THE PSYCHOLOGIST AS EXPERT WITNESS IN COURT: A COMPARATIVE APPROACH*

Abstract
The earliest description of the role of expert evidence in common law courts is to be found in the case of Buckley v Rice Thomas [1]. Experts in the form of medical doctors appear to have first been called upon to advise judges at the Old Bailey 600 years ago, but it was not until around 1620 that a jury was furnished with expert testimony for the first time. By 1721, there was the first challenge to an expert witness (a surgeon) testifying for the prosecution by another expert testifying on behalf of the defendant[2]. However, it was not until the later part of the 18th century that the role of expert witness was finally shaped, as counsel came to participate more and more in questioning and cross-examining expert witnesses.[3] This study concentrates on the role of the psychologist as expert witness given the impact of psychology on human behaviour.

Keywords: *Psychologist, Expert Witness, Court, Evidence*

1. Introduction

One of the earliest psychologists to testify in a criminal trial was J. Varendonck in Belgium in 1911[4] but it was not until 1921 that an American psychologist testified as an expert. Professionals' demand for expert evidence by psychologists has increased significantly since the 1980s, reflecting growing recognition that psychologists 'have a unique contribution to make to judicial proceedings[5]. While the specialty most involved in forensic Psychology in practice is Clinical Psychology[6]. Forensic psychologists, including legal psychologist, developmental psychologist, social psychologists, cognitive psychologists etc have become accepted as experts in both sides of the Atlantic. A survey by GudJonsson[7] of 522 psychologists testifying as expert witness in the courts have increased by 60 percent since 1984 and less of them were cross examined. Some good news about psychologist as expert witnesses has come from Bach and GudJonsson[8] who used a questionnaire to survey personal-injury on lawyers about how satisfied they were with expert witness reports by psychiatrists and psychologists. With a response rate of 15 percent, they found that the majority of the respondents were found between the expert reports of psychologists and psychiatrists. Areas that show increasing involvement of a psychologist as an expert are syndrome evidence, confessions by suspects, eyewitness testimony and family law. Psychologists, of course, are called as expert witnesses in both civil and criminal cases.

It is noted that in a major judgment *Daubert v Merrell Dow Pharmaceuticals*[9], the US Supreme Court has reasoned its criteria for deciding whether expert evidence shall be admissible without abandoning the 'common knowledge and experience rule' *R. v Turner*[10]. The courts in England have opened the door to psychologists as expert witnesses. Careful examination of the relevant case law in Australia, New Zealand and Canada[11] shows that in a number of recent cases, the courts in these countries have followed a more liberal approach to the interpretation of the common law rule.[12] One of the basic assumptions in common law is that there exists a distinction between

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[1] *R v Turner* (1975) QB 843
[2] S Landsman, 'Of witches, madmen and products liability: an historical survey of the use of expert Testimony' (1995) 13 *Behavioural Sciences and the law,* 131-57. .
[3] *Supra*
[4] CR Bartol & AM Bartol, *Introduction to Forensic Psychology.*(Sage, 2004b).
[5] GH GudJonsson, 'The implications of poor psychological evidence in court'. (1993b) 2 *Expert Evidence*, 120- 4.
[6] R Blackburn, 'What is forensic psychology'? (1996) 1 *Legal and Criminological Psychology,* 3-16.
[7] GH GudJonsson, 'Psychological Evidence in Court'. (1996a) 9 *The Psychologist*, 213-19 .
[8] LJ Bach & GH GudJonsson,. *Evaluation study of Lawyers Satisfaction with expert witness reports.*
[9] *Daubert v Merrell Dow Pharmaceuticals* 113 S.CT 2786 (1993).
[10] *I bid* p. 92
[11] I Freckelton & H.Selby, (3rd ed), *Expert Evidence*: *Law, Practice Procedure and Advocacy* Pyrmont, New South Wales, Australia; 2005) p.
[12] I Freckelton & H Selby, *Expert Evidenced Law* , *Practice Procedure and Advocacy* (Sydney: Law Book co. 2005) p. 105.

'fact' and 'opinion'. However, this is not without difficulties[13]. It is the function of magistrates, judges and juries to draw inferences from witnesses as they have observed them. In other words, witnesses do not give their opinions. However, the law makes an exception to this basic rule in the case of an expert in cases where a court or counsel decides that a specific issue calls for an expert witness because the particular expertise does not fall within the knowledge and experience of the magistrate, judge or jury. In some jurisdictions, for example, the United States, an expert witness is allowed to also express an opinion on the ultimate issue, the very question which the tribunal itself has to answer. Hamlyn-Harris[14], however has pointed to the danger of courts coming to depend on experts' opinion on an ultimate issue before deciding the issue. The question of whether a witness is an expert is a question of fact for the judge[15]. To illustrate, in *Moore v Medley*[16] a member of the inner circle of magic was allowed to testify as a highly expert magician that there were various ways 'one could have a fraudulent manipulation of coins'[17]. Australian Federal, New South Wales and Tasmanian Statutory Law[18] provided that: "if a person has specialized knowledge based on the person's training, study or experience, the opinion rule[19]" does not apply to evidence of an opinion that is wholly or substantially based on that knowledge[20]. The well-known British forensic psychologist Haward[21] identified four roles for forensic psychologists (using the term 'forensic' in a broad sense) who appeared as expert witnesses:[22]

Experimental Role: This could involve a psychologist informing the court (a) about the state of knowledge relevant to cognitive process and/or (b) carrying, or a defendant's claim to be suffering from phobia directly relevant to the individual's case before the court[23] .

