W. M. Best. *Principles of the Law of Evidence* (11th edition, 1911), p. 491.

who, in the main, offer expert opinion in the courts. These changes, viewed against the background of the superior discrimination and greater sophistication characteristic of modern juries, have contributed to the modern attitude that a jury, properly directed, will find expert opinion a source of material assistance, rather than a hindrance or a distraction, in the discharge of their duty.

The contemporary educational, social and cultural context warrants a fresh point of departure, in regard to formulation of the principles which regulate the admissibility of expert opinion, in several respects:

(i) It is submitted that the credentials of an expert should be flexibly construed. The diversity of the avenues of acquiring expertise in different fields at the present day militates against the adoption of a rigid criterion in regard to the qualifications of an expert. Thus, a formal training in the relevant field should not be regarded as an indispensable prerequisite for the acceptance of a witness as an expert, and due weightage should be given to practical experience. The majority of the decided cases is in line with this approach, and the authorities which cannot be reconciled with it ought not to be followed on grounds of policy.

(ii) There is no cogent reason to recognize a total bar against the admissibility of expert opinion on ultimate issues. It is evident that there are many contexts in which an expert is in a better position today than a member of the jury to form an opinion on an ultimate issue in judicial proceedings, and it does not seem desirable to deny a jury the benefit of this assistance. The traditional reluctance of the law to permit an expert to express an opinion on an ultimate issue is inappropriate today in regard to matters on which the tribunal does not share with the witness comparable competence to draw an accurate inference.

An acceptable approach is embodied in the American Law Institute's Model Code of Evidence which provides that "In testifying to what he has perceived a witness may give his testimony in terms which include inferences and may state all relevant inferences, whether or not embracing ultimate issues to be decided by the trier of fact, unless the judge finds (a) that to draw such inferences requires a special knowledge, skill, experience or training which the witness does not possess, or (b) that the witness can readily and with equal accuracy and adequacy communicate what he has perceived to the trier of fact without testifying in terms of inference or

stating inferences, and his use of inferences in testifying will be likely to mislead the trier of fact to the prejudice of the objecting party".[143] Adherence to this principle will obviate the discrepancy which now exists between the theoretical legal position and the consistent practice of the courts.

Lord Parker, C.J., has aptly observed: "I cannot help feeling that, with the advance of science, more and more inroads have been made into the old common law principles. Those who practise in the criminal courts see every day cases of experts being called on the question of diminished responsibility, although technically the final question 'Do you think he was suffering from diminished responsibility?' is strictly inadmissible, it is allowed time and time again without any objection."[144] This conflict is manifested in the palpable artificiality with which the law is frequently applied. A clear example of this is furnished by the ruling of an English court that, in a case of medical negligence,[145] a doctor who had been in court throughout the proceedings might not be asked whether he thought that the defendant was guilty of any want of skill, although he might properly be asked whether anything he had heard suggested reprehensible conduct on the part of the defendant.[146]

(iii) Although it is important to forestall the oblique reception of hearsay via expert opinion, some degree of resilience is required to give the law a realistic complexion. Severance should not be insisted upon too stringently in circumstances where a comprehensive statement which may incorporate hearsay in trivial respects is essential to convey to the jury an intelligible impression of the expert's opinion. Thus, "a valuer may be unable to recall all the details of all the sales on which he bases his opinion, yet he may be closer to the mark than a less experienced practitioner who has made an exhaustive examination of comparable sales."[147]

(iv) The hesitation to have recourse to expert opinion on the ground that it is often founded on assumed facts, may be whittled down by the increased use of the expedient of hypothetical questions. This procedure is undoubtedly cumbersome and protracted, but its value consists in the explicit allocation to the jury of the function of determining questions of credibility and other issues of fact.

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143. Rule 401.
144. *Director of Public Prosecutions* v. *A and B. C. Chewing Gum, Ltd.* (1968) 1 Q. B. 159 at p. 164.
145. *Rich* v. *Pierpont* (1862) 4 F. & F. 35.
146. R. Cross, *op. cit.*, p. 389.
147. H. H. Glass, *Seminars on Evidence* (1970) p. 70

(b) Non-Expert Opinion

The basis of a realistic attitude to the admissibility of non-expert opinion in modern times is acknowledgment of the nebulous quality of the distinction between inferences and the facts which support them. The facile veneer of the traditional law is attributable predominantly to the assignment of responsibility in these spheres, respectively, to the jury and to witnesses, with inadequate appreciation of the problems which arise in penumbral areas.

It is obvious that the law cannot impose an absolute prohibition on all evidence involving inferences. "It can only draw a line between some inferences which are considered objectionable, and others which are not."[148] The distinction between permissible and unacceptable inferences depends not on theoretical criteria but on broad considerations of policy and expediency. The crucial factor is the degree of legal relevance of the opinion offered or the inference made. Given a high degree of legal relevance, *de facto* delegation of a jury's function to a witness, with discrimination and in limited contexts, is not intrinsically objectionable. Generally, however, such delegation would be more readily defensible in the setting of expert, than in that of non-expert, evidence.

148. L. H. Hoffmann, *The South African Law of Evidence* (1963) p. 175.