Preface

It is over five years since the first edition of this book was published and the quantity of changes in the law prompted the edition that now lies in your palm. We hope that this second edition will provide a useful guide to the law of evidence in Hong Kong. This second edition continues the principle-focused approach to the law of evidence, examining specifically the key ideas that underlie the rules and the contexts within which the rules have been formed.

We also welcome Dr. Arthur McInnis to the author panel for the second edition.

With the increasing focus on technology in the law of evidence, a new, short chapter on electronic discovery and computer forensics is included in this edition.

Whilst there remains, inevitably, considerable dependence upon the common law decisions of the courts in England and Wales, as the text will demonstrate, uncritical reliance on these decisions would be a serious mistake. Hong Kong has taken its own path, in many instances drawing upon jurisprudence from other countries, and the law of evidence in Hong Kong is significantly different in many areas from that currently prevailing in England and Wales.

The text attempts to take account of relevant case law and statutory enactments available to us or anticipated as of 15 August 2014.

Where appropriate, we have sought to alert the reader to relevant material in other jurisdictions and to the writings of commentators and significant empirical research which throws light on aspects of social life to which the rules of evidence apply.

As always, we welcome comments and suggestions from readers for improvements to future editions.

Mike McConville

Dmitri Hubbard

August 2014

CHAPTER 3

Matters Which Need Not Be Proved

3.00 Overview

Whilst ordinarily, common law courts operate on the basis that all facts in issue must be established by evidence, there are limited exceptions. This chapter brings together different matters which need not be proved in varying degrees, either because there is a presumption that a state of affairs or situation exists, the court recognises that the matters are notorious (judicial notice), the parties admit them, or the matters are not in dispute. This area of the law is still under development. The Law Reform Commission of Hong Kong was established by the Executive Council in January 1980 to reform such aspects of the law as referred to it by the Secretary for Justice or Chief Justice: see The Law Reform Commission of Hong Kong Report – *The Common Law Presumption That a Boy Under 14 is Incapable of Sexual Intercourse.*

3.01 Presumptions generally

'Presumption' is used in many ways in evidence law. A presumption operates to cause a particular fact to be treated as proved unless and until the presumption is rebutted by countervailing evidence. In its common usage, if there is a presumption that 'x' exists, it will mean that the conclusion that 'x' exists will be drawn unless and until the contrary is proved. Presumptions in common law may be divided into irrebuttable or rebuttable presumptions. First, irrebuttable or conclusive presumptions are those that cannot be rebutted by evidence and must be taken to be the case whatever the evidence to the contrary. Whereas, a rebuttable presumption is a presumption made by a court, one that is taken to be true unless someone comes forward to contest it and proves otherwise. For practical purposes, presumptions are divided into *presumptions of law* (which are not really presumptions at all but, rather, *rules of law*) and *presumptions of fact*. A *presumption of law* is a presumption based upon a policy of law or general rule and now upon the facts or evidence in an individual case. On the other hand, a *presumption of fact* is an inference as to the existence of one fact not certainly known, from the existence of some other facts known or proved, founded on a precious experience of their connection. Even this basic distinction is not universally recognised because judges and writers are divided as to whether particular presumptions are ones of fact or of law.

3.02 Presumptions of law

Though cases sometimes refer to presumptions of law, these are really rules of substantive law.

A Criminal incapacity

It is presumed that a child below the age of ten cannot commit a crime; the child is said to be '*doli incapax*' or '*incapable of crime*'. In fact, properly understood, this is a substantive rule of law, expressed as a presumption, now incorporated into the Juvenile Offenders Ordinance (Cap 226), s 3:

> "It shall be conclusively presumed that no child under the age of 10 years can be guilty of an offence. The presumed fact in such cases is the absence of guilt."

Therefore, under this provision, a conclusive or irrebuttable presumption arises that the child is *doli incapax* (incable of committing a crime) on proof or admission of the basic fact that he is under the ten years of age. No evidence is admissible to rebut this presumption. HK changed the presumption from 7 years to 10 years in 2003 in response to a Law Reform Commission Report on the subject. The Commission said: "In recent years, there have been calls in Hong Kong for the minimum age of criminal responsibility to be raised. Those favouring a change argue that it is undesirable to subject young children who are still socially and mentally immature to the full panoply of criminal proceedings, with their attendant sanctions and stigma."

The presumption of *doli incapax* is a recognition of the fundamental nature of childhood, that children are not naturally equipped with an ability to understand the wrongfulness of criminal acts but develop this gradually, at different and inconsistent rates. The presumption is flexible and practical. The assumption of absolute incapacity for children below the age of ten is an expression of the conviction that they are not ever developed enough to be held criminally responsible. For children aged ten but not yet fourteen, it is acknowledged that some may be able to form a guilty mind. The presumption of incapacity can therefore be rebutted if there is proof to the contrary. This affords protection to those who are not developed enough to be criminally responsible while at the same time allowing the conviction of those who are able to understand the wrongfulness of what they have done.

The following table gives the information on which the Law Reform Commission based its finding:

Persons aged 7 - 14 arrested for crime from 1993 to 1997 (by age at arrest)

	No. of Persons Arrested (%)								
Year \ Age	7	8	9	10	11	12	13	14	Total
1993	26 (0.56)	51 (1.09)	101 (2.17)	198 (4.25)	358 (7.68)	664 (14.24)	1,368 (29.34)	1,896 (40.67)	4,662 (100)
1994	27 (0.55)	67 (1.35)	107 (2.16)	187 (3.78)	386 (7.80)	674 (13.62)	1,508 (30.46)	1,994 (40.28)	4,950 (100)
1995	24 (0.50)	52 (1.09)	100 (2.09)	207 (4.33)	324 (6.78)	680 (14.23)	1,436 (30.04)	1,957 (40.94)	4,780 (100)
1996	29 (0.63)	46 (1.00)	101 (2.21)	183 (4.00)	327 (7.14)	665 (14.53)	1,345 (29.39)	1,881 (41.10)	4,577 (100)
1997	22	52	74	154	273	614	1,248	1,828	4,265

	(0.52)	(1.22)	(1.74)	(3.60)	(6.40)	(14.40)	(29.26)	(42.86)	(100)
1993 - 1997	128 (0.55)	268 (1.15)	483 (2.08)	929 (4.00)	1,668 (7.18)	3,297 (14.19)	6,905 (29.72)	9,556 (41.13)	23,234 (100)

In each of the years from 1993 to 1997, fewer than 1% of the total number of arrested persons aged between seven and 14 years of age were seven-year-olds.

B Presumption of innocence

This is a shorthand reference to the principle that the prosecution in a criminal case generally bears the legal burden of proving each element of the offence with which the defendant is charged, as discussed in cases such as ***Woolmington*** in chapter 2. The presumption of innocence originates from the Latin legal principle *er incumbit probation qui dicit, non qui negat* (the burden of proof rests on the one who asserts, not on the one who denies).

C Presumption of sanity

Derived from the famous case of ***Daniel M'Naghten*** (1843) 4 St Tr (NS) 847, at common law it is presumed that every person of the age of discretion is presumed to possess a sufficient degree of reason to be responsible for his or her crimes until the contrary is proved. This presumption simply means, as we have seen, that the legal burden of proving insanity ordinarily lies on the defendant seeking to invoke the defence. The central issue of this definition may be stated as *did the defendant know what he or she was doing, or, if so, that it was wrong?* The standard of proof is on a balance of probabilities, that is to say that mental incapacity is more likely than unlikely. If this burden is successfully discharged, the party relying upon it is entitled to succeed. Lord Denning said in ***Bratty v Attorney-General for Northern Ireland*** [1963] AC 386 that whenever the defendant makes an issue of his state of mind, the prosecution can adduce evidence of sanity. In practice, this presumption only arises to negate the defence case when automatism or diminished responsibility is in issue to negate or minimise criminal liability.

D Presumption of sexual capacity

At common law, a boy under the age of 14 years of age is conclusively presumed to be incapable of committing sexual intercourse, and no evidence may be called to rebut this presumption: ***R v Jordan & Cowmeadow*** (1839) 9 C & P 118. The presumption that a boy under 14 is incapable of sexual intercourse is a longstanding one which has its origin in Roman law, which applied 14 as the age of puberty where this was relevant judicial proceedings: ***R v Waite*** (1892) 2 QB 600, where Lord Coleridge said:

> "there is a presumption *juris et de jure*, and judges have time after time refused to receive evidence to shew that a particular prisoner was in fact capable of committing the offence"

As a result of this, regardless of the circumstances, a boy under 14 years of age cannot be convicted of rape, though he may be convicted of aiding and abetting another to commit rape, or of indecent assault: ***R v Angus*** (1907) 26 NZLR 948. Despite its strong roots in common law, the presumption of sexual incapacity of children under age 14 has been abolished in many jurisdictions, including Canada, and Hong Kong may likely follow as the application of the presumption is at odds with reality and means that on occasion the true criminality of the defendant's conduct cannot be reflected in the charge.

3.03 Rebuttable presumptions of law

Some presumptions of law are capable of being rebutted in specified circumstances. These are assumptions that are made in the law that will stand as a fact unless evidence is put forward to contest it and prove otherwise. A common example, in the area of adoptions, it is used to "presume" that if a woman is married when she gives birth to a child, that her husband is its father. This "presumption" will stand as a legal fact unless it is contested and proven to be wrong. The most common examples include:

A Presumption of regularity

It is presumed that, until the contrary is proved, a person who has acted in a public capacity was duly appointed and has properly discharged the duties of that office. In Latin this is called '*omnia praesumuntur rite et solemniter esse acta*' or 'all things are presumed to be correctly and solemnly done'.

This means, for example, that it is presumed that individuals acting as public officers are properly appointed and that persons performing public acts or duties have performed them regularly and properly.

The presumption of regularity will also apply to establish that a mechanical instrument which is usually in working order was in fact in working order at a particular time. For example, where traffic lights are set up for public use and are in active operation, there is a presumption that the traffic light is in proper working order, unless there is evidence to the contrary. Also, this presumption may be applied in a conveyance situation. A conveyance of real estate, regular on its face, and under the corporate seal, executed by a municipal corporation having the power to dispose of its property, will be presumed to have been executed in pursuance of that power, and hence it is unnecessary for the grantee, or party claiming under it, to produce the special resolution or ordinance authorising its execution.

However, the presumption may not be relied upon by the prosecution in order to establish an essential element of an offence in a criminal prosecution: ***Dillon v R*** [1982] AC 484 (PC) where on a charge of negligently permitting a prisoner to escape from custody, the prosecution could not rely upon a presumption that the prisoner had been in lawful custody because this was an essential element of the offence.

What will constitute evidence to the contrary is fact-specific: ***Yau Wah Yau v Commissioner of Inland Revenue*** [2006] 3 HKLRD 586.

B Presumption of criminal capacity

While the presumption that a child under the age of 10 cannot be guilty of committing crime is conclusive, after the child has attained the age of 10 but before attaining the age of 14, the presumption still applies, but may be rebutted on proof that the child had "*mischievous discretion*". Broadly speaking, this means that the child understood that the act in question was seriously wrong. The presumed fact in such cases relates only to the mental state. This was applied in ***Chan Chi Wah v The Queen*** [1967] HKLR 241:

> A girl 13 years 8 months was convicted of possession and dealing in drugs under the Dangerous Drugs Ordinance. Pickering J found the presumption of *doli incapax* was rebutted on the facts, and that her claim that she thought she was packing Western medicine rather than drugs was false.