Clinical Role: As already noted, this is the more common role for psychologists appearing in Western English-speaking Common Law countries and involves testifying for example, in their assessment of a client's personality, intelligent quotient (1Q), neuropsychological functioning, mental state or behaviour.[24]

Actuarial Role: In a civil case involving, for example, a plaintiff claiming for damages, a psychologist may be asked to estimate the probability that such an individual could live on their own and /or be gainfully employed.[25]

Advisory Role: In this role, a psychologist could be advising counsel before and/or during trial about what questions to ask the other side's witnesses including their expert witness(es). Knowing that there is another psychologist in court evaluating one's testimony has been reported to increase an expert's level of stress when testifying in court.[26]

2. Five Rules for Admitting Expert Evidence

According to Freckelton and Selby[27] five rules have evolved that specifically apply to the reception of expert evidence.

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[13] I Freckelton & H Selby, *Expert Evidenced Law* , *Practice Procedure and Advocacy* (Sydney: Law Book co. 2005) p. 1.1

[14] S Hamlyn-Harris , *The limits of expert evidence*. In Freckelton *et al* (eds) *Current Controversies in Psychiatry, Psychology and Law.* 'Proceedings of the Thirteenth Annual Congress of the Australian and New Zealand Association of Psychiatry, Psychology and Law'. Melbourne; 1992.

[15] GA Cattermole, *The Psychologist as an expert witness*. In M. Nixon (ed), *Issues in psychological Practice* (Melbourne: Longman Cheshire; 1984) p. 121-32.

[16] *Moore v Medley* The Times "Various Skills in Magic" 3 February, 1995.

[17] J C Smith, *Criminal Evidence London.* (Sweet and Maxwell; 1995) p.113.

[18] Section 79 Evidence Act 1995 (cth) Evidence Act 1995 (NSW) and Evidence Act 2001 (TAS).

[19] This rule states that: The evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was sought (Freckelton and Selby, 2005:57).

[20] *Ibid* .

[21] LR C Haward, *Forensic psychology*. (London; Batsford Academic Educational, 1981a).

[22] For a detailed discussion of the roles of the forensic psychologist see the book by GudJohnsson and Haward. *Forensic Psychology*: (1998). *A Guide to practice* , Chichester: Wiley &J H Blau, *The Psychologist as Expert witness* (2nd ed.) (New-York: Wiley, 1998).

[23] G.H GudJohnsson & G Sartory, Blood-injury phobia: a 'reasonable excuse for failing to give a specimen in case of suspected druaken driving' (1983) 23, *Journal of Forensic Science Society* 197-201.

[24] G.H. GudJonnson. 'Psychological Evidence in Court: results from the Bps Surety' (1985) 38. *Bulletin of the British Psychological Society* 327-330.

[25] *Ibid* p

[26] Supra

[27] *Ibid* p.94

Expertise Rule: Does the witness have sufficient knowledge and experience to qualify as an expert?

Area of Expertise Rule: Is the claimed knowledge and expertise sufficiently recognized as credible by others capable of evaluating its theoretical and experiential foundations?

Basis Rule: To what extent can an expert's opinion be based upon matters not directly within the expert's own observation? Such reliance on material that cannot be directly evaluated by the court falls foul of fundamental principle of evidence.

Common Knowledge Rule: Is the information sought from the expert really something upon which the tribunal needs the help of any third party or can the tribunal rely upon its general knowledge and common sense.

Ultimate Issues Rule: Is the expert's contribution going to have the effect of supplanting the function of the tribunal to decide the issue before the court? If so, it is likely to be rejected.

Where parties to a dispute in a criminal or civil trial call their own expert witnesses, a 'battle' of experts can eventuate,[28] reported that experts were equally likely to testify for the prosecution as for the defence, and for both sides in a civil case. The same survey shows that although 'hired guns' exist in forensic psychology as they do in other fields there is no justification for assuming that this is a common feature of such experts. Regarding the 'hired gun' effect idea, a mock juror study by Cooper and Neuhaus[29] used 140 jury eligible residents in New-Jersey aged 18-72 years as subjects, and the legal case used involved the scientific issue of whether a chemical to which the plaintiff had been exposed was the immediate cause of his cancer. It was found that (a) the experts who are highly paid for their testimony and testify frequently are perceived as 'hired guns' and (b) they are neither likely nor believed, especially if the expert testimony adduced is complex and cannot be easily processed. There are differences between legal proceedings in different countries and this includes the precise roles of expertise and expert witnesses[30]. In Western Common Law countries, an expert witness testifies for the side that has retained him/her and pays his/her fees. In contrast to this practice in continental European jurisdictions expert witnesses are normally appointed by the court to assist the court. In addition, there is a difference in status between court appointed and privately-retained expert witness with the former enjoying a higher status.

Another important difference between continental European jurisdictions, England and Wales for example, which Njiboer points out is the fact that in the former that is, France, Switzerland, Holland and Belgium, the jurisdictions are characterized by very low thresholds for the admissibility of expert evidence. They prefer to be regulated[31]. Expert witnesses, of course, may be involved in different stages of legal proceedings: pre-trial, trial and post-trial. This sub-topic is concerned with psychologists as expert's witnesses in courts based legal dispute[32]. According to Freckelton and Selby[33], court in some countries are increasingly appointing specialists called 'referees' to report development in this context. In addition, 'assessors' have been used in some jurisdictions to ascertain customary laws and habits. 'Assessors' are persons with expertise in a particular area by virtue of their special skill, knowledge or experience who sit with a judge during court proceedings to answer questions posed by the judge in their area of expertise. The assessors are not usually lawyers as a matter of fact. In Nigeria, the use of Assessors is part of our legal jurisprudence. In *Mai Unguwa Lawal Mai Gezoji & Anor v Audu Kulere*[34] the court defines Assessors thus: 'Assessors are mere advisers to the court; they have no votes in determining the matters in controversy[35]. An 'assessor' is one who evaluates or makes assessments, especially for the purposes of taxation, or he or she is a person who advises a judge or magistrate about a scientific or technical matters during trial. The

