1
The Legal System, Courts, and Witnesses

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1.1 Introduction

Forensic medicine in its broadest sense is that branch of medicine which is involved with legal matters and proceedings. The term 'forensic' is derived from the Latin *forensis*, meaning 'the forum'.[1] Forensic practitioners work within the legal system of their area of practice and occasionally may be required to provide reports and give evidence in jurisdictions beyond their own. It is outside the scope of this text to describe in detail different legal systems and here only a brief description of the different main legal systems is given.

There are a number of legal systems and many countries have a mixture of different systems that has ultimately resulted from cultural, religious, and other influences in the development of each particular nation. The main legal systems include common law, Roman law (civil law), religious law and a mixed system. Furthermore, in the European Union (EU) the Court of Justice takes an approach mixing civil law (based on the treaties) with an attachment to the importance of case law.

[1] In ancient Rome the forum was a market place where people gathered not just to buy things, but also to conduct all kinds of business, including that of public affairs. The meaning of 'forensic' later came to be restricted to refer to the courts of law. The word entered English usage in 1659.

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1.1.1 Common law

Common law developed in England, was influenced by the Norman conquest, which introduced legal concepts from Norman law, and was later inherited by the Commonwealth of Nations and adopted by almost every former colony of the British Empire.

Common law has its source in decisions on cases made by judges. The doctrine of precedent is the main difference from codified law systems. A precedent is a legal case establishing a principle or rule that a court or other judicial body may utilise when deciding subsequent cases with similar issues or facts. Alongside this system of law, there is a legislature that passes new laws and statutes, and the relationships between statutes and judicial decisions can be complex.

The court's role is to apply and develop common law. Statute law, which is created by Parliament, takes precedence over common law and is the supreme legal authority in the United Kingdom (UK). Membership of the EU has meant that European law takes precedence over British Acts of Parliament.

1.1.2 Civil law (Roman law)

Civil law is the most widespread system of law around the world and is sometimes known as *continental European law*. Scots law is a mixed system based on Roman and continental law with elements of common law dating back to the Middle Ages.

The authoritative source of civil law is based on codifications in a constitution or statute passed by legislature (rather than judicial precedents, as in common law).

Historically, the Code of Hammurabi in Babylon c. 1790 BCE is recognised as the first codification (Hooker 1996). The main origin of civil law, however, is from the Roman Empire, the *Corpus Juris Civilis* issued by the Emperor Justinian c. 529 CE. In addition, civil law in its development was also partly influenced by religious laws such as Canon law and Islamic law (Kunkel 1966).

1.2 British courts

There are three court system structures in the UK governed by three different legal systems: England and Wales (English law), Scotland (Scots law), and Northern Ireland (Northern Ireland law).

1.3 The Supreme court of the United Kingdom

The United Kingdom Supreme Court was established by the Ministry of Justice in October 2009 following the passing of the Constitutional Reform Act 2005. Twelve professional judges who are members of the House of Lords carry out its judicial functions. It has assumed the jurisdiction of the Appellate Committee of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council. It is therefore the final and highest court of appeal for all UK civil cases, and criminal cases from England, Wales, and Northern Ireland. It hears appeals on arguable points of law of general public importance and concentrates on cases of the greatest public and constitutional importance. It also maintains and develops the role of the highest court in the UK as a leader in the common law world.

The Supreme Court cannot consider a case unless a relevant order has been made in a lower court. The courts from which appeals are heard in the UK include:

- *England and Wales*: the Court of Appeal, Civil Division; the Court of Appeal, Criminal Division; the High Court in some limited cases
- *Scotland*: the Court of Session
- *Northern Ireland*: the Court of Appeal in Northern Ireland; the High Court in some limited cases.

Most courts in England and Wales are the responsibility of the Ministry of Justice and Her Majesty's Courts and Tribunals Service (HMCTS 2011), an agency of the Ministry of Justice, for their administration.