In ***R v Gorrie*** [1918] 83 JP at 136, where one boy stabbed another with a penknife, the court said in order to rebut the presumption to make the child liable for manslaughter:

> "that meant that they must satisfy the jury that when the boy did this he knew that he was doing what was wrong - not merely what was wrong, but what was gravely wrong, seriously wrong. It was for the jury to say whether there was any evidence that this boy when, as was alleged, he 'jabbed' the other with the knife in this horseplay, had any consciousness that he was doing that which was gravely wrong."

'Seriously wrong' is broader than merely morally wrong. "A court has to look for something beyond mere naughtiness or childish mischief": per Mann J in ***J M (A Minor) v Runeckles*** [1984] 79 Cr App R 255 at 259. In ***B v R*** [1958] 44 Cr App R 1, at 3-4, Lord Justice Parker said the evidence must be "strong and pregnant". The fact that a child was raised in a respectable family, properly brought up and was generally well behaved were all important factors to be considered.

Other principles are stated in ***R v Sheldon*** [1996] 2 Cr App R 50, at 53:

> "1. It is presumed that a child between the ages of 10 and 14 is *doli incapax* and in all cases it is for the [prosecution] to rebut the presumption: to prove that when doing the act charged the child knew that this act was seriously wrong as distinct from an act of mere naughtiness or childish mischief.
>
> 2. The criminal standard of proof applies: clear positive evidence is required, not consisting merely in the evidence of the act amounting to the offence itself, however horrifying or obviously wrong that act may be.
>
> 3. The older the defendant is and (logically, notwithstanding paragraph 2 above) the more obviously wrong the act, the easier it will generally be to prove guilty knowledge.
>
> 4. The surrounding circumstances are clearly relevant and what the defendant said and did both before and after the act may go to prove guilty knowledge. Certain conduct, however, such as running away or lying, may, depending on the circumstances, be equivocal, as consistent with naughtiness as with wickedness.
>
> 5. Proof that the defendant was a normal child for his age (which must not be presumed but, assuming guilty knowledge can otherwise be established, need not be proved) will not necessarily prove also that he knew his action was seriously wrong. The less obviously wrong the act, the less likely is it to do so.
>
> 6. Even where, as in ***Coulburn*** (1988) 87 Cr App R 309 (a murder case), the *doli incapax* presumption is overlooked, if on appeal the Court is satisfied that had the issue been left to the jury they must inevitably have found that the defendant knew that his act was seriously wrong, the verdict will be found safe and the appeal will fail."

C Presumption of death

Where there is no acceptable affirmative evidence that a person, 'A.B.', was alive at some time during a continuous period of seven years or more, a presumption of death will be made in limited circumstances.

In ***Chard v Chard*** [1956] P 259 (applied in HK in ***Cali Enterprises Ltd v Chongmark Ltd*** [1986] HKLR 816) Sachs J stated:

> By virtue of a long sequence of judicial statements, which either assert or assume such a rule, it appears accepted that there is a convenient presumption of law applicable to certain cases of seven years' absence where no statute applies. That presumption in its modern shape takes effect (without examining its terms too exactly) substantially as follows. Where as regards "A.B." there is no acceptable affirmative evidence that he was alive at some time during a continuous period of seven years or more, then if it can be proved first, that

> there are persons who would be likely to have heard of him over that period, secondly that those persons have not heard of him, and thirdly that all due inquiries have been made appropriate to the circumstances, "A.B." will be presumed to have died at some time within that period.

In many cases this will be a relevant consideration regarding capacity to marry when the husband / wife is presumed dead, such as in ***Ives v Ives*** [1967] HKLR 423. Such a presumption must, it is submitted, be classified as one of law rather than one of fact, because, as has been well-remarked, there can hardly be a logical inference from any particular set of facts that a man had not died within 2,555 days but had died within 2,560 (ie, 7 years). The common law creates this reasonable rule to achieve particular objectives as, for example, the settlement of the status of a marriage, the distribution of property and closure on a psychologically distressing state of affairs.

D Presumption as to the state of mind

There was a presumption at common law that a person intends the natural and probable consequences of his acts. In ***DPP v Smith*** the House of Lords appeared to go further and suggest that this was a rule of law.

DPP v Smith [1961] AC 290 (HL)

The respondent was driving a car in the back of which were some sacks of scaffolding clips ('the gear') which had been stolen. A police constable, noticing the sacks, told him to draw in to the kerb, but instead the respondent accelerated. The constable clung on to the side of the car, which pursued an erratic course, but he was finally shaken off and fell in front of another car, receiving fatal injuries. The respondent did not stop but drove on some 200 yards and dumped the stolen property. He then returned, and there was evidence that on being told that the constable was dead he said that "I knew the man. I wouldn't do that for the world. I only wanted to shake him off." but that he had become frightened at the constable's actions and "didn't want him to find the gear."

The respondent was charged with capital murder. In his summing-up the judge said to the jury: "If you are satisfied that ... he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer ... and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder. ... On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer - in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in consequence of his actions – well, then, the verdict would be guilty of manslaughter." The respondent was convicted of murder: –

Dismissing the appeal, the House of Lords stated that

> It is immaterial what the accused in fact contemplated as the probable result of his actions, provided he is in law responsible for them in that he is capable of forming an intent, is not insane within the M'Naghten Rules and cannot establish diminished responsibility. On that assumption, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result, and the only test of this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.

> Once the accused's knowledge of the circumstances and nature of his acts has been ascertained, the only thing that can rebut the presumption that he intends the natural and probable consequences of those acts is proof of incapacity to form an intent, insanity or diminished responsibility. The test of the reasonable man, properly understood, is a simpler criterion than that of the "presumption of law" and contains all the necessary ingredients of malice aforethought.
>
> There is no warrant for drawing any distinction between the case where serious harm is "certain" to result and that where it is "likely" to result. The true question in each case is whether there is a real probability of grievous bodily harm.

The judgment caused a great deal of controversy and was, in effect, ignored by later courts without the case actually being overturned. To clarify the situation for Hong Kong, s 65A of the Criminal Procedure Ordinance was enacted. It provides:

> **CPO S65A Proof of criminal intent**
>
> (1) A court or jury, in determining whether a person has committed an offence-
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his acts or omissions by reason only of its being a natural and probable consequence of those acts or omissions: but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.
>
> (2) In this section "court" includes the District Court and a Magistrate.

Section 65A (which reproduces s 8 of the English Criminal Justice Act 1967) does not alter the substantive law relating to murder or define what *mens rea* needs to be proved by the prosecution in such a case. The effect of the statutory provision in both Hong Kong and the UK is to ensure that this presumption is simply a *permissible inference* which might be drawn from the other facts as to whether in fact the accused had the requisite intention that the prosecution are required to prove. A jury must not infer that an accused intended or foresaw simply because this was a natural and probable consequence of his actions: instead, a jury *shall* (the provision is mandatory) decide whether the accused did *in fact* intend or foresee. (See for example ***R v Fung Mui Lee*** (CA22/1995, 21 September 1995). Whether someone foresaw something is generally to be determined according to their subjective intention: ***R v Li Ping Lun & Anor*** [1977] HKDCLR 32 per Judge Rhind. This presumption, however, is alone sufficient to justify the jury in inferring criminal intent, which specific intent is not required to be shown (See for example, ***Com v York***, 9 Met 93, 43 Am Dec 373; it was held that it is not erroneous to charge that the presumption that an unlawful act was done with an unlawful intent, and that a person intends to the ordinary consequence of his voluntary act, is by law satisfactory, if uncontradicted by other evidence; and that when the doing of an act is proven which, if coupled with guilty intent, would be a violation of law, the burden of showing the absence of guilty intent is usually upon the accused).

The presumption of criminal intent, even where it has been shown that the act charged was done with the knowledge of the facts, is not a presumption of law, but a question for the jury. It is error to instruct them that the law presumes a criminal intent. They may be instructed that from such facts they may infer criminal intent. But where

a specific intent is necessary to make the act criminal, the specific intent cannot be inferred from the act.

See for example, ***People v Baker***, 96 NY 340, 2NY Crime Rep 218 – it was held error to charge the jury that if they found that the defendant made the representations charged, and they were false, and that he knew they were false when he made them, then the law presumed the fraudulent intent. The court said "The jury, from these facts, and from all the other facts, may infer a fraudulent intent, but the law does not presume a fraudulent intent".

3.04 Presumptions of fact

A presumption of fact exists where, upon proof of a fact or facts (X, or X and Y), another fact (Z) may be inferred without further proof. This further fact (Z) is presumed to exist because it is probable that it exists; but it stands as a presumed fact unless and until the contrary is proved by the opposing party. This often involves elements of crime that are difficult for the prosecution to prove, like the purpose of ulterior motive of the accused. The accused is in a better position to raise evidence to indicate the ulterior purpose. To illustrate how this works, imagine the prosecution being able to prove that the accused broke and entered a dwelling, there will be a presumption that the accused intended to commit an indictable offence.

Other common examples of well-known presumptions of fact are set out below:

A Presumption of marriage

Where there is a ceremony of marriage followed by cohabitation as husband and wife, there is a presumption that the parties are lawfully married. The presumption of marriage may be displaced by contrary evidence, but the evidence must be "the clearest and most satisfactory evidence": ***Kao Yeung Lun-luk v Kao Cho, David*** [1975] HKLR 449 (SC) per Trainor J.

In criminal cases, the prosecution must prove that the ceremony took place and where serious charges are laid against the accused, it will not be sufficient if the accused makes an admission of marriage (for example, on charges of incest). In ***L v C*** [2007] 3 HKLRD 819 the couple celebrated at a marriage ceremony and then co-habited for ten years, which raised the presumption of marriage for the purposes of the offence of bigamy. On the other hand, the mere fact of intimacy between a master and a servant residing in his house will not be sufficient to raise the presumption of marriage for the purposes of bigamy: ***Woo Yan Nui Oi v William G Woo and Daisy Woo*** (1949) 33 HKLR 202 (SC) per Sir Leslie Gibson CJ.

> Tuesday Law Report: Widow could rely on presumption of marriage
>
> Kate O'Hanlon
>
> *Tuesday, 9 November 1999*
>
> ***Chief Adjudication Officer v Bath***
>
> Court of Appeal (Lord Justice Evans, Lord Justice Schiemann and Lord Justice Robert Walker) 22 October 1999
>
> WHERE THERE had been manifold non-compliance with the provisions of the Marriage Act 1949 in a Sikh marriage ceremony, the wife was none the less able to claim a widow's pension after her husband's death in reliance on the presumption of marriage from long cohabitation.

The Court of Appeal dismissed the appeal of the Chief Adjudication Officer against the decision of a social security commissioner that the respondent was entitled to a widow's pension.

The respondent, now aged 59, had gone through a Sikh marriage ceremony in a Sikh temple in 1956 when she was aged 16. She and her husband, then aged 19, had recently arrived in the United Kingdom, and were unfamiliar with the English language and with English laws and customs. They had lived together as man and wife for 37 years until the husband's death in 1994, had had two sons, and had built up a successful business. The husband had paid income tax and social security contributions on the basis, which had never been queried, that he was a married man.