[28] S M. Kassin & SI-S. Wrightsman . 'General Acceptance of Psychological Research on Eye Witness Testimony: a Survey of Experts' (1989) 44, *American Psychologist*, 1089-98; see also O. Turnstall *et al.* 'Professional issues arising from Psychological Evidence Presented in Court' (1982) 35, *Bulletin of the British Psychological Society 329-31.*

[29] J. Cooper & I M Neuhaus, The 'hired gun' effect: assessing the effect of pay, frequency of testifying and credentials on the perception of expert testimony' (2000) 24, *Law and Human Behaviour* 149-71.

[30] H Nijboer *Expert Evidence*. In Bull & D Carson (eds), 444-64.

[31] JC Smith *Criminal Evidence* (London. Sweet & Maxwell) p 559

[32] M Malsch & I Freckelton, 'Expert Bias and Partnership: a Comparison between Australia and the Netherlands' (2005) 11 (1), *Psychology, Public Policy and Law,* 42-61.

[33] *Ibid* p. 93

[34] *Mai Unguwa Lawal Mai Gezoji & Anor v Audu Kulere* [2011] LPELR- 8951 (CA)

[35] See *Adeigbe & Anor V Kusimo & Ors (1965) NMLR 284 at 288*

Nigerian Evidence Act[36] provides that 'in cases tried with assessors, the assessors may put any question to the witnesses through or by leave of the judge which the judge himself may put and which he considers proper'.

Many legislations in Nigeria such as Merchant Shipping (Marine Boards) Regulations (Subsidiary Legislations)[37], all made provisions for the selection of assessors, trial with Assessors, Use of Assessors, Qualifications of Assessors, Committee of Assessors, Appointment and discharge of assessors, Sheriff to summon Assessors, Power of Assessors, Penalty of Assessors not attending, court exempting persons from serving as assessors. By these enactments and provisions, it is obvious that the use of Assessors is well provided and practiced in Nigeria. Specifically in Nigeria under the Child's Right Act[38], all criminal offences involving a child shall be tried by a special court called the family court. Section 152 of the Act makes provision for the establishment of the family court at the High Court Level. It provides as follows:

1. The court at the High Court Level shall consist of such number of
a. Judge of the capital territory, Abuja and
b. Assessors, who shall be officers not below the rank of the Chief Child Development Officer as shall enable the court to effectively perform its functions under this Act.
2. The members of the court at the high court level shall be appointed by the Chief Judge of the State and in the case of the Federal Capital Territory, Abuja, the Chief Judge of the High Court of the Federal Capital Territory Abuja.
3. The Court at the High Court level shall be duly constituted if it consists of
a. A judge, and
b. Two assessors, one of whom has attributes of dealing with children and matters relating to children preferably in the area of Child Psychology Education.

Section 153 of the Act makes provision for the establishment of the family court at the Magistrate Court Level. It provides that:

1. The court at the magisterial level shall consist of such number of
a. Magistrates, not below the rank of chief magistrate, and
b. Assessors who shall be officers not below the rank of Senior Child Development Officer as shall enable the court to effectively perform its functions under the Act.
2. The members of the court (assessors) at the magisterial level shall be appointed by the Chief Judge of the State and in the case of the Federal Capital Territory Abuja, the Chief Judge of the High Court.
3. The court at the magisterial level shall be duly constituted if it consists of
a. A magistrate
b. Two assessors, one of whom shall be a woman and the other person who has attributes of dealing with children and matters relating to children, preferably in the area of Child Psychology Education.

This Act made specific reference in the history of legislations and statutes in Nigeria specifically calling and referring to the employment of psychologist or persons with background knowledge of Psychology in expressing opinions or giving facts or information based on knowledge of Psychology. Irrespective of whether an expert witness has been instructed by the prosecution or the defence, the duties of an expert witness in a criminal trial were set out in *R v Harris* and other appeals[39] and reiterated in *R v Bowman*[40] a year later in order to assists in building up a culture of good practice, are duties they owed to the court and override any obligation the expert may have to the side that is instructing or will be paying him and are as follows:

1. The evidence preferred should be, and be seen to be, the independent product of the expert, devoid of any influence by the exigencies of litigation;
2. To assist the court by providing independent (that is, objective unbiased) opinion within his expertise;
3. Should state the facts or assumptions on which his opinion is based, including material facts that might detract from his opinion;
4. He should clearly acknowledge when a particular issue or question does not lie within his expertise;

[36] S. 247 Evidence Act 2011 Laws of the Federation.
[37] Regulation 23; see also S. 446; S. 441, 442-452 1945 Law of the Federation.; S. 13 [1960] Laws of the Federation ; S. 29 [2006] Laws of the Federation; S.7, 1992 Laws of the Federation,; Rule 16; Rule 15;
S. 27 1976 Laws of the Federation; Rule 1,2,3,6,10,12,14 &15; Rule 16 and Rule 17.
[38] S. 152 and 153.
[39] *R v Harris* [2006] ALL ER (D) 298 (JUL)
[40] *Ibid*

5. If his opinion is based on insufficient data, he must make it clear that his opinion is only provisional; and finally,
6. He must communicate immediately to the other side and, if appropriate, to the court, any change of opinion on material matters following exchange of reports. The court stressed that an expert should at all times be objective and impartial. Finally, the court outlines what should be included in an expert witness report, in addition to the specific factors mentioned in *R v KaiWhitening*[41].