The HMCT was created on 1 April 2011 and brings together Her Majesty's Courts Service and the Tribunals Service into one integrated agency providing support for the administration of justice of the criminal, civil, and family courts and tribunals in England and Wales and non-devolved tribunals in Scotland and Northern Ireland. It uniquely operates as a partnership between the Lord Chancellor, the Lord Chief Justice, and the Senior President of Tribunals.

1.4 English and Welsh courts

1.4.1 Court of Appeal

This court consists of two divisions, the Criminal Division and the Civil Division. Decisions of the Court of Appeal may be appealed to the Supreme Court. The Civil Division hears appeals concerning civil law and family justice from the High Court, from tribunals, and certain cases from county courts. The Criminal Division of the Court of Appeal hears appeals from the Crown Court.

1.4.2 High Court

The High Court consists of three divisions, the Chancery Division, the Family Division and the Queen's Bench Division. Decisions of this court may be appealed to the Civil Division of the Court of Appeal.

1.4.3 County Courts

These courts deal with all except the most complicated and most simple civil cases (including most matters under the value of £5000). Decisions in county courts may be appealed to the appropriate division of the High Court.

1.4.4 Crown Court

The Crown Court deals with indictable criminal cases that have been transferred from the Magistrates' Courts, including serious criminal cases (such as murder, rape, and robbery). Cases are sent for sentencing and appeals. Cases are heard by a judge and a jury. Decisions by the Crown Court may be appealed to the Criminal Division of the Court of Appeal.

1.4.5 Magistrates' Courts

These courts deal with summary criminal cases and committals to the Crown Court, with simple civil cases, including family proceedings courts and youth courts, and with licencing of betting, gaming, and liquor. Cases are normally heard by three magistrates or by a district judge, without a jury. Criminal decisions may be appealed to the Crown Court and civil decisions to the county courts.

1.4.6 Tribunals

The Tribunal Service makes decisions on matters of asylum, immigration, criminal injuries, employment, compensation, social security, education, child support, pensions, tax, and lands. Decisions may be appealed to the appropriate division of the High Court.

The structure of the court system in England, Wales, and Northern Ireland is shown in Figure 1.1.

1.5 Scottish Courts

In Scotland, the Superior Courts consist of the Court of Session and the High Court of Justiciary. The Supreme Court of the United Kingdom (described above) hears appeals from the Inner House of the Court of Session.

1.5.1 The court of session

The supreme civil court in Scotland sits in an appeal capacity and also as a civil court dealing with disputes between people or organisations. It consists of the Inner House and Outer House. The Inner House deals mainly with appeals. Appeals are heard from the Outer House, from the Sheriff Court, and from certain tribunals and other bodies. Decisions may be appealed to the Supreme Court. The Outer House hears cases at first instance on a wide range of civil matters. Decisions of the Outer House may be appealed to the Inner House.

1.5.2 The High Court of Justiciary

The High Court of Justiciary deals with criminal appeals and serious criminal cases. Decisions may be appealed to the Privy Council (functions have been taken over by the Supreme Court).

1.5.3 The Sheriff Court

Most cases are heard before a judge called a sheriff. The work of the Sheriff Courts can be divided into three main categories: civil, criminal and commissary. They deal with more serious cases than Justice of the Peace Courts.

1.5.4 Justice of the Peace Courts

From 10 March 2008 the Scottish Court Service is responsible for the administration of the former District Courts – now Justice of the Peace Courts (JP Courts).