When he died, the respondent applied for a widow's pension under section 38 of the Social Security and Benefits Act 1992. Her application was refused on the ground that she was not a widow because there was no evidence of a valid marriage ceremony in accordance with the Marriage Act 1949.

The respondent appealed to the Social Security Appeal Tribunal, which, whilst sympathising with her predicament, dismissed the appeal on the ground that the ceremony could not be accepted as a valid marriage because it had been established that it had taken place in a Sikh temple which was not registered for performing marriages, and had not been registered in a Register Office.

The respondent appealed to a Social Security Commissioner, who allowed the appeal, holding that the marriage had been validated by the common law presumption of marriage from long cohabitation. The Chief Adjudication Officer appealed.

Richard McManus QC (Solicitor to the Department of Social Security) for the appellant; the respondent did not appear and was not represented.

Lord Justice Robert Walker said that apart from the presumption of marriage arising from long cohabitation, the law as to the validity of marriages was now wholly statutory, and contained in the 1949 Act.

In section 49 it stated expressly that a marriage was void if the parties to it "knowingly and wilfully intermarry" in contravention of specified requirements.

The respondent and her husband had intended to get married and had not intended to break the law in any way. They did not therefore come within the scope of section 49, and there was no other statutory provision which would expressly have rendered their marriage void.

Notwithstanding that, there had nevertheless been a manifold non-compliance with the provisions of Part III of the Act: there had been no notice of marriage under section 27; no declaration under section 28; no entry in the marriage notice book under section 31, no certificate under section 32, no registered building under section 41, and no registrar or authorised person present under section 44.

If the respondent and her husband had been compelled by adverse circumstances to separate soon after the ceremony, it was doubtful whether they could have been regarded as lawfully married under English law, despite the logic of the argument based on the mental state required to render a marriage void under section 49.

However, where there was an irregular marriage ceremony which was followed by long cohabitation, it would be contrary to the general policy of the law to refuse to extend to the parties the benefit of a presumption which would apply to them if there

were no evidence of any ceremony at all. In the present case there was insufficient evidence to rebut the presumption, and accordingly the decision of the Social Security Commissioner was correct.

B *Presumption of age*

By virtue of the Criminal Procedure Ordinance (Cap 221) s 106A:

CPO S106A Presumption and determination of age

(1) Where the age of any person at any time is material for the purposes of any proceedings in this Ordinance or any other Ordinance regulating the powers of a court in relation to offenders, his age at the material time shall be deemed to be or to have been that which appears to the court, after considering any available evidence, to be or to have been his age at that time.

(2) In this section, "court" includes the District Court and a magistrate.

There is a rebuttable presumption that parties to a conveyance are of full age.

The presumption of age doctrine has been widely applied for judgement purposes in court proceedings. For example, where the proceedings are commenced against someone who is alleged to have been a young person at the time the offence was committed but is later determined, prior to sentencing, that the person was not in fact a young person at the time of the alleged offence, the proceedings must either be dismissed if the person was under 12 at the relevant time, or continued if the person was over 18 at the relevant time, according to the Youth Justice Act of British Columbia, Canada. If the proceedings are continued against an adult, they are valid regardless of the fact that the matter was dealt before the young person's age was determined.

C *Presumption of knowledge in tax returns*

There is a presumption that an individual is aware of the contents of his or her tax return as set out in s 51, Inland Revenue Ordinance (Cap 112). This presumption is not unconstitutional because it is capable of being rebutted and it is always for the prosecution to establish knowledge: ***The Queen v Ng Wing Keung*** [1997] HKLRD 142. This presumption can be rebutted and it is for the prosecution to establish knowledge.

In ***Ng Wing Keung*** the sole proprietor of an insurance agency business, was convicted on four charges of wilful use of a fraud, art or contrivance with intent to evade tax, contrary to s 82(1)(g) of the Inland Revenue Ordinance (Cap 112) and four charges of wilfully making a false statement with intent to evade tax, contrary to s 82(1)(c) of the same Ordinance. The charges related to four separate profits tax returns filed by D. In each of these returns, D was alleged to have falsely represented to the Inland Revenue Department that he had paid commissions to sub-agents which over four years came to $1,887,840 in deductible expenses and a total tax-saving of $269,439. There were in fact no sub-agents and the schedule attached to the returns claiming these "expenses" was false.

The trial judge took into account:

(1) the time span covered by the offences;

(2) the sophisticated method used to evade tax;
(3) the amount of tax evaded;
(4) that D had repaid the tax in full after the falsity of his returns had been exposed;
(5) that D was responsible for the dishonest scheme and would have been the beneficiary if it had succeeded; and
(6) that D was a man of previous good character.

He adopted three consecutive terms of six months' imprisonment as his starting point but considered that that would probably cause D's ruin. Accordingly, he sentenced D to a total of three months' imprisonment by way of concurrent terms of that duration and fined him a total of $940,000.

D sought leave to appeal against conviction and sentence arguing that s 51(5) of the Inland Revenue Ordinance was inconsistent with Art 11(1) of the Hong Kong Bill of Rights Ordinance (Cap 383), which secures the presumption of innocence and that this was an appropriate case to suspend the sentence of imprisonment.

On appeal it was held that, although s 51(5) of the Inland Revenue Ordinance deemed an individual to be cognizant of all matters in his return, it was not an irrebuttable presumption as it allowed for proof to the contrary. The only thing that an individual was deemed to be aware of under s 51 was the contents of his return. While s 51(5) could be of some assistance to the prosecution by relieving it of having to prove certain matters, the primary burden remained with the prosecution and no dishonesty was presumed or deemed. Accordingly, s 51(5) was consistent with the Bill of Rights.

D *Presumption of possession and knowledge of dangerous drugs*

The Dangerous Drugs Ordinance (Cap 134), section 47 provides :

Presumption of possession and knowledge of dangerous drugs

47.- (1) Any person who is proved to have had in his physical possession –

(a) anything containing or supporting a dangerous drug;

(b) the keys of any baggage, briefcase, box, case, cupboard, draw, safe-deposit box, safe or other similar container containing a dangerous drug;

(c) (repealed)

shall until the contrary is proved, be presumed to have had such a dangerous drug in his possession.

(2) Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of the drug.

(3) The presumptions provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the dangerous drug.

The Court of Final Appeal in ***HKSAR v Hung Chan Wa*** [2006] 3 HKLRD 841 'read down' this provision so that the presumptions thereby created imposed only an evidential burden on the defendant; that is, a burden to place evidence before the court which, if believed, could be taken by a reasonable jury to support the defence.

R v Leung Ping-lam – District Court (Case No 235 of 1991)

The defendant was found in possession of two keys, one of which opened the door to a room in a premise from which the defendant was seen to have come out, and one of which opened the door to the premises itself. Two unsealed plastic packets and seven sealed plastic packets of dangerous drugs were found in the room. The defendant was charged with possession of dangerous drugs for the purpose of unlawful trafficking under ss 7(1) and (2) of the Dangerous Drugs Ordinance (Cap 134). The court raised as a preliminary issue whether the presumption as to possession and knowledge contained in s 47 of the Ordinance was consistent with the presumption of innocence in Art 11(1) of the Bill of Rights.

The presumption of possession under ss 47(1)(c) and (d) of the Dangerous Drugs Ordinance and the presumption of knowledge under s 47(3) of the same Ordinance are presumptions of an essential element of the offence under s 7 of the Ordinance. The burden of rebutting these presumptions lies on the defendant, who has to satisfy the court on a balance of probabilities. The defendant could be convicted for the offence even if he succeeded in raising a reasonable doubt on the correctness of these presumptions, but was not able to rebut them on a balance of probabilities. Further, any limitation sought to be imposed upon Art 11(1) would not be necessary or justified. Accordingly, ss 47(1)((c) and (d) and s 47(3) are in violation of Art 11(1) of the Bill of Rights, and must be repealed.

3.05 Judicial notice

It is possible to view a court proceeding as a set of decisions made by the judge and jury concerning the existence of facts and the application of the law. These decisions are based on information which may come from various sources, and judicial notice is one source of information.

Some matters are deemed to be established even though no evidence is introduced to support them because they are 'judicially noticed'. They are judicially noticed because they are taken to be within the knowledge of judges or the jury. Judicial notice operates as a *substitute* for proof rather than as a form of proof. Judicial notice is *conclusive* as to the fact noticed: no evidence is admissible to contradict the fact and argument by counsel is not allowed. Accordingly, courts exercise care in taking judicial notice.

A court or jury may be asked to receive and to act upon facts which are either:

(1) matters of general knowledge (notorious facts), or
(2) matters which can be discovered by resort to sources of indisputable accuracy to which it is proper to refer.

The general rule applies to both judges and juries.

However, the rule does not permit judges or jurors to rely upon their *private knowledge* of any of the facts of a particular case: the principle is confined to matters which are so *generally known* that all the persons may be presumed to be aware of them. Nonetheless, the facts of which notice may be taken will vary as knowledge expands or changes in material respects and so it can be said that there is no fixed boundary to what may be judicially noticed.

CHAPTER 6

Witnesses: Competence, Compellability and Defendants

6.00 The oral tradition

A principal foundation of the common law is the oral tradition. Access to the truth, at common law, is best secured by hearing from persons who saw or heard the occurrence which is the subject of dispute and whose evidence can be tested through the forensic process of examination and cross-examination. Originally, as we have seen, jurors were selected because they were from the neighbourhood and were likely to have personal knowledge of a crime and could bring that knowledge into the courtroom. As the jury evolved, personal knowledge of the case became a disqualification from jury service and individuals who possessed knowledge of the occurrence in question were required to be sworn in as witnesses and to give evidence accordingly.

Under the principle of party autonomy, which is at the heart of the adversarial system, the general rule is that the parties to litigation decide which witnesses are to be called and in what order. There are some qualifications which need to be made to this in criminal cases arising from the duty of the prosecutor to act fairly and because a trial judge has discretion to call a witness at any time up to the point at which the jury retires to consider its verdict. For its part, the broad rule is that there is no obligation upon the defence to call particular witnesses and, indeed, there is no obligation for anyone, including the defendant, to give evidence.

6.01 General background regarding witnesses

The common law system emphasises the self-contained hearing (or trial) the outcome of which turns upon the performance of the witnesses. This is still very much the case in criminal trials though less so now in civil trials.

The principles of *judicial neutrality* and *party autonomy* mean that the parties are free to call whatever witnesses they wish. The principle of party autonomy is, as stated, affected to some extent in criminal litigation by the obligation upon the prosecutor to act fairly. This, for example, requires the prosecution to advise the defence in advance of trial of relevant unused material, ie, material in the prosecution files but not relied upon by the prosecution in the presentation of its case, which might help the defence case.

The common law system of *oral trials* is based upon the principle that the witness should be under a responsibility to tell the truth. Historically, when religion held greater sway in society, the oath was considered a major guarantor of truth in the belief that those who breached the oath would suffer eternal damnation. In ***The Queen's Case*** (1820) 2 Brod & Bing 284, Chief Justice Abbott said:

> "[I]n taking that oath, he has called his God to witness, that what he shall say will be the truth, and that he has imprecated the divine vengeance upon his head, if what he shall afterward say is false."