Interestingly, the expert's report should contain details, of the methodology and so forth used to do the research, etc, whether it was under the expert's supervision and, also, relevant extracts of literature or any other materials that may assist the court as well as a statement by the expert that in compiling his report, he has done so in accordance with the duties stated above. Importing non-legal knowledge into both criminal and civil trial has proven problematical in Western Common Law countries with their adversary legal systems[42]. There is no doubt that magistrates, be they stipendiary or justices of peace, judges and jurors sometimes require assistance to establish the facts of a case before them. In this context, the expert witness can play a crucial role. In the words of Ian Freckelton, a well-known Australian practicing lawyer and authority on expert testimony: 'the role of experts is vital. They supply information that can't be supplied elsewhere. They supply counter-intuitive information, myth-dispelling information, which may be essential to clear thinking'[43]. Alas, however, fact-finders have to also contend with the knowledge that expert evidence can be complex and hard from a jury (court) to understand. Also, there is the danger of bias. These are hard financial times and forensic expert needs to be a repeat player. If they do not supply the information required, they will find they don't have as much work as they need to survive. Enough concern within the organized profession about the nature and quality of expert testimony has resulted in Forensic Psychologists in the United States, for example, being provided with formal guidelines[44]. According to GudJonsson[45], the main theme of these guidelines is that Forensic Psychologists have the responsibility of providing a service which is of the highest professional standard.

3. Psychologist as Expert Witness in the United States of America

The practice of providing expert testimony for a fee and as a means of earning a living did not become widespread in the United States until the middle of the nineteen century, and the test for admitting expert testimony between 1850 and 1920 was 'whether the proffered expert was appropriately 'qualified' to render an opinion on the issue before the court[46]. In the landmark decision in the case of *Frye v United States*[47], the District of Columbia Court of Appeals rejected: (a) a testimony by a lie-detector expert[48] that the defendant was telling the truth when he denied having committed the alleged offence on the ground that the scientific theory on which it was based was not generally accepted within the relevant professional community, and (b) a request by the defence attorney that the lie-detector expert conduct his test in the jury's presence. The decisions in Frye test came to be cited frequently in court decision in the United States[49] Frye was a vague ruling that was instrumental in American Courts admitting expert testimony in a rather broad range of fields without much scrutiny. According to Freckelton and Selby[50], while supporters of Frye have maintained its conservatism is its strength; critics have pointed to its lack of clarity and undue rigidity and that 'it is contradictory to the underlying theme of the Federal Rules of Evidence 1975, which is to admit all reliable evidence unless it is unduly misleading, confusing or time wasting'[51]. The American Federal Rule of Evidence (FRE) were adopted by congress in 1975 and included a modified standard for admitting expert testimony, namely, that the scientific evidence proffered be relevant and reliable. The American FRE and Frye standards continued to be applied by court in the United States until 1993 when a land mark unanimous

[41] *R v Kai Whitening* [2005] ALL ER (D) 14 (MAY).
[42] M J Saks, Normative *and empirical issues about the role of expert witnesses*. In D.K. Kagehiro and W.S. Laufer (eds) 185-203; 1992.
[43] M Ragg,' Proof Positive or Negative'? (1995) *Bulletin, 13 June*, 14-17. Canberra, Australia;
[44] American Psychology Law Society and Committee on Ethical Guidelines for Forensic Psychologists' (1991) for details.
[45] *Ibid* p 92.
[46] S Landsman, ' Of witches, madmen and products liability: an historical survey of the use of expert Testimony' (1995) 13. *Behavioural Science and the Law,* 131-57.
[47] *Ibid*
[48] The expert concerned was William Marston, a pioneer in the use of the polygraph to detect lying'
[49] *Supra.*
[50] *Ibid* p. 93
[51] For this comment, Freckelton and Selby cite Weinstein and Berger's book on *evidence* 702 (03), 702 (06); 2005

decision was handed by the US Supreme Court in *Daubert v Merrell Dow Pharmaceuticals*[52]. The case concerned a decision by the United States' Court of Appeals for the Ninth circuit which had applied the Frye test to exclude evidence by an expert on behalf of two minor children and their parents that the children's serious birth defects were caused by their mother's ingestion of Bendection, a prescription anti-nausea drug manufactured by Merrell Dow Pharmaceuticals. The Supreme Court held that the Frye 'general acceptability' standard was too austere and should no longer be the criterion in federal trials and that it had not been incorporated as part of US federal evidence law but had in fact been rejected when the expert testimony rules of the US Federal Rules of Evidence were proclaimed in 1975. According to the ruling in Daubert[53], the test for expert witnesses is 'vigorous cross-examination, presentation of contrary evidence, and careful instructions'[54] .More specifically, the Daubert judgment stated inter-alia that:

> The subject of an expert's testimony must be "scientific …knowledge"...in order to qualify as "scientific knowledge", an inference or assertion must be derived by the scientific method and the criterion of scientific status of the theory is its falsifiability, or refutability or testability…another pertinent consideration is whether the theory or technique has been subjected to peer, review and publication.

A majority of the Supreme Court Justices also stated that three criteria are important in deciding the issue of expert witness admissibility:

(i) Has the technique or theory been tested
(ii) The error rate involved
(iii) Has the technique or theory been through peer review and been published and
(iv) The general acceptance the technique or theory enjoys in the scientific community concerned.