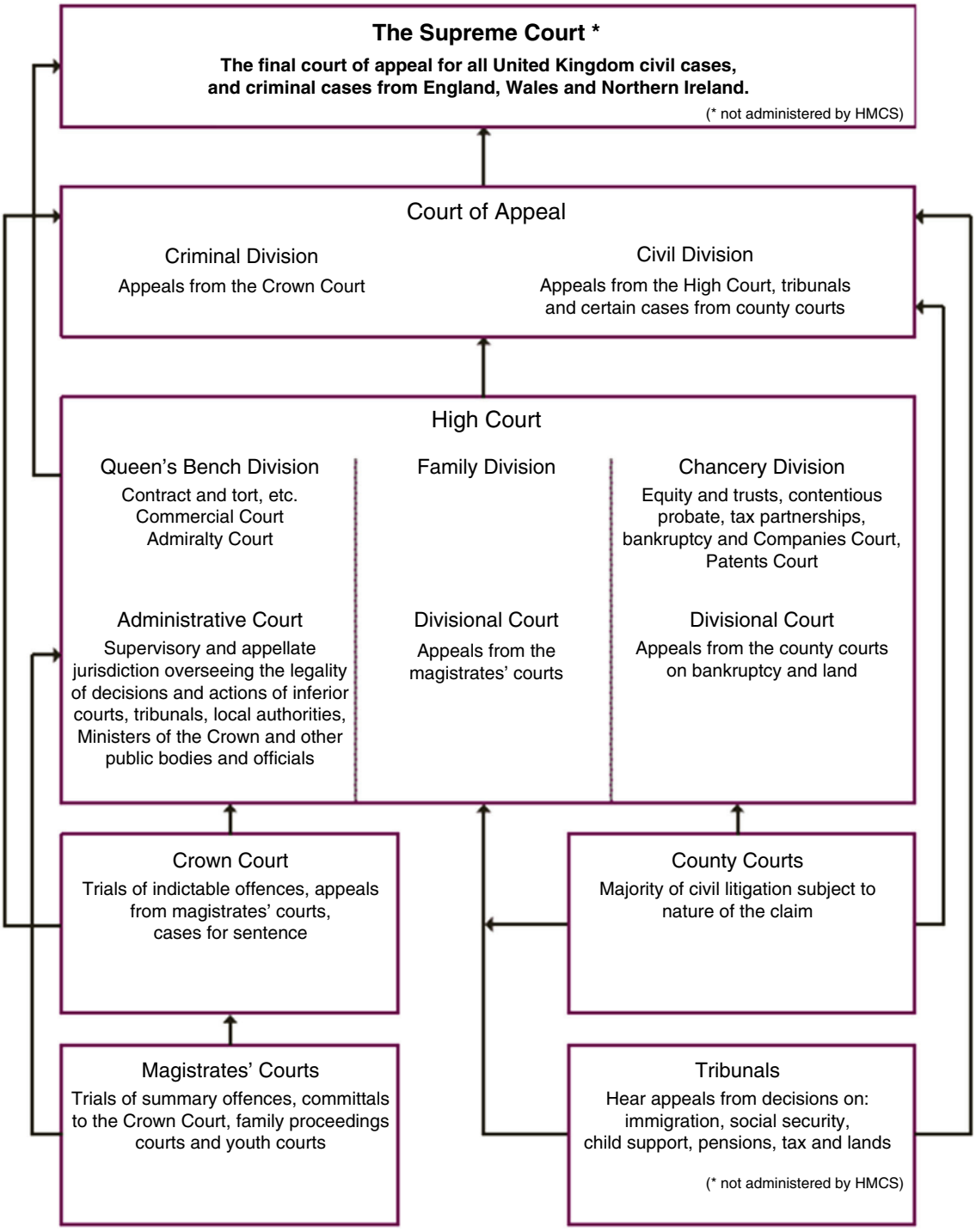

Figure 1.1 Court system in England, Wales, and Northern Ireland. (Source: Reproduced from Her Majesty's Court Service – Structure of HMCS https://webarchive.nationalarchives.gov.uk/aboutus/structure/index.htm.)

1.6 Northern Ireland Courts

Northern Ireland's legal system is similar to that in England and Wales. The Lord Chancellor is responsible for court administration through the Northern Ireland Court Service. The Northern Ireland Office deals with policy and legislation concerning criminal law, the police, and the prison system.