This meant that the oral testimony of a witness is inadmissible at common law unless the witness has been sworn to speak the truth. The oath must be administered in open court and, under the Ordinance, must be 'appropriate' to the religious belief of the person taking the oath.

Oaths and Declarations Ordinance (Cap 11), (as amended), s 5:

OADO S 5 Normal manner of administration of oaths

(1) An oath may be administered and taken in the following form and manner –

The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that", followed by the words of the oath prescribed by law.

(2) The officer shall, unless the person about to take the oath objects thereto, or is physically incapable of so taking the oath, administer the oath in the form and manner aforesaid:

Provided that, in the case of a person who is neither a Christian nor a Jew, the oath may be administered in any manner which is appropriate to his religious belief.

(3) In this section, "officer" means a person authorised to administer an oath.

If a witness objects to taking the oath, the witness will be permitted to make an affirmation instead: **Oaths and Declarations Ordinance (Cap 11)**, s 7(1):

> "A person, upon objecting to being sworn, shall be permitted to make his affirmation instead of taking an oath to any purpose for which an oath is required by law."

6.02 Competence and compellability

In dealing with witnesses, one must distinguish two distinct matters: *competence* – whether a potential witness is competent to give evidence; and *compellability* – whether a witness may be lawfully compelled to give evidence.

6.03 Competence

Who is competent?

Witnesses are competent to give evidence if their evidence is receivable by law in the proceedings in question.

Historically, various kinds of people were not considered competent – including those with criminal convictions (deemed to be lacking in moral responsibility) and parties to the case (thought to be inevitably biased in their own favour).

The modern rule is that everyone is presumed to be competent unless there is something to suggest that this may not be the case, ie a general *presumption of competence*. A person would be incompetent, for example, if because of mental health problems, he or she was incapable of remembering events, recalling them, understanding questions put to them or giving rational answers.

The main exceptions are 1) limited companies, 2) young children, 3) mentally incapable witnesses. In criminal cases we can add 4) husband and wife against each other in certain circumstances, and 5) the defendant as a witness for the prosecution.

1) **Limited companies** are not competent witnesses even though they have legal personality. They may, of course, be competently represented by an appropriate officer of the company.

2) **Young children** are subject to special rules regarding their evidence: s 4 of the Evidence Ordinance and ***R v Fung Kam-Keung*** [1991] 1 HKLR 377 (CA), as discussed further in Chapter 8.

3) **Mentally incapable** people are covered by s 3B **Evidence Ordinance** which provides that the only persons who are not competent are:

"persons of unsound mind, who, at the time of their examination, appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly;"

The section further provides that:

"no person who is of unsound mind shall be liable to be summoned as a witness without the consent previously obtained of the court or person before whom his attendance is required."

The effect of s 3B is that it is not enough for a witness to be of unsound mind: he or she must also be incapable of receiving and relating just impressions. Essentially this comes down to whether the witness can give intelligible testimony.

4) **Husband and wife** are adverted to in the Evidence Ordinance

Section 6 EO provides:

"Nothing in this Ordinance shall render any husband competent or compellable to give evidence for or against his wife or any wife competent or compellable to give evidence for or against her husband in any criminal proceedings."

This means that it is necessary to look outside the EO for guidance on the position of defendants and their spouses in criminal cases, as discussed in the Criminal Procedure Ordinance, which will be discussed in more detail in chapter 8.

5) The **prosecution cannot call the defendant** as a witness as long as he or she is the defendant: this would take away the right of silence and impose a burden of proving innocence on the defendant.

What is the process for determining competency?

(i) Whether a witness is competent is a *question of fact* which is decided by the judge at the *voir dire*. As in other instances relating to admissibility, where there is a question as to the competency of a witness, the judge should hear evidence at a *voir dire* from the witness or others in the absence of the jury: ***R v Deakin*** [1995] 1 Cr App R 471 (CA).

In ***R v Deakin*** [1994] 4 All ER 769 (CA) the defendant was charged with various acts of indecent assault upon a woman suffering from Down's syndrome. Questions were raised at trial as to the alleged victim's competence to give evidence. The court held:

(A) Questions of admissibility of evidence are for the judge to decide.

(B) If after hearing the evidence and the submissions on the issue in the presence of the jury, the judge decides against admitting the evidence in question, the jury would have difficulty in excluding from their mind the evidence which the judge had ruled out. In the present case this consideration was not significant as the prosecution would not have proceeded if the judge had decided not to admit the evidence of the complainant.

(C) The rule, if it be a rule, that the jury should hear all the evidence given in a case does not here apply because at the time the evidence of the psychologists was given, the complainant was not a witness. It was of course only after hearing the evidence that the judge was able to rule on the complainant's competence to give evidence.

(D) While acknowledging that it is right in law that questions relating to the competence of the witness in question should be answered by the witness himself in the presence of the jury, different considerations arise in relation to the evidence given by "third party" experts. In the former case the jury may be assisted in deciding whether to accept the evidence of the complainant by observing the manner of his or her answers to the judge's questions. The evidence of the experts is in an altogether different category.

(E) The jury would not be assisted in deciding the issue before them by hearing the expert evidence, which was concerned with the capacity of the complainant to tell the truth. Where a question arises as to the competence of a witness, the judge will hear evidence on this matter and give a ruling. Where necessary, evidence can be called to show competence.

(ii) For prosecution witnesses, the judge must be satisfied beyond reasonable doubt that the witness is competent; and it is likely that for defence witnesses the prosecution must prove incompetence.

Objections to competency are usually dealt with before the witness gives evidence: ***Toohey v Metropolitan Police Commissioner*** [1965] AC 595.

6.04 Compellability

For a witness to be compellable, as a prerequisite, the witness must be competent. Compellability means they may lawfully be required by the court under the sanction of

a penalty for contempt, to give evidence as a witness (see: s 34(1) Criminal Procedure Ordinance, Cap 221:

> 34(1) For the purpose of any criminal proceedings before the court a summons requiring the person to whom it is directed to attend before the court and give evidence or produce any document or thing specified in the summons may be issued out of the court.

A compellable witness who refuses to testify, without just cause or who without just cause refuses to answer a question, is liable to be punished for contempt. A witness who gives evidence may be cross-examined.

Cross-examination is at large so that, subject to exceptional cases, any question (eg as to their previous convictions) can be put to the witness provided that the question is relevant.

Leave for such cross-examination is given only if the judge is satisfied that it would be unfair to the defendant to refuse to allow that evidence to be adduced or the question to be asked. See: ***R v Viola*** [1982] 3 All ER 73, ***Cheung Moon-tong v R*** [1981] HKLR 402 (CA)

Cheung Moon-tong v R

> The evidence was that, while in the company of a third young man, the appellants accosted two European girls who were making their way back to Sek Kong after spending a weekend on Hong Kong Island. The girls said that they were somewhat reluctant to accept a lift in the appellants' car but were bundled into the back seat. They set off up Route Twisk but were then driven to an isolated spot near the Tai Lam Chung Reservoir. Eventually the car stopped and the second appellant, who had been driving, attempted to fondle the breasts of the first girl. When she objected, he produced a large knife and ordered her out of the car. According to the girls they were then raped, the first by the second appellant and the second initially by the first appellant and then by the third man, who was not before the court. Both appellants were alleged to be present, aiding and abetting the rape by the other. During the attack on the first girl lights were seen some distance away and she started to scream, but the second appellant put his hand over her mouth and in so doing caused an injury which was found on her lip. Afterwards the man reverted to their previous friendly attitude and took the girls back to Sek Kong. On the way they sought to arrange a further meeting and exchanged telephone numbers, the girls co-operating so that they would not be abandoned out in the country. A subsequent medical examination disclosed that both girls had semen in their vaginas.
>
> The appellants did not deny having picked up the girls and taken them to the place described. The defence of the first appellant was that the girls consented to have intercourse but that he was unable to penetrate the second girl because he could not raise an adequate erection. The second appellant similarly alleged that the girls consented and, though admitting intercourse with the first girl, alleged that he withdrew before ejaculation.
>
> It was a substantial part of the defence of both appellants that the semen found in the girls was not theirs and in the course of the trial their counsel sought the leave of the judge, under section 154 of the Crimes Ordinance, to cross-examine the girls about their previous sexual experience. This step was prompted by questions put to the girls in examination in chief to establish that they had not had sexual intercourse with another man during the previous week. The judge refused leave and that refusal was the subject of the appeal.
>
> Sir Alan Huggins, VP for the Court held:
>
> > "It must be said that the basis of the application for leave to cross-examine upon this matter was not put before the judge in the clearest manner. In particular there was no indication that the cross-examination was primarily concerned with sexual

> experience during the previous week. Had there been, it is possible that the judge would have taken a different view. His decision was that there was no reason for giving leave to advance what he described as (and junior counsel for the applicants conceded to be) "a standard defence". Exactly what was meant by that phrase we are not sure, but it does suggest that the judge had not appreciated that the cross-examination was to be concerned with the presence of the semen rather than to be a general attack on the character of the girls. There was, indeed, no reason for giving leave to cross-examine with a view to attacking their characters. Nevertheless the importance of the issue whether the semen could have come from persons other than the appellants was indicated by the questions which had been put by counsel then appearing for the Crown. In the case of the second appellant his allegation of withdrawal before ejaculation stood little chance of belief in the face of the presence of the semen and the uncontroverted (and, by reason of the previous ruling in relation to the first appellant, unchallenged) evidence that she had not been with another man. Had he been believed on this issue there was at least a possibility that the jury would have doubts concerning the lack of consent. In our opinion a fair trial was impossible unless the second appellant was allowed to challenge the girl's denial of previous intercourse...."
>
> The first appellant denied ever penetrating the second girl and prima facie it was equally vital to his case that he should be allowed to challenge her denial that she had been with another man previously. There was, however, this difficulty – the significance of which was not made clear to us on the hearing of the appeal – that there was evidence of a subsequent rape of this girl by the third man. (Incidentally, the evidence of the first appellant was that he attempted sexual intercourse with the girl after the third man and not before him). The girl said that the third man ejaculated inside her, and, if believed, that could have accounted for the semen found and it would have been immaterial whether the girl had had sexual intercourse with someone else prior to the offence charged. Only if the evidence of connection with the third man was disbelieved would the possibility of prior sexual intercourse have become material: it could then have lent credence to the evidence of withdrawal and conceivably have raised a doubt in the minds of the jury as to the rest of the girl's evidence. Although not explicitly admitted, it does not seem to have been denied that the third man had sexual intercourse with the second girl and the jury probably accepted that he did. In the absence of evidence contradicting the girl they probably also accepted her evidence that he ejaculated inside her, unless they thought that she had been proved to be wrong on some other issues. It is here, again, that the denial of previous sexual intercourse was important. If counsel for the defence had been able to shake her on that, it is conceivable that the jury might have begun to have doubts upon other matters. The refusal to allow cross-examination could thus have contributed to the verdicts returned.

However some competent witnesses are not compellable. Generally the main categories of competent but not compellable witnesses are (1) Husband and Wife in certain circumstances, where one of them is accused, as discussed at chapter 8; (2) The defendant for the defence; and (3) Diplomatic agents under the Consular Relations Ordinance (Cap 259), s 13.