By handing the Daubert ruling, the US Supreme Court has indicated its confidence in judges adequately deciding the scientific status of a theory or technique in a civil or criminal case without scientific training. In fact, both advocates and the judiciary will need to be rather sophisticated in scientific matters[55]. To achieve this, it will be necessary for lawyers to possess 'cross-disciplinary knowledge and understanding'. The urgent need for Legal Psychology courses for practicing lawyers provides psychologists with a great opportunity to communicate their expertise to the legal profession and move closer to bridging any remaining gap between the two disciplines. As would be expected, 'a large body of scholarship continues to debate the merits of the Daubert criteria in judicial decision-making guidelines'[56]. In the main, such discussion has concentrated on analyzing published opinions by state appellate court and the Supreme Court[57].

The next significant Supreme Court decision in the United States was handed down in *General Electric Co. v Joiner*[58]. The issue in this case was whether Joiner's exposure over 16 years to electrical transformer chemicals at work (the Water and Light Department of Thomasville in Geogia) contributed to his lung cancer even though he was a smoker. The trial judge excluded the testimony provided by Joiner's expert witnesses on the grounds that it did not rise above "subjective belief or unsupported speculation". In other words, the expert witness in Joiner did not show the scientific link between the lung cancer and the exposure to chemicals. The appellate court reversed the trial judge's decision but the Supreme Court reversed it again, reinstating the trials judge's exclusion, stating that the legal standard for allowing expert testimony to be put to the jury is the same as that which the relevant professional community uses[59] The question of whether the Daubert guidelines apply to all forms of technical or otherwise specialized knowledge, or just to scientific knowledge, was addressed by the US Supreme Court in *Kumho Tire Co v Patrick Carmichael*[60]. Kumho concerned the expert testimony of an engineer testifying that a defective car tyre caused a car accident. The essence of the court decision is that (a) the factors that a court ought to use to decide whether a scientific theory is reliable as enunciated in Daubert, may apply to testimony of engineers

[52] *Ibid* p 93
[53] I. Freckelton, 'Science and the Legal Culture ' (1993) 2, *Expert Evidence* 107-14
[54] Supra
[55] I Freckelton, 'Science and the Legal Culture' (1993) 2, *Expert Evidence,* 107-14.
[56] S I Gatowski *et al,*. 'Asking the gatekeepers: a national survey of judges on judging expert evidence in a post Daubert World' (2001) 25 (5) , *Law and Human Behaviour,* 433-58.
[57] Supra
[58] *General Electric Co. v Joiner* 522 US 136, 118 S.Ct, 512 (1997).
[59] J G Gutheil & MD Stein. 'Daubert gate keeping and psychiatric/psychology testimony in court': Review and proposal.' (2000) 28, *Journal of psychiatry and Law*, 235-51.
[60] *Kumho Tire Co v Patrick Carmichael* 526 us, 13, 152, 119 S.Ct 1176 (1999).

and other experts who are not scientists; (b) the 'gate keeping' obligation of the trial judge under the US Federal Rule of Evidence[61] applies to all expert testimony because FRE 702 and section 68 of the Nigerian Evidence Act does not distinguish between "scientific" "technical" or other specialized knowledge. Rule 702 Fre which is in pari material with the Nigerian Law of Evidence. Section 68 of the said Nigerian Law of Evidence states that:

> When the court has to form an opinion upon a point of foreign law, customary law or custom, or of science or act, or as to identity of handwriting or finger, impressions, the opinions upon that point of person specially skilled in such foreign law, customary law or custom or science or art, or in questions as to identity of handwriting or finger impressions, are admissible, persons so specially skilled as mentioned in subsection (1) of this section above are called experts.

So the law empowers the Nigerian Court to form their opinion about experts but by so doing become gate keepers to expert evidence.

4. Expert Testimony in Australia, New Zealand and Canada

Three interesting developments in Australia are the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW) and Evidence Act 2001 (TAS). Section 80 of the Cth Act and Section 137 of the NSW Act 'abolish the common knowledge exchange exclusionary rule and the abolition is 'in the form of an opinion not being inadmissible' 'only because it is about' a matter of common knowledge. Writing about expert testimony in repressed memory syndrome[62], stated that 'since the focus of the legislation is upon weighing the probative value of expert evidence against its potential for unfair prejudice' and 'given the current profound division of opinion among psychiatrists and psychologists,' the provisions of the new legislation 'should result in the exclusion of expert evidence concerning repressed memory syndrome'. However, the Victorian Court of appeal in *R v Bartlett*[63] decided that, in certain circumstances, the defence in criminal trials may adduce suitable qualified expert evidence about the unreliability of recovered memories[64]. Freckelton points out that the decision in Bartlett needs to be assessed in terms of the same court's repudiation of an 'area of expertise' rule and the fact that the judgment does not contain arguments about the probative value of such expert evidence as against the prejudicial impact.