The court system is similar to English courts, with a few modifications, and includes: The Court of Appeal, the High Court (three divisions as in England: Queen's Bench, Family and Chancery), the Crown Court, county courts and magistrates' courts.

1.7 Other courts

There are many other courts in existence. The following is not an exhaustive list.

1.7.1 The Court of Justice of the European Union

A case may be referred to the Court of Justice of the European Union (CJEU), based in Luxembourg. This may happen if European legislation has not been implemented properly by a national government, if there is confusion over its interpretation, or if it has been ignored. The case is then sent back to the national court to make a decision based on the ruling of the CJEU.

1.7.2 The European Court of Human Rights

The European Court of Human Rights, based in Strasbourg, deals with cases in which a person thinks their human rights have been contravened and for which there is no legal remedy within the national legal system.

1.7.3 Court martial (military court)

The Armed Forces Act 2006 established the Court Martial as a permanent standing court, effective from 1 November 2009. The Court Martial may try any offence against service law, which includes all criminal offences under the law of England and Wales. The procedure is broadly similar to that of the Crown Court in England and Wales. It is presided over by a Judge Advocate, and there is a jury (known as a 'board') of between three and seven officers.

1.7.4 International Courts

International courts are set up either between nations through treaties or by international organisations such as the United Nations (UN) and also include international tribunals established for specific purposes.

The *International Criminal Court (*ICC*)* governed by the Rome Statute (a multilateral treaty), is the first permanent, treaty-based court and was established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. The ICC is an independent international organisation and is not part of the UN system. Its seat is at The Hague in the Netherlands. The international community has long aspired to the creation of a permanent

international court and in the twentieth century it reached consensus on definitions of genocide, crimes against humanity, and war crimes. The Nuremberg and Tokyo trials addressed war crimes, crimes against peace, and crimes against humanity committed during the Second World War. In the 1990s, after the end of the Cold War, tribunals like the International Criminal Tribunal for the former Yugoslavia and for Rwanda were the result of a consensus that impunity is unacceptable. However, because they were established to try crimes committed only within a specific time-frame and during a specific conflict, there was general agreement that an independent, permanent criminal court was needed. On 17 July 1998, the international community reached a historic milestone when 120 states adopted the Rome Statute, the legal basis for establishing the permanent ICC, which entered into force on 1 July 2002 after ratification by 60 countries.

The *International Court of Justice (ICJ)* is the principal judicial organ of the UN. It was established in June 1945 by the UN and began work in April 1946. It is based in The Hague (Netherlands). The Court's role is to settle, in accordance with international law, legal disputes submitted to it by states and to give advisory opinions on legal questions referred to it by authorised UN organs and specialised agencies. Fifteen judges, who are elected for a term of nine years by the UN General Assembly and the Security Council of the UN, comprise the court. It is assisted by a Registry, its administrative organ, and the official languages are English and French.

1.7.5 Coroner Courts

Coroner courts are covered in Chapter 2.

1.8 Types of witnesses and evidence

1.8.1 Ordinary witness

An ordinary witness is anyone who can give a first-hand factual account of what they have seen or otherwise experienced in some way, e.g. an eyewitness in a road traffic collision. Any person may be called upon in such a capacity to give evidence.