6.05 Defendants in criminal cases

At common law a party to proceedings was considered to have the greatest incentive to manufacture or exaggerate evidence. Originally they were not competent witnesses at all and could not, accordingly, testify in their own trial: until just over 100 years ago, the defendant in a criminal case could not give evidence in his or her own defence. These rules have changed.

The old common law rule by which the accused person was rendered incompetent to give evidence was reversed by s 1 of the Criminal Evidence Act 1898 which provided:

> "Every person charged with an offence... shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows- (a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application....."

The effect of this change in the law was to make the accused a *competent* witness in his or her own defence and also of the defence of a co-accused. However, the accused is not thereby a *compellable* witness; he or she can be called as a witness only upon his or her own application.

Parties to a civil case are now fully competent. Whilst a party to a civil case may call the other party as a witness, this would be unwise because in calling a person as a witness the party is putting that person forward in support of his or her case (which would manifestly not be so and lead to a 'hostile' witness situation dealt with later).

6.06 Defendants as witnesses

The defendant in a criminal case is now a competent (but not compellable) witness for the defence at any stage in the proceedings. By virtue of Article 11(2) (e) of the Bill of Rights:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality...(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; .."

In line with this, s 54(1) CPO provides:

> "Every person charged with an offence, whether charged solely or jointly with any other person shall be a competent witness for the defence at every stage in the proceedings...."

The defendant may not, however, give an unsworn statement from the dock: CPO section 54(2):

> 54(2) "Notwithstanding any rule of law, the right of a person charged to make a statement without being sworn is hereby abolished."

A Defendant as a prosecution witness in a criminal trial

The general rule is that a defendant is *not a competent witness for the prosecution*. In other words, defendants cannot be called as prosecution witnesses as long as they remain defendants in that case. Thus, if a defendant is tried alone, that defendant cannot be called as a witness by the prosecution; similarly, when two defendants, D1 and D2 are tried jointly, D1 cannot be called to give evidence against his co-accused D2.

Charged Jointly

An important question arises in practice where more than one defendant is jointly charged with committing an offence. In such an event, the prosecution might wish to call one defendant (D1) as a prosecution witness against another jointly-charged defendant (D2). To enable this to happen, the prosecution must ensure that the defendant they propose to call as a witness (D1) ceases to be a defendant in those (formerly, joint) proceedings. This can be achieved in a number of ways, by:

(1) the defendant (D1) pleading guilty; or

(2) the defendant (D1) pleading not guilty and the prosecution accepting the plea by entering a *nolle prosequi*, giving the defendant an immunity from prosecution; or

(3) by the trials being separated (severed); or

(4) the defendant (D1) having been previously acquitted

In such circumstances, a defendant (D1) who ceases to be a defendant and who can give relevant evidence for either side is both a competent and a compellable witness.

Where the witness gives evidence for the prosecution under some arrangement or deal with the prosecutor, the defence is entitled to know the circumstances under which the testimony is being proffered. As was said in ***R v Tsui Lai-ying and Others*** [1987] HKLR 857:

> "The defence is entitled to know everything about [the accomplice], the terms of the immunity and any matters surrounding it which could affect the credibility of his evidence...credibility is clearly a jury question. The issue here is: were the witnesses so inherently incredible and was the background of the granting of the immunities to them so much against the public interest that the trial judge, in permitting their evidence to go before the jury, was wrong in the exercise of his discretion?"

B *The defendant to a criminal trial as a witness for a co-defendant*

The defendant is a competent but not compellable witness for a co-defendant. Thus, in ***R v Rowland***, R and his co-defendant, B, were jointly tried. R elected not to give evidence in his own defence. R, however, agreed to give evidence on behalf of B. It was held that R, by agreeing to give evidence for B, had exposed himself to cross-examination by the prosecution as to his (R's) own guilt. Equally, if the defendant in the course of giving evidence concedes that he is guilty, he may be cross-examined with a view to obtaining incriminating evidence against his co-defendants.

R v Rowland [1910] 1 KB 458 (CCA)

The appellant was indicted together with one Bessant for having broken and entered a dwelling-house and stolen certain articles therein, and also for receiving the articles knowing them to be stolen. The evidence went to show that the house was broken into and the goods in question were stolen on October 12, and that on October 14 the appellant pledged the goods with various pawnbrokers. On October 15 the appellant was taken into custody, and at that time none of the goods were in his possession. At the trial the appellant declined to give evidence on his own behalf, but at Bessant's request he went into the witness- box and gave evidence with the object of establishing Bessant's innocence. He did not when in the witness-box make any statements tending to exculpate himself. Counsel for the prosecution, however, cross-examined him as to the circumstances under which he obtained possession of the goods which he pawned, with the view of showing that he was guilty of the offence charged. The appellant was found guilty of receiving stolen goods.

Lord Alverstone CJ:

> "...[I]t is contended that the prisoner was wrongly cross-examined as to his own share in the transaction. It was said that, as he only gave evidence in chief in support of Bessant's case and did not give any evidence in support of his own, he could only be cross-examined for the purpose of establishing Bessant's guilt. That turns upon the language of s 1, subs (e) of the Criminal Evidence Act 1898 , which provides that "A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged." Here the appellant was "a person charged," and he was also "a witness in pursuance of this Act," for

before the Act he could not have given evidence in Bessant's favour. Therefore he comes directly within the words of the subsection...."

The situation could exceptionally arise in other situations, for example, on a *voir dire* (trial within a trial to determine the admissibility of some item of evidence) as to whether a confession said to have been made by one co-accused was voluntary and the other co-accused is able to give relevant evidence on this point (for example, that D1 says that he was present when D2 was struck by a police officer, after which D2 made a confession).

This situation is, as we have noted, unlikely to occur on the main issue of guilt or innocence because if one defendant (D1) testifies for another co-defendant (D2), D1 can be asked questions about his or her own involvement in the offence.

C The defendant in a criminal trial as a witness for the defence

As we have noted, a defendant is a competent but not compellable witness for the defence (s 5 Evidence Ordinance and s 54 Criminal Procedure Ordinance, (Cap 221) (CPO)). Section 54(1) CPO provides:

> Every person charged with an offence, whether charged solely or jointly with any other person shall be a competent witness for the defence at every stage in the proceedings.

Similarly, as stated above, the Hong Kong Bill of Rights Ordinance (Cap 383) Art 11(2)(e) provides:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality –
>
> ....(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ....

Defendants to criminal cases in Hong Kong have the right to silence (the position in England and Wales has been changed by the Criminal Justice and Public Order Act, 1994).

The right to silence must not be undercut by the prosecution commenting upon the failure of an accused to give evidence. There is, however, no restriction upon a co-accused commenting on the failure of a co-defendant to give evidence and the court may comment upon that failure: ***R v Bathurst*** [1968] 2 QB 99.

Bathurst

The defendant Bathurst, bought a knife and later stabbed and killed his former mistress, Sandra Holt, at the house of the man with whom she was then living. The defendant was arraigned on an indictment charging him with murder. He admitted the killing but contended that he was only guilty of manslaughter by reason of diminished responsibility, because at the time he was suffering from reactive depression, a mental illness which had substantially impaired his mental responsibility. Two psychiatrists were called by the defence, but the defendant himself did not give evidence. In summing-up the judge, Melford-Stephenson J. commented upon the fact that the defendant had chosen to remain silent and not to go into the witness box. He was convicted of murder and sentenced to life imprisonment.

Lord Parker made some *obiter* comments which have been influential. He said that, when the burden of proof is on the prosecution:

> "... the accepted form of comment is to inform the jury that, of course, the accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that, while the jury had been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box...
>
> When one comes to this sort of case [diminished responsibility], the case where the burden is on the defence and the defendant does not go into the witness box, the comment is directed to something quite different, it would more likely take this form, that he is not bound to go into the witness box, nobody can force him to go into the witness box, but the burden is upon him, and if he does not, he runs the risk of not being able to prove his case."

In other words, failure to provide support for the defence theory of the case from the witness box might be taken to have weakened the defence. The strength of comment a judge is allowed to make will vary according to the circumstances of each case and must always be viewed in Hong Kong against the background of the right to silence of the accused.

If the defendant gives evidence he is to be treated in all respects as any other witness would be treated *subject to the protection (unless this is lost) of not being cross examined about character or previous convictions*. This is what is known as "**the shield**" (see below). Subject to that cross-examination of the defendant is at large.

The defendant could, for example, be cross examined about parts played in the alleged crime by a co-accused: see ***R v Paul*** [1920] 2 KB 183. In this case, Paul, Goldberg and others were jointly charged with burglary of a warehouse and stealing furs. The defence was alibi. Near the end of the trial, the trial Judge told Goldberg that he was not bound to give evidence unless he wished to do so, but could do so if he wanted to. Goldberg elected to go into the witness box, was sworn, said that he pleaded guilty and had nothing more to say. He was then cross-examined by the prosecutor and incriminated his co-defendants.

Equally, the defendant may be questioned about his own liability as in ***R v Rowland*** [1910] 1 KB 458 (above).

A defendant who gives evidence in his or her own defence can be cross-examined *on behalf of a co-defendant*, even if the evidence in chief was not adverse to that co-defendant, for the purpose of eliciting evidence favourable for that defendant.

A defendant who gives evidence can be cross-examined by the prosecution about the role of co-defendants whether or not the defendant said anything about that in examination in chief.

D The defendant cannot decline to answer when giving evidence

A defendant giving evidence cannot decline to answer questions the answers to which are likely to incriminate him on the offence charged: section 54(1)(e) Criminal Procedure Ordinance (cap 221):

> 54(1)(e) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;

If an accused has chosen to give evidence and declines to answer a question, the judge will instruct the witness to answer. Failure to answer is in any event a matter

CHAPTER 11

Opinion / Expert Evidence

11.00 Overview

"My name is Sherlock Holmes. It is my business to know what other people don't know."

"On the contrary, Watson, you can see everything. You fail, however, to reason from what you see. You are too timid in drawing your inferences."

In Arthur Conan Doyle's *The Adventure of the Blue Carbuncle (1890)*

As a general proposition, the law of evidence has sought to distinguish between matters of fact and matters of opinion. Opinions involve drawing inferences from facts. Witnesses are generally limited to testify as to facts within their own personal knowledge and cannot advance their opinions on matters which are in issue. However, this will be allowed in the courtroom from layperson witnesses for convenience only in restricted circumstances. Similarly, 'expert' witnesses are permitted to give their opinions on matters falling within their area of expertise; the inference drawn by the expert should be outside the ordinary experience of the jury.

11.01 Sources of evidence

The common law insists that proof must come from the most reliable source. This applies in several areas of evidence, including hearsay (chapter 10) and opinion evidence. The traditional rule is that a witness may speak only to facts about which he or she has personal knowledge (did, said, heard, smelled or witnessed) and may not express an *opinion* about these or other facts. Whether any inference, and if so what, should be drawn from the observed and proven facts is a matter entirely for the tribunal of fact (the court or jury).