As Freckelton *et al*[65] pointed out, unlike the United States and Canadian Supreme Courts, the High Court of Australia has had no occasion to articulate in a comprehensive way, the criteria for admissibility of expert evidence at common law. In this context, there is the threshold question whether there is an 'area of expertise test in the way one exists in the United States, Canada and New Zealand'. Freckelton et al summarize that such a test does not exist under the Evidence Act 1995 (Cth and NSW). The same authors' analysis of the same legislation leads them to conclude that in Australia, 'there are several aspects of the expert evidence presented in courts that await final determination at appellate level. More specifically, Freckelton et al maintain that the two Acts 'simplify the common law exclusionary rules of evidence by (apparently) abolishing the common knowledge and the ultimate issue rules and omitting both the basis and the area of expertise rules.' Consequently, since the 'era of expertise rule' exists in common law, expert evidence is admissible only if the expert is a specialist by virtue of training, study or experience in the absence of any judicial guideline like those in Daubert or Kumtto in the United State. Meanwhile, psychologists in the Antipodes may take comfort in Hampel J's decision in the criminal case of *Whitbread v The Queen*[66] that 'there is no reason why a psychologist may not be just as qualified or better qualified than a psychiatrist to express opinions about mental states and processes[67]'. It is probable that Australian expert law will be significantly influenced by the Daubert decision because it provides a sophisticated means of distinguishing between evidence that is not yet capable of being effectively evaluated by the courts from that which is falsible and has been tested within the medium of peer review and debate amongst those constituting the intellectual market place [68]

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[61] FRE 702.

[62] I Freckelton, 'Repressed Memory Syndrome Counterintuitive or counterproductive? (1996) *Criminal Law Journal*, 207-33.

[63] *R v Bartlett* (1996) 2 v R 68.

[64] I Freckelton. 'Admissibility of False Memory Evidence' *R v Bartlett* (1996) 2 VR 687 per J.A Winneke, Charles *et a*l South well. *Psychology, Psychiatry and Law* 4 (2) 241-4.

[65] I Freckelton *et al, Australian Magistrates' perspectives on Experts Evidence*: a comparative Study. Melbourne: Australian. Institute of Judicial Administration; 2001.

[66] *Whitbread v The Queen* [1995] 78 A Crime R 452

[67] *Supra*

[68] I Freckelton,& H Selby, *Expert Evidence: Law, Practices, Procedure and Advocacy. Sydne*: (Law Book Co.; 2002).

Drawing on Freckelton and Selby's comprehensive analysis of New Zealand authority, in two unreported cases decided by the High Court of New Zealand, namely *R v Calder*[69] and *R v Brown*[70], significant endorsement was given to the Daubert test. As far as Canadian authority on the admissibility of expert evidence is concerned, 'The Calder and Brown decision leave the law unclear as to both the existence of an area of expertise rule and as to the criteria for the exercise of the prejudice/probative discretion in Zealand. However, there are early indication of the extent to which the concept of 'realiability' is likely to command influence in the admission of scientific evidence in the post Daubert era. They also tend to suggest the importance of the concept of 'falsifiability' as a key of 'realiabiity' for New Zealand'[71]

Canadian courts have generally admitted expert testimony on a broader range of issues instead of focusing narrowly on mental illness, as has been the approach of courts in England, Australia and New Zealand[72] while the impact of the Daubert decision on Canadian courts is difficult to predict. It is interesting to note that in *R v Johnston*[73] (a DNA case) it was held that the FRYE test was not part of Canadian law and that the criteria for admissibility for novel scientific evidence were relevance and helpfulness to the tribunal of fact, helpfulness to be decided by considering a list of 14 factors. The facts in JOHNSTON go beyond those stated in DAUBERT. Freckelton and Selby state that the most important Canadian decision concerning the admissibility of expert evidence in *R v Mohan*[74] in which the supreme Court determined that the question of expert evidence admissibility is to be decided by applying the following four criteria: relevance; necessity in assisting the trier of fact; the absence of any enclusionary rule; and a properly qualified expert. The MOHAN approach has been applied by the Supreme Court of Canada in *R v J-LJ*[75].

Freckelton et al[76] carried out the first national survey of magistrates and judges perspective on expert evidence and found out that while more than three-quarters of both responding judges and magistrates found expert evidence to be 'often useful' many magistrates were concerned about a percentage of experts who lack objectivity, are unable to be clear communicators and related to these, a low quality of advocacy and the magistrate own difficulty in evaluating conflicting expert views. It is sobering thought, perhaps that when it comes to deciding which, if any, of the experts and their opinions a magistrate should rely upon, the majority could remember occasions when they did not evaluate the expert evidence adequately in the cases they were hearing and also experienced difficulty evaluating the opinions expressed by another. More than half of the respondents were of the view that the courts are not a place where the reliability of expert theories and opinions can be evaluated adequately. Finally, the magistrates were in favour of training to improve the performance in courts of expert witnesses and lawyers alike. The need to develop codes of ethic for forensic experts in Australia and elsewhere[77] is evident in the fact that already there exist the following:

(i) The Federal Court Australia's Guidelines for Expert Witnesses
(ii) Practice Direction No 3 of 2002 of the Supreme Court of the Act
(iii) Schedule R of the New South Wales Supreme Court rules
(iv) Direction 46 of the South Australian Supreme Court Rules
(v) The State of Victoria Civil and Administrative Tribunal's Practice Direction concerning Expert witnesses
(vi) New Zealand High Court Rules (324-330D)
(vii) Civil Procedure Rules (UK)

It is hereby advocated that the High Court Rules in Nigeria will contain guidelines in the admissibility of Expert evidence as is done in other jurisdiction as discussed above so as to maintain standard and uniformity of outcome.