1.8.2 Professional witness versus the expert witness

The terms professional witness and expert witness are often used synonymously although in the UK the distinction is made where a witness gives evidence in relation to a case in which they may be involved in a professional capacity, e.g. a casualty doctor who has treated the victim of an assault. The doctor will be requested to provide a statement for the court giving a factual account of what injuries they found and how they were investigated and treated. An opinion in relation to the causation of the injuries may be requested if the court agrees and if it is likely that the causation is not contentious, although opinions derived from the facts of a case are the province of expert witness testimony. It would be a common occurrence for a medical expert in the same case to give opinion based on the evidence of the treating doctor. The Faculty of Forensic and Legal Medicine clarified the position in relation to forensic physicians (FPs) acting as professional witnesses as opposed to expert witnesses, stating that FPs document the clinical findings and may include a limited opinion with respect to the significance of the examination findings, e.g. causation of a bruise (Academic Committee of the Faculty of Forensic and Legal Medicine, UK 2008**)**. Although it is expected that

all FPs should have had training in how to produce a factual statement, and have ongoing support with writing statements from an experienced FP, the author of a professional statement is merely a witness of fact and does not have to have any experience or expertise with regard to the interpretation of the clinical findings. However, the courts will often need expert interpretation of the medical evidence and this task will fall to an expert witness. The Crown Prosecution Service, alluding to the investigation of rape cases, makes the point that investigating officers and rape specialist prosecutors need to be aware that many FPs, whilst competent to carry out the examination and collect samples, lack the experience and expertise to provide expert opinion (Crown Prosecution Service 2011). This results in professional rather than expert status and may apply particularly where police forces have outsourced services. In these circumstances consideration should always be given to instructing an expert to provide an opinion on the FP's findings.

1.8.3 Expert evidence

An expert witness may give evidence on both fact and opinion or on opinion alone. With respect to criminal proceedings in England and Wales, and following a number of concerns about forensic medical and scientific expert evidence that have resulted in a number of miscarriages of justice, the Law Commission recently published a report that has been presented to Parliament recommending a number of changes (The Law Commission 2011). One of the key recommendations of the report is that there should be a statutory admissibility test which would provide that an expert's opinion evidence is admissible in criminal proceedings only if it is sufficiently reliable to be admitted.

Four requirements have developed at common law in relation to the admissibility of expert evidence in criminal cases.

Assistance

For expert opinion evidence to be admissible it must be able to provide the court with information which is likely to be outside a judge or jury's knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions.

Relevant expertise

To demonstrate expertise in a particular area, it is essential to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of expert conclusions so as to enable the judge or jury to form their own independent judgement as to the accuracy of their conclusions (Davie v Magistrates of Edinburgh 1953).

The expert usually has academic qualification and experience within their field of expertise. However, expertise can be gained through experience alone, e.g. a police officer may be an accident investigator, or a charity worker with drug abusers may give opinion on the amount of drugs for personal use. An expert may therefore qualify as such through study, training or experience in a particular area (Keane 2000).

Federal rule 702 (Federal Rules of Evidence USA 2006) deals with conditions under which testimony by experts can be given and states, '*If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case*'.

Impartiality

The expert must be able to provide impartial, objective evidence on the matters within their field of expertise.

The Civil Procedure Rules (2011) state that (i) it is the duty of experts to help the court on matters within their expertise and (ii) this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

Criminal Procedure Rules (2010) state that (i) an expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his/her expertise, (ii) this duty overrides any obligation to the person from whom he/she receives instructions or by whom he/she is paid, and (iii) this duty includes an obligation to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement.

Evidential reliability

Courts in the USA and elsewhere have developed through common law from 'general acceptance' to 'reliability'.

The Frye test (Frye v 1923). In this case the appellant (defendant), was convicted of the crime of murder in the second degree. The case is based on the admissibility of the polygraph (lie detector test).[2] It followed from this judgement that scientific evidence presented to the court must be interpreted by the court as 'generally accepted' by a meaningful segment of the associated scientific community'. This applies to procedures, principles or techniques that may be presented in the proceedings of a court case.

In R v Bonython (1984), King CJ explained the court's approach as follows: 'Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions.

The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (i) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgement on the matter without the assistance of witnesses possessing special knowledge or experience in the area [common knowledge rule – see below] and (ii) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the court'.

The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court.