Thus, for example, on a charge of theft, a witness is permitted to say that he saw D go into a shop, take an item from the counter and leave the shop without paying for the item; but the witness cannot say that, on the basis of what he saw, D was 'dishonest' or 'intended to permanently deprive' the owner of the item in question because these latter issues relating to honesty and intention are inferences to be drawn, if at all, by the tribunal of fact once the other facts are established. Similarly, a witness is not permitted to make observations about what might have caused a fact to come into existence or what its effect might be, that D must have acted out of a particular motive; or that what D did must have put in fear or upset another party.

The admissibility of opinion evidence also depends upon the purpose for which admission is sought. Thus, where D is charged with handling stolen goods (proof of which requires that the goods were stolen goods), D's opinion or belief as whether the goods were stolen would be inadmissible to prove that the goods were stolen but would be admissible on the issue as to whether D knew or believed the goods to be stolen.

This is consistent with the fundamental doctrine of the common law that espouses trial by jury or judge (the tribunal of fact) as opposed to trial by witness. The tribunal of fact, not the witness, should draw inferences and, if need be, make value judgments. A witness should not give an opinion or state a conclusion about the very issues that the court or jury have to decide (it is sometimes said that a witness cannot give an opinion on the '*ultimate issue*'). Additionally, the giving of opinions frequently involves hearsay evidence, because the person may be relying, either explicitly or implicitly, on something that some other person has told him or her or that he or she has learned from another source.

However, despite the general statement regarding confining witnesses to what they witnessed and ruling out their opinion, it is impossible to draw any clear and indisputable distinction between 'fact' and 'opinion' and much of what is received as evidence of fact in reality involves at least an element of opinion.

For example, almost every statement made by a witness contains an element of inference. To take the example of a street robbery case resting upon identification evidence in which the prosecution relies upon identifying evidence from two witnesses, W1 and W2, both of whom were asked to attend an identification parade in which the defendant and others participated. At trial, if witness W1 to the robbery states that the person at position 6 in an identity parade, of whom she caught a fleeting glimpse in the street at the time of the robbery and who was otherwise unknown to her, is a person whom she recognises as the defendant, the witness can only be offering an opinion. A second witness (W2), who also saw the robbery, may pick out the person at position 3. A third witness (W3) may pick out the person at position 9. It is obvious that if W1, W2 and W3 are truthful they cannot all be testifying to a fact but only to an *opinion*; and in this case the opinions conflict. In reality, in such cases, each witness is giving evidence based upon an inference. The law, however, recognizes that in such cases the witness cannot give evidence at all unless they are able to express an opinion and in such cases the witness is permitted to do so.

The law recognises that all testimony to matters of fact involves opinion evidence in the sense that it is a conclusion drawn from phenomena and mental impressions (as was stated by Thayer, *A Preliminary Treatise on Evidence at the Common Law*, 1898, p 524). Even though the inference in question is one which any rational person would draw, it remains an inference. The law also recognises there are situations in which the drawing of an inference by a witness, even if possibly avoidable, is desirable. This occurs where the witness has an experience that no one else possesses, as where he or she was at the scene of the crime and saw the perpetrator and can thus identify him/her better than the tribunal of fact.

The law also recognizes and accepts that expert witnesses frequently have to rely upon hearsay evidence. In ***R v Abadom*** [1983] 1 WLR 126, [1983] 1 All ER 364 (CA) at p 127 as per Kerr LJ, four masked and gloved men broke into the office of the Williamses family business when they were working there with other members of the family. The men were wearing balaclava helmets with slits for the eyes, so those present could only form some general impression of their description, without being

able to identify them. They were armed with cudgels and the leader broke an internal window in the office to contribute to the fright experienced by those present. They demanded to know where was money kept and took over £5,000 from an office drawer.

Abadom was charged with robbery. At trial the Crown's case was that Abadom broke a window during the robbery and fragments of glass found adhering to and imbedded in a pair of shoes taken from his home after his arrest came from that window. An expert witness for the Crown gave forensic evidence that the glass from the window and the fragments found in the shoes had an identical refractive index. The witness gave evidence he had consulted statistics compiled by the Home Office Central Research Establishment and found that the refractive index referred to occurred in only 4% of all glass samples investigated by the establishment. He gave his opinion that there was a very strong likelihood the glass from the shoes originated from the window. Abadom was convicted.

On appeal, was the evidence of the Home Office research establishment's statistics hearsay and inadmissible because the expert witness had no personal knowledge of the analysis on which the statistics were based? The Court of Appeal dismissed the appeal. Kerr LJ said:

- When an expert witness is asked an opinion on a question, the primary facts on which that opinion was based must be proved by admissible evidence given either by that expert or some other competent witness.
- Once such facts were proved, the expert witness could then draw on work, including unpublished work of others in that field of expertise as part of the process of arriving at a conclusion, provided the expert referred to that material in evidence so the cogency and probative value of the conclusion could be tested by reference to that material.
- Relying on the work of others and reference to it in evidence did not infringe the hearsay rule. Accordingly, the evidence of the Crown's expert witness in which he made reference to the Home Office research establishment's statistics was admissible. The appeal would therefore be dismissed.

Kerr LJ noted at p 129 of the judgment:

> "We therefore consider that [the expert's] reliance on the statistical information collated by the Home Office Central Research Establishment, before arriving at his conclusion about the likely relationship between the fragments of glass and the control sample, was not only permissible in principle, but that it was an essential part of his function as an expert witness to take account of this material."

Generally, the law permits opinion evidence to be given in two circumstances: (1) where the giving of an opinion cannot be avoided because it does not make sense to ask the witness to separate observed facts from the inference that the witness draws from those facts; and (2) where the drawing of an inference demands specialist knowledge or skill outside the normal experience/competence of the tribunal of fact (expert evidence). Each of these will be dealt with in turn.

11.02 Unavoidable opinions by lay people

The common law recognizes that there may be situations where it would be absurd to prevent a lay person giving an opinion or to require the witness to separate what has been observed from the inference drawn by the witness. Where a witness gives

testimony which is essentially descriptive, the evidence technically is a way of summarising a set of inferences based upon the observations of the witness. This will occur where a witness states that the person involved was 'a young boy' or 'an old man': in such situations it would be absurd to require the witness to give a detailed account of all the characteristics of the person concerned which gave rise to the ultimate description as 'young' or 'old' or as 'boy' or 'man'.

The law has developed beyond this to permit lay witnesses to express opinions in other limited circumstances. This is restricted to matters concerning everyday life where opinions may be safely acted upon by other citizens. On matters with respect to which it is in practice impossible for any witness to swear positively, a lay witness may give evidence of his or her opinion on questions such as identification, condition, comparison or resemblance of persons or things. Some examples of instances where a lay witness is permitted to express an opinion include:

- identification evidence of persons
- identification of physical objects
- the condition of an object
- the value of an object
- the speed of vehicles
- health
- time
- distance
- weather conditions
- the apparent age of a person
- the physical or emotional state of the person (for example, sobriety or drunkenness; calmness or distress)
- handwriting of a person known to the witness. Such opinion in relation to handwriting comparison may be given by either laymen or experts. In the case of laymen, the opinion may be of little weight unless the witness had some demonstrated experience or expertise as for example gained through the course of business. Section 17 of the Evidence Ordinance which deals with comparison of disputed handwriting permits evidence to be given by witnesses in any proceedings where this is in issue and is not restricted to expert witnesses:

  > "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses in any proceedings, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and to the jury, if any, as evidence of the genuineness or otherwise of the writing in dispute".

- evidence may be given of reputation or character: ***R v Rowton*** Le & Ca 520, [1861-1873] All ER Rep 549.

11.03 Opinions by experts – general principles

"Perhaps, when a man has special knowledge and special powers like my own, it rather encourages him to seek a complex explanation when a simpler one is at hand."

Sherlock Holmes – In Arthur Conan Doyle's *The Adventure of the Abbey Grange (1890)*

At common law, the drawing of inferences and formulation of opinions is in general a matter for the court or jury. However, where the issue is such that competence to form an opinion or draw an inference depends upon special knowledge, study or experience, expert evidence is admissible on the matter. This rule has a long history.

In ***Folkes v Chadd*** (1782) 3 Doug KB 157, 99 ER 589 an engineer was called by the plaintiffs to give evidence as to the effect of the erection of an artificial bank for preventing the sea overflowing into meadows contributed to the choking up and decay of a harbour. The defendants complained of surprise because the engineer's report had not been disclosed in advance.

The question was, was the expert evidence admissible? The court held, that if the jury can form their own opinion on the issue it is inadmissible. However, in this situation it could provide assistance. Lord Mansfield CJ said the opinion of scientific men upon proven facts may be given by men of science within their own science. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not 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 danger they may think it does.

The accepted statement defining the boundaries of expert evidence is that of Lord President Cooper in ***Davie v Edinburgh Magistrates*** [1953] SC 34 at p 40 of the judgment:

> "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 the case."

If the issue is one on which the jury can itself form an opinion, expert evidence is *not* admissible. For example, where the state of mind of a defendant is in issue in a criminal case, the jury will have to decide whether the defendant "intended" or was "reckless" on the basis of his or her behaviour and from the circumstances that he or she knew certain facts or foresaw certain consequences. If the defendant is a person of normal disposition, expert evidence is not admissible on such issues, as discussed in ***Turner***.

In ***R v Turner*** [1975] QB 834 (Court of Appeal), Lawton LJ gave a summary of the factual background at pp 838-389 as follows:

> "Turner killed his girlfriend in a car by battering her over the head with a hammer. At his trial for murder his defence was provocation. He said he was in love with W and understood she was pregnant by him, but she had told him she had been having affairs with two other men while he was in prison and that the expected child was not his, he lost his self-control and hit her with the hammer without realising what he was doing and without intending to do her harm."

His counsel sought to call a psychiatrist (i) to help the jury to accept as credible the appellant's account of what happened and (ii) indicate why the appellant was likely to be provoked. The judge asked to see the evidence. He was handed a report by the psychiatrist based on information provided in part by medical records and in part by Turner, his family and friends. The psychiatrist expressed the following opinion at the end of the report. In the words of Lawton LJ at pp 839-340 of the judgment:

> "His homicidal behaviour would appear to be understandable in terms of his relationship with W which... was such as to make him particularly vulnerable to be overwhelmed by anger if she confirmed the accusation that had been made about her. If his statements are true that he was taken completely by surprise by her confession, he would have appeared to have killed her in an explosive release of blind rage. His personality structure is consistent with someone who could behave in this way... since her death his behaviour would appear to have been consistent with someone suffering from profound grief... in the absence of formal psychiatric illness there are no indications for recommending psychiatric treatment."

Consequently Lawton LJ refused to admit the evidence of the psychiatrist on the ground that the report contained hearsay character evidence, and was irrelevant and inadmissible. The appellant was convicted of murder. The key question was whether the expert evidence was admissible. The question was, was the expert evidence admissible? Lawton LJ said at p 841 of the judgment:

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. 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."

Note:

Is it right to imply that there is a recognized distinction between 'ordinary' and 'abnormal'? Should the expert opinion of psychiatrists be confined to speaking about those individuals who are 'abnormal'?

An expert is entitled to give an opinion only on relevant matters which are (1) within his or her particular area of expertise and (2) outside the general knowledge and understanding of the court or jury.