[69] *R v Calder* 12 April 1995.
[70] *R v Brown* 19 September 1997.
[71] I Freckelton & H Selby. *Expert Evidence: Law, Practices, Procedure and Advocacy*. *Sydne*: (Law Book Co.; 2005) p 93.
[72] I Freckelton, Who *R v Holland* (1981) 6 WCB *R v Clark* (1983) IDLR (4d). 46.; 1990: 56.
[73] *R v Johnston* [1992] 69 CCC 395.
[74] *R v Mohan* [1994] SCR 9. (1994) 89 CCC (3d) 402.
[75] *R v J-LJ* [2000] SCC 51; see also *R v DD* [2000] SCC 43
[76] *Ibid,* p 93.
[77] *Ibid*

5. Impact of Expert Testimony by Psychologists

Expert testimony has sometimes caused reductions in conviction rates[78]. There is encouraging evidence that where expert testimony is provided, it does influence cases. Available empirical evidence suggests that expert testimony in child sexual abuse cases has been generally admitted by courts in the United States and when challenged on appeal it is again admitted in more than half of the cases[79]. Using data in trial court transcript[80], surveyed 122 appellate court decisions in both civil and criminal cases in which expert witness testimony on the characteristics of abused children provided by a total of 160 experts were challenged. Thirty-one percent of the experts concerned were clinical psychologists. It was found that in over half of the cases (55 percent) the expert testimony was allowed on appeal and in 9 percent the evidence was partly admitted, in those cases where the courts rejected the expert witness testimony went to the issue of the child's credibility, something that, in evidence law, is for the jury to decide and not for an expert witness. Mason concluded that expert testimony informing the court about the weight of the evidence in the relevant literature pertaining to sexually abused children's willingness to remember, the accuracy of their recall and vulnerability to suggestive questioning can indeed assist the judge or jury to evaluate a child's testimony.

Drawing on Krauss and Sales[81], discussion of the literature, researchers have reported that juror decision making is influenced if expert testimony is presented on the following issues:

i. The fallibility of eyewitness identification
ii. Clinical syndromes (for example, battered wife syndrome, rape trauma syndrome, child sexual abuse syndrome and depressed memory syndrome)
iii. Insanity
iv. Future dangerousness of a defendant.

Poor evidence by psychologists appearing as experts can be very damaging for psychologists in general, undermining the positive impact which psychologist can have on developments within the legal system; and can have disastrous effects on individual cases, causing miscarriages of justice[82]. For GudJohnsson, poor psychological evidence is testimony that, first does not inform and second is misleading or incorrect. Furthermore, the characteristics of such poor evidence are 'poor preparation, lack of knowledge and experience, low level of thoroughness and inappropriate use of misinterpretation of test results' Advice for forensic psychologists, as for other expert witnesses who wish to avoid the embarrassing and unpleasant experience of seeing their expert testimony being distorted and their professional reputation damaged includes:

i. Being very familiar with court room procedure rules of evidence and ways of presenting psychological data to a bench or a jury as well as being aware of the conduct expected of an expert witness[83].
ii. Having well prepared reports and other evidence and, if inexperienced, to undertake some training in how to best handle lawyers' cross-examining[84].
iii. Stick to one's own area of expertise and be explicit and open[85]
iv. Novice expert witness psychologist can also benefit from having in mind a number of criteria by which to judge their testimony when preparing for it[86]. American attorney
v. Michael Lee[87] list the following top five mistakes expert testimony make (a) relying only on information provided by the lawyer (b) forgetting that he/she is an advocate for his/her opinions and methodology but not for the case itself (c) putting too much in writing, too soon and too casually; (d) being myopic and finally (e)

[78] EF Loftus, 'Impact of expert psychological testimony on the unreliability of eyewitness identification.' (1980) 65 *Journal of Applied Psychology*,9-15;

[79] MA Mason, 'A judicial dilemma: expert witness testimony in child sexual abuse cases' (1995) 19, *Journal of psychiatry and law* 3**-** 4.

[80] *Supra.*

[81] D A Krauss & BD Sales, 'The effect s of clinical and scientific expert testimony on juror decision making in capital sentencing' (2001) 7, *Psychology, public policy and law*. 67, 310.

[82] *Ibid*

[83] G Wardlaw, *The Psychologist in Court: Some Guidelines on the Presentation of Psychological Evidence*. In M. Nixon (ed) *Issus in Psychological Practice* (Melbourne: Longman Cheshire, 1984)
(pp. 133-43).

[84] *Ibid* .

[85] *Supra*

[86] SA Newman, 'Assessing the Quality of Expert Testimony in Cases Involving Children' (1994) 22, *Journal of Psychiatry and Law* 181-234.

[87] T M Mulroy, 'How to Examine a Psychologist in a Custody Case' (1993) 7, *American Journal of Family Law*, 65-72.

sounding too much like an 'expert'. Regarding cross-examination[88], list a number of rules likely to prove helpful for the witness. Inter-alia, these include:

i. Answer all questions and do not allow counsel on the other side to put words in your mouth. Do not make guesses, and take as much time as you need to reply to questions.
ii. If under attack, keep calm and avoid getting angry or unreasonably defensive.
iii. Prepare for the cross-examination by trying to anticipate the questions by imagining that you are the one who is cross-examining.

In providing advice for the art of advocacy[89],reminds his readers that even experienced expert witnesses have been known to 'just came apart like wet cardboard toys when actually giving evidence and urges them to remember that nobody- not even the ultimate leader in the
field-knows everything about his subject[90] are more specific in their advice on how to best cross-examine an expert witness. They suggest first to obtain from the expert admissions favourable to one's client, then to discredit unfavouable evidence and finally, to impeach the expert him/herself. The same authors list a number of cross-examination techniques, including:

i. Build up the expert's field of expertise and then proceed to show that it is not directly relevant to the issue facing the court.
ii. Use hypothetical situations to show that the expert would in fact agree with your presentation of facts of the case to show that the expert's credibility is doubtful because of apparent rigidity against considering other possible interpretations of the fact in issue.
iii. Demystify the expert's apparent self-importance by obtaining from him/her definitions of technical terms in simple, everyday language.
iv. Cast doubt on the thoroughness with which the expert has obtained his results.
v. Get the witness to admit that in the past other experts are known to have disagreed with him/her on the issue concerned.