Frye was followed in England in R v Gilfoyle (2001), though it had been superseded by Daubert (Daubert v Merrell Dow Pharmaceuticals Inc. 1993).[3] The Court of Appeal in Dallagher (2002) stated that the approach in English law followed Daubert, although they referred to the pre-2000, 702 amendment.

[2] The Appeal Court judges stated 'We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made'.

[3] Jason Daubert and Eric Schuller had been born with serious birth defects. They and their parents sued Merrell Dow Pharmaceuticals Inc., a subsidiary of Dow Chemical Company, in a California state court, claiming that the drug Bendectin had caused the birth defects.

In the USA the conservative approach in Frye has now been replaced in most states by the case of Daubert, which provides a less conservative approach to admissibility and recognises validity and reliability. 'Daubert hearings' are voir dires to assess whether the expert evidence can be subject to falsifiability, refutability or testability taking into account methodology (including peer review and publication, known or potential error rate, and existence and maintenance of standards), and furthermore, whether the technique has gained general acceptance within the scientific community.

1.8.4 Common knowledge rule

The common knowledge rule bars the admission of expert evidence on matters that can be decide by the court based on its own common sense and everyday experience, and without the assistance of expert knowledge. The purpose of this rule is to preserve the integrity of the decision-making process of the tribunal of fact. It is not designed to filter out inaccurate, invalid or inexpert evidence. Therefore, the common knowledge rule operates to exclude opinion evidence even if the evidence is extremely reliable. Such evidence would include expert evidence on intoxication and intent, character, credit, and credibility Furthermore, evidence from psychiatrists and psychologists is not admissible to prove the veracity of the accused's evidence or the credibility of witness accounts. The case of R v Turner (1975) stands as the main authority for the common knowledge rule at common law.[4] The case of R v Chard (1972) is also of relevance in relation to intention.[5]

1.8.5 Basis rule

The basis rule requires the underpinning of an expert's opinion to be proven by admissible evidence, failing which the expert's opinion is either inadmissible or carries much-reduced weight. The conceptual principle underlying the basis rule is that if an expert is to render the assistance for which his/her evidence is adduced, he/she must furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions. In other words, to state explicitly the facts or assumptions upon which his/her opinion is based.

In England at common law a liberal attitude is taken on the use of hearsay evidence by an expert. This approach is rooted in pragmatism rather than conceptual coherence. The concern is the virtual impossibility of strict compliance with the hearsay rule and the potential for excluding much highly useful and highly reliable opinion evidence. As the English courts said in another case (Borowski v Quayle 1966) 'no one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths'.

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[4] The defendant was charged with murdering his girlfriend and raised the defence of provocation. He alleged that he had committed the crime in a fit of blind rage when she confessed that she had been unfaithful to him. The defence sought to adduce expert testimony for three purposes: first, to establish that the defendant lacked intent, second, to establish that the defendant was of a nature to be easily provoked, and, third, to bolster the defendant's credibility. The trial judge refused to accept a psychiatrist's report on these issues and since the defendant in *Turner* was not suffering from any mental illness, the Court of Appeal was of the view that the jury did not *need* expert assistance on the issue because the way he was likely to react to his girlfriend's distressing news was a matter well within ordinary human experience.

[5] A is charged with murder. Defence counsel desired to question a prison doctor on the supposed inability of A to form any intent to kill or to do grievous bodily harm, but the judge refused to admit the evidence and this was upheld on appeal. Roskill LJ '… 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 with reference to the crucial question of what that man's intention was'.

1.8.6 Ultimate issue rule

The general rule was that a witness, whether an expert or ordinary witness, may not give evidence about a matter that is an 'ultimate issue' in the case, as this would usurp the function of the judge or jury. This rule has now been abandoned in civil cases and effectively in criminal cases (Civil Evidence Act 1972). The important feature in each such case is that the jury are reminded that it is their assessment of the totality of the evidence that matters and that they are not bound to accept the expert's opinion (R v Stockwell 1993).

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