The facts upon which expert witnesses base their opinion must be proved by admissible evidence, otherwise the opinion of the expert will be inadmissible. Proof of the factual basis will enable the jury to evaluate and weigh the opinion of the expert. Expert evidence should be confined to factual situations relevant to the case and the expert should not be invited to speculate regarding hypothetical matters.

Expert evidence has been ruled inadmissible where it was sought to be introduced as to whether or not the defendant had formed the necessary intention on a charge of murder when there was no suggestion of insanity or diminished responsibility: ***R v Chard*** (1972) 56 Cr App R 268. In the words of Roskill LJ at pp 270-271 of the judgment:

> "...one purpose of jury trials is to bring into the jury box a body of men and women who are able to judge ordinary day-to-day questions by their own standards, that is, the standards in the eyes of the law of theoretically ordinary reasonable men and women. That is something which they are well able by their ordinary experience to judge for themselves. Where the matter in issue is outside that experience and they are invited to deal with someone supposedly abnormal, for example, supposedly suffering from insanity or diminished responsibility, then plainly in such a case they are entitled to the benefit of expert evidence. But where... they are dealing with someone who by concession was on the medical evidence entirely normal, it seems to this Court abundantly plain, on first principles of the admissibility of expert evidence, that it is not permissible to call a witness, whatever his personal experience, merely to tell the jury how he thinks an accused man's mind-assumedly a normal mind-operated at the time of the alleged crime and with reference to the crucial question of what a man's intention was."

Chard was distinguished in ***R v Toner*** (1991) 93 Cr App R 382 in which it was considered that expert evidence on the possible effect of mild hypoglycaemia on the ability to form an intent was admissible, just as medical evidence on the effects of a drug on the ability to form and intent would be: "These are matters outside the ordinary experience of jurors. They cannot bring to bear their own judgment without the assistance of expert evidence...." (per Russell LJ at p 387 of the judgment).

In ***R v Masih*** [1986] Crim LR 395 the English Court of Appeal held that the dividing line between the mentally normal and sub-normal was to be drawn at the IQ value of 70. On this basis, if the accused has an IQ below 70 the expert opinion is deemed to be sufficiently probative to justify its admission: if, on the other hand, it is 70 or above, such evidence is not admissible. On a charge of rape, Masih sought to introduce psychiatric evidence to explain how his low IQ would have affected his ability to appreciate the absence of consent. This evidence was held inadmissible because Masih had an IQ of 72 (notwithstanding the fact that he was described as 'dull-normal', immature, docile and with a limited understanding of people). Note some further reading is available at '*Psychiatric evidence: over-rationalising the abnormal*' Crim LR 1988, May, 290-294; and '*Expert evidence – mental capacity of defendant – admissibility of evidence*' Crim L R 1986, Jun, 395-397.

In general, expert evidence will not be permitted in relation to ordinary emotions such as stress, grief, insecurity and depression since these are all considered within the realms of experience of jurors. However, the law has developed in some areas such as in respect of so-called domestic violence to allow expert evidence on the defendant's condition as in 'battered wife syndrome' (learned helplessness), and personality characteristics (such as post-traumatic stress disorder) relevant to such matters as provocation and self-defence.

Courts have also adopted a more flexible approach in relation to expert evidence relating to the *reliability* of confessions. In ***R v Raghip*** (*The Times,* 9 December 1991) (consolidated with ***R v Silcott*** and ***R v Braithwaite***), the defendant was an abnormally-suggestible young man with an IQ of 74 and the Court of Appeal in England held that the psychological and psychiatric evidence of the defendant's mental condition should have been admitted on the issue of the reliability of the confession. The Court of Appeal drew a distinction between the admissibility of psychiatric and psychological evidence which went to the reliability of a confession. It is admissible in such a case if it will assist the jury in determining the defendant's mental condition, but it will not be admissible in relation to *mens rea*.

This approach has permitted expert evidence to be given on a disorder of the accused which might affect the reliability of the confession. In ***R v O'Brien*** [2000] Crim LR 676,

the English Court of Appeal laid down three conditions for admissibility: the disorder must be of a type that might render a confession unreliable; the defendant's condition must show a significant deviation from the norm; and there must be independent history of the disorder pre-dating the making of the confession. O'Brien also suggested that expert evidence in such cases- e.g. that D was unduly compliant or suggestible-might be admissible in relation not only to a confession but also in relation to D's testimony.

Where the defendant is regarded as 'abnormal', expert evidence will be admissible to assist the jury in determining whether a person with a defendant's abnormalities might be expected to know or foresee in the way required by law. It is for the judge to decide whether the expert evidence, if admitted and accepted, will show the defendant to be a normal person. Such evidence is not restricted to insanity and diminished responsibility but can cover other matters outside the experience of the ordinary person such as a person's behaviour whilst sleepwalking: ***R v Smith*** [1979] 1 WLR 1445. ***Smith*** was an appeal against conviction for murder in which the defendant had raised the defence of automatism while asleep. The English Court of Appeal ruled that the trial judge had not erred in admitting evidence of psychiatrists on sleep walking, Lane LJ stating at p 1451 of the judgment:

> "this type of automatism – sleepwalking –...is not something, we think, which is within the realm of the ordinary juryman's experience. It is something on which, speaking for ourselves as judges, we should like help were we to have to decide it and we see not why a jury should be deprived of that type of help."

Expert evidence is admissible on the question whether a prospective witness is *competent* to give evidence.

While expert evidence is rarely, if ever, admitted in cases of visual identification (because the tribunal of fact is considered to be in as good a position to make an assessment as witnesses) expert evidence may be admitted in cases involving voice identification: ***R v O'Doherty*** [2003] 1 Cr App R 5. Evidence of 'facial-mapping' may be admissible in an appropriate case as, for example, where a photograph is unclear and where it appears that the defendant has changed his appearance: ***Stockwell*** (1993) 97 Cr App R 260 at pp 263-264 per Lord Taylor LCJ:

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

And evidence from an expert at lip-reading may be given in appropriate cases: ***R v Luttrell*** [2004] EWCA Crim 1344.

The better view is that expert testimony should not be given in cases involving obscene publications where the issue is whether the articles in question have *a tendency to deprave and corrupt* those to whom they are published.

In ***DPP v A and B Chewing Gum Ltd*** [1968] 1 QB 159 A and B Chewing Gum sold chewing gum battle cards to kids 5 and above. Among the 72 cards 43 were said to deprave and corrupt children. The company was charged under s 2 of the Obscene Publications Act 1959 (UK) (a similar offence to the HK s 21 of the Control of

Obscene and Indecent Articles Ordinance (Cap 390)). Child psychiatrist evidence was sought to be admitted about the effects these cards would have on children.

The question was: Was this an appropriate case to admit expert evidence, or did it offend the rule that experts should not give evidence on the ultimate issue?

The court held that the expert evidence was admissible on the facts as it did not decide the ultimate issue the fact-finder needs to determine, nor was it within the common knowledge of the fact-finder.

Lord Parker CJ said the expert witness evidence was not on the *ultimate issue*. If the child psychiatrists were not asked directly whether any particular card tended to corrupt or deprave, they would not be giving an opinion on the ultimate issue. The psychiatrist evidence should focus on the effect these cards would have on children of different ages and what it would lead them to do. Also whether what they were lead to do was a sign of corruption of depravity. The information about children's reaction to the cards was not within the *common knowledge* of an adult jury so it was admissible.

As he remarked at p 164 of the judgment:

> "...it would be perfectly proper to call a psychiatrist and to ask him in the first instance what his experience, if any, with children was, and to say what the effect on the minds of children of different groups would be if certain types of photographs or pictures were put before them, and indeed, having got his general evidence, to put one or more of the cards in question to him and say what would their effect be upon the child. I think it would be wrong to ask the direct question as to whether any particular cards tended to corrupt or deprave, because that final stage was a matter which was entirely for the justices. On that ground alone, as it seems to me, the evidence in the present case is admissible."

Future courts have described this case as an exceptional circumstance as it seeks to avoid the ambit of the ultimate issue rule. However, the ultimate issue rule is firmly entrenched as discussed in ***R v Anderson*** [1972] 1 QB 304. A number of cases have indicated that ***A and B Chewing Gum*** is to be regarded as confined to its own special facts (a euphemism for saying that it should not be followed), in particular, that it was a case that involved very young children: ***R v Anderson*** [1972] 1 QB 304. In ***DPP v Jordan*** [1977] AC 699 (HL) Lord Dilhorne stated *obiter* at p 277 of the judgment:

> "If an article is not manifestly obscene as tending to deprave and corrupt, it seems to me somewhat odd that a person should be liable to conviction for publishing obscene matter if the evidence of experts in psychiatry is required to establish its obscenity."

Advances made in scientific and technical areas of human experience have vastly expanded the need for and reliance upon expertise. Fingerprinting was first adopted by Scotland Yard in 1902 (the same time at which such evidence was used in New York). Other early advances were made in such areas as blood grouping, ballistics, toxicology and narcotics. More recently, there has been an explosion in diverse areas such as DNA profiling, facial-mapping, corneal-mapping, photographic analysis and computer-related technologies (including data storage and retrieval).

Increasingly, courts have to come to terms with recent advances in science such as with DNA evidence. Detailed guidance on the question of DNA evidence was provided by the English Court of Appeal in ***R v Doheny and Adams*** [1997] 1 Cr App R 369 at pp 374-375, per Phillips LJ:

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

> He will properly explain to the jury the nature of the match ('the matching DNA characteristics') between the DNA in the crime stain and indeed in any blood sample taken from the defendant. He will properly, on the basis of empirical statistical data, give the jury the random occurrence ratio-the frequency with which the matching DNA characteristics are likely to be found in the population at large. Provided that he has the necessary data, and the statistical expertise, it may be appropriate for him then to say how many people with the matching characteristics are likely to be found in the United Kingdom-or perhaps in a more limited relevant subgroup, such as, for instance, the Caucasian, sexually active males in the Manchester area.
>
> This will often be the limit of the evidence which he can properly and usefully give. It will then be for the jury to decide, having regard to all the relevant evidence, whether they are sure that it was the defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics.
>
> The scientist should not be asked his opinion on the likelihood that it was the defendant who left the crime stain, nor when giving evidence should anyone use terminology which may lead the jury to believe that he is expressing such an opinion....
>
> The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides a context which gives the ratio its significance and that which conflicts with the conclusion that the defendant was responsible for the crime stain. In so far as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the effects of the particular case:
>
> 'Members of the jury, if you accept the scientific evidence called by the Crown, this indicates that there are probably only four or five white males in the United Kingdom from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics.'

Where a party proposes to adduce expert evidence in any proceeding in the Court of First Instance or the District Court, that party must give notice to the other party as soon as practicable of that evidence together with a copy of any statement, report or finding or opinion of the expert: section 65DA (1) Criminal Procedure Ordinance. Upon written request, a party must be supplied with a copy of any observation, test, calculation or other procedure on which the expert finding or opinion is based and any document or other thing or substance in respect of which any such procedure has been carried out (for these purposes, 'document' includes such things as maps, plans, photographs, graphs, drawings, discs, tapes, films, microfilms, sound tracks). Failure to comply with these requirements will render expert evidence inadmissible without the leave of the court.

Note: the scope for admitting expert evidence in civil cases is wider. See section 58 Evidence Ordinance (Cap 8):

EO	S58
(1)	Subject to any rules, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.
(2)	Where a person is called as a witness in any civil proceedings a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section, "relevant matter" includes an issue in the proceedings in question.

11.04 Weight of expert evidence

Evidence provided by an expert witness is simply evidence to assist the court or jury in making its determination: expert witnesses provide no more than evidence and they cannot usurp the functions of the judge or jury. There is no obligation on a judge or jury to accept expert evidence even if this has not been contradicted (as, for example, where the prosecution and defence experts agree). This applies equally in criminal and civil proceedings.

For example, in ***Armstrong v First York*** [2005] 1 WLR 2751 the English Court of Appeal in a civil case found nothing wrong in the decision of the trial judge to reject evidence submitted by a single joint expert on road accidents and to rely, instead, on contrary evidence provided by two non-expert claimants who the judge found to be credible witnesses. Brooke LJ stated the matter this way at p 2760 of the judgment:

> "...**27** In my judgment there is no principle of law that an expert's evidence in an unusual field-doing his best, with his great experience, to reconstruct what happened to the parties based on the secondhand material he received in this case-must be dispositive of liability in such a case and that a judge must be compelled to find that, in his view, two palpably honest witnesses have come to court to deceive him in order to obtain damages, in this case a small amount of damages, for a case they know to be a false one.
>
> **28** In *Liddell v Middleton* [1996] PIQR P36 Stuart Smith LJ, who had immense experience of personal injury litigation, said, at p 43: "We do not have trial by expert in this country; we have trial by judge." In the last resort it is for the judge-or it may be the jury in a criminal trial as the triers of fact-to determine, on the balance of probability, on all the evidence they receive, where the probabilities lie. It may be that they are impelled to that conclusion when they are weighing two different types of evidence, one from extremely honest-appearing witnesses of fact and the other from an expert doing his best in his particular field of expertise...."

Of course, when there is uncontradicted expert evidence on a scientific matter, a judge in a civil case would need to provide cogent reasons for rejecting such evidence; but the overall principle that the facts are determined by the tribunal of fact and not by the experts remains unaffected.

While this equally applies in criminal cases, there is a fundamental requirement that the defendant is given a fair trial and this principle will prevail if it conflicts with the principle that expert opinion evidence may be rejected by the tribunal fact. However, for a verdict of conviction to be quashed on appeal in such circumstances, there would have to be proof that the verdict (resting upon the rejection of expert testimony which was uncontradicted) was one to which no reasonable jury could have come to on the evidence. Thus, for example, in ***R v Smith*** [1999] All ER (D) 1455, a conviction for rape was quashed on appeal in circumstances where the jury had rejected unchallenged and, therefore, uncontradicted medical evidence that the alleged incident could not possibly have happened as described by the alleged victim. However, the circumstances in which a conviction will be overturned on such a basis will be rare because there will usually be other evidence, apart from that provided by the expert witnesses, which the jury could properly rely upon.

Scientific evidence is itself subject to limitations. The scientific process is prone to error; and error may occur at all stages in the procedures which are applied. The scientific instruments may be inappropriately calibrated; the samples being tested

may be contaminated by inappropriate procedures; and the calculations which form the basis of the scientific opinion may be erroneous. All of these errors, and many more, have occurred. In the cases of the *Birmingham Six* and the *Maguire Seven*, the prosecution secured convictions (for murder and the making of bombs) with the assistance of so-called 'scientific' tests that were said to be able to detect the presence of nitroglycerine. Evidence was given that the test used could *uniquely* detect nitroglycerine. Many years later, the *May Inquiry* found that the tests were not reliable in the way believed by the scientists and that the procedures had been conducted in a slipshod manner (and had resulted in wrongful convictions).

A note on (in)expert evidence

In a number of high profile cases, scientific evidence proved to be disastrously wrong but discovered only after, sometimes long after, the wrongful convictions secured as a result. For accounts of some of these and of the expert forensic process, see:

P. Alldridge, "Scientific expertise and comparative criminal procedure" (1999) *International Journal of Evidence & Proof* 141

G. Conlon, *Proved Innocent* (199) London: Penguin

S. Greer, "Miscarriages of justice reconsidered" (1994) 57 *Modern Law Review* 58

T. Hodgkinson, *Expert Evidence: Law and Practice* (1990) London: Sweet & Maxwell

C. Jones, *Expert Witnesses* (1994) Oxford: Oxford University Press

R. Kee, *Trial and Error* (1986) Hamish Hamilton

Sir John May, *Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks at Guilford and Woolwich in 1974*, HC Paper 556 (1990) and HC Paper 296 (1992)

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Beyond this, expert evidence must be evaluated and understood. This in itself may be highly problematic particularly in cases involving difficult issues such as statistics and probability. One area in which problems occur in this regard is *DNA profiling*, formerly regarded with little understanding of the potential difficulties as evidenced by its introduction as 'DNA Fingerprinting' (see: A. Hall, "DNA fingerprinting" (1990) 140 *New Law Journal* 203; W. Thompson and S. Ford, "Is DNA fingerprinting ready for the

courts?" (1990) *New Scientist* 31 March, 38) Attempts by the defence to educate juries in DNA probabilities through the use of expert statisticians and complicated formulae were criticised by the English Court of Appeal in ***R v Adams***, the Court of Appeal saying that such evidence should never be given in that form again.

In ***R v Adams*** [1998] 1 Cr App R 377, Adams was convicted of rape. His victim did not get a good look at him and said Adams did not look like the man who attacked her. The prosecution case rested entirely on DNA (deoxyribonucleic acid) of semen from a vaginal swab. The expert doctor witness for the prosecution said the chance of another white male having the same profile was said to be one in two million. The defence gave an alibi for the night of the attack. An expert statistician for the defence said using the Bayes Theorem analysis mathematical values could be assigned to probabilities arising from the non-scientific evidence.

One issue for the court was, was DNA evidence alone capable of establishing guilt? Was the expert evidence related to Bayes Theorem in relation to the DNA evidence admissible to induce juries to attach mathematical values to probabilities arising from non-scientific evidence?

Lord Bingham CJ (at pp 384-385 of the judgment) held DNA evidence alone could establish guilt because the data and deductions were available for the defence to criticise and challenge. The Bayes Theorem should not be admitted because it usurped the function of the jury to make their own judgment about probabilities of non-scientific aspects of the case:

> "...[W]e regard the reliance on evidence of this kind in such cases as a recipe for confusion, misunderstanding and misjudgement, possibly even among counsel, but very probably among judges and, as we conclude, almost certainly among jurors. It would seem to us that this was a case properly approached by the jury along conventional lines. That would involve them perhaps in asking themselves at the outset whether they accepted wholly or in part the DNA evidence called by the Crown. If the answer to that was "no", or uncertainty as to whether the answer was "yes" or "no", then that would be the end of the case. If, however, the jury concluded that they did accept the DNA evidence wholly or in part called by the Crown, then they would have to ask themselves whether they were satisfied that only X white European men in the United Kingdom would have a DNA profile matching that of the rapist who left the crime stain."

11.05 Who is an expert?

The question whether the witness is an expert is a *question of fact* to be determined by the trial judge. It is, in technical terms, a matter relating to competence as a witness. This determination may be made on the papers or after holding a *voir dire*. While most experts called to give evidence will have academic or professional qualifications, this is not a legal requirement: expertise itself is the determining factor, not the way in which the expertise was acquired.

To illustrate, in ***R v Silverlock*** [1894] 2 QB 766, expert evidence could be given on the authorship of disputed handwriting by an individual who had made an amateur study of handwriting over a number of years. This was permitted notwithstanding the fact that the 'expert' was the solicitor for the prosecution who had, over a period of years, made a private study of handwriting, especially of old parish registers and wills.

As was said in ***Silverlock*** (above) by Lord Russell at p 771 of the judgment:

> "It is true that the witness to be called upon to give evidence founded on a comparison of handwriting must be *peritus*; he must be skilled in so doing; but we cannot say that he must

> have become *peritus*, but *peritus* in the way of his business, or in any definite way. The question is, is he *peritus*? Is he skilled? Has he an adequate knowledge?"

And a police constable's careful study of CCTV film over many years might qualify him or her to give an opinion on the identity of an individual seen on CCTV: ***R v Clare*** [1995] 2 Cr App R 333.

At common law, a person may become an expert by acquiring expertise in the subject otherwise than through the practice of the profession and, subject to the judge being satisfied that he or she has done so, he or she is competent as an expert witness. In essence, the judge must be satisfied that the person proposed as an expert has achieved a level of knowledge or skill which exceeds or is likely to exceed that of the jury. For example, in ***Moore v Medley*** (*The Times*, 3 February 1955) the trial judge allowed a member of the Inner Circle of Magic to testify as an expert magician that there were a number of ways in which a fraudulent manipulation of coins could have been carried out. In ***Cooper-King v Cooper-King*** [1900] P 65, (an action for the restitution of conjugal rights by the wife) a former Governor of HK was permitted to give expert evidence on the marriage laws of Hong Kong even though he was not a lawyer. The entirety of the short judgment, from pp 65-66 is as follows:

> "The marriage, which was clandestine, was solemnized in the office of the Registrar-General at Hong-Kong by special licence, but the parties never cohabited.
>
> The copy of the marriage certificate was headed "Hong-Kong Ordinance No. 14 of 1875, Section 23," and after the usual particulars as to the names, ages, condition, and as to the rank or profession of the parties and their respective fathers, it stated that the parties were "married in the Registrar-General's Office by special licence under sections 14-24 of Ordinance of 1875 and section 3 of Ordinance 14 of 1896." The certificate was signed by "J. H. Stewart Lockhart, Registrar- General."
>
> *Le Bas,* for the petitioner, stated that the only lawyer in this country who could be found to give the necessary expert evidence usually required in such cases had demanded a prohibitive fee of fifteen guineas; and, under these circumstances, he asked to be allowed to give the evidence by an affidavit to be obtained from a former Governor of the Colony, who was now in this country.
>
> **Gorell Barnes J:** I will accept the affidavit, if the deponent is acquainted with the laws of the Colony. To save expense, I will hear the evidence now in support of the petition, and will then adjourn the further hearing.
>
> Feb. 1. The affidavit of Sir William Robinson, G.C.M.G., formerly Governor of Hong-Kong, in proof of the validity of the marriage of the petitioner and respondent was read to the Court.
>
> The affidavit stated that from the years 1891 to 1898 the deponent was Governor-General of the Colony of Hong-Kong, and that he was well acquainted with the laws relating to British subjects in that Colony; and that from such knowledge he was able to say that a marriage performed in accordance with the statements contained in the original certificate of marriage (produced to the deponent) was a valid marriage. The said certificate would be admissible in the courts of the Colony as evidence of the said marriage.
>
> **Gorell Barnes J:** That is sufficient. I pronounce a decree of restitution of conjugal rights in the usual form."

Likewise, it is quite common in Hong Kong for police officers from drugs squads to give evidence regarding the price of illegal drugs and on the language or street argot of those engaged in such matters as drug trafficking and protection rackets.

It would seem that there is no artificial limitation on matters that can be the subject of expert evidence as, for example, in new or emergent branches of science or