The courts in the United States, Canada, England, Australia and New Zealand have opened the door to psychologists to testify as expert witness. Psychologists as expert witnesses in English speaking common law countries have appeared in cases involving child sexual abuse[91], child custody cases[92], the battered woman syndrome[93], eye witness testimony[94], post-traumatic stress disorder, profiling and false confessions[95]. The significance of the US Supreme Court's important judgment in Joiner and Munho, which followed in the wake of the Daubert decision in 1993, is dependent on American judges' ability to understand and implement crucial concepts in Daubert, but empirical evidence points to the contrary for the great majority of the American judiciary. This knowledge is cause for concern. Post-Munho decisions such as *United States v Plaza*[96] show preparedness by courts in the United States to admit expert testimony concerning a technique that may not be based on falsifiable theory but enjoys general acceptance within the community of its practitioners. In other words, American courts do not appear to adhere to a strict application of the Daubert criteria for admissibility of expert evidence as has been feared. In England and Wales, further relaxation of the Turner rule is evidenced in the court of appeal's admitting in a number of cases, such as that of Patrick Kane, expert testimony by forensic psychologists on a defendant's psychological vulnerability (that is, his/her suggestibility) to make a false confession to the police while in custody; in addition, the dame court's decision in *R v Bowman* that it should have the benefit of any development in scientific thinking including expert testimony about scientific knowledge and techniques that are at the stage of hypothesis. Thus, the courts in England and Wales do not seem to consider 'general acceptance' as the main admissibility criterion for expert testimony as American courts.

[88] Source <http://library.findlaw.com/jul/22/186441.html>
[89]WK Evans, 'Statistical Theory of Spontaneous Recovery and Regression' (1995) 62, *Psychological Review* 145-154.
[90] T A Mauet & LA Mc Crimmon (eds), *Fundamentals of Trial Techniques***.** Australian (Meltbourne: Longman)
[91] M A Mason, 'A Judicial Dilemma: Expert Witness Testimony in Child Sexual Abuse Cases' (1991) 19 (3-4). *Journal of Psychology and law* 185-219.
[92] *Ibid*
[93] H Breyer, 'The Battered Woman Syndrome and the Admissibility of Expert Testimony (1992) 28, *Criminal Law Bulletin*, 99-115.
[94] R Elliot, 'Expert Testimony about Eyewitness Identification: a critique' (1993) 17,. *Law and Human Behaviour*, 423-37. *see also* E F Loftus & K E Ketechman . *Witness for the defense.* (New-York St Martin's Press; 1991).
[95] G H GudJonsson, *The Psychology of Interrogations and Confession*. *Int*. Williamson (ed) *Investigative Interviewing: Rights, Research, Regulations. (*Cullompton L William, 2006) pp. 123-46.
[96] *United States v Plaza* 188F Supp 2d (2002).

GudJonsson[97] reminds us that empirical research by psychologists has influenced 'legal structures, procedures and case law' in the United States in such areas as eyewitness testimony, prediction of dangerousness, forensic hypnosis and lie-detection. Similarly, legal researchers in the UK have influenced the development of police procedures in interviewing suspects and the admissibility of expert testimony on whether a witness is suggestible. Unfortunately, an opportunity to reform the law of evidence in England regarding the admissibility of expert testimony by the Royal commission on Criminal Justice[98] (the Runciman Report) has been missed. Despite the fact that the commission called for a greater opportunity for experts to educate tribunals of fact, its report (a) took a myopic view of the issue of court experts and (b) by means of 'bizarre reasoning'- that such a move would lead to a confusion of roles and prevent the cross-examination of expert witness (c) rejected a proposal of a forensic science service that would be independent of both the persecution and the defence and which would be appointed by the courts[99]

As far as Australian courts are concerned, by not admitting expert testimony by mental health professionals on the working of memory, pitfalls in identification evidence, the typical behaviour of children after they have been sexually abused or how likely it is that a record of interview presented by police was in fact made by the defendant, they deny 'the assistance of specialist information possessed by mental health professional which may provide insights into a range of matters germane to the proof of a defendant's guilt or innocence[100]. The need for evidence law reform in Australia at state level along the lines of the Commonwealth Act cannot be overstated. Explicitly, abolishing the common knowledge rule in the rest of Australia's Jurisdiction, in the UK and New Zealand would be significant first step in the right direction. One cannot agree with Freckelton that, when a theory is sufficiently acknowledged by the experts in a given field to be reliable and characterized by scientific integrity, 'surely it is only arrogance and foolhardiness for the law to close its eyes to knowledge and understanding which is germane to its decision-making process.

6. Conclusion

Despite the empirical evidence that expert testimony impacts on trial outcome, those skeptical of the need for expert testimony in court[101] list three alternatives, namely: (a) making use of psychologist's expert report on particular legal issues pertinent to a trial to cross examine witnesses; (b) introducing independent forensic psychologists as part of an independent forensic science services, and (c) providing lawyers with much-needed training in psychology. Writing about the judiciary in England[102], there has also been canvassed the need for judicial training in area of forensic psychology. In the future, judgments in individual cases in England, Australia and New Zealand, but less so in Canada where there is a lesser need may well significantly reduce current restrictions to the admissibility of expert evidence. This however, is a process that is likely to take a long time not only in these jurisdictions above but also in Nigeria which may even take longer time. An alternative would be to let the courts or tribunal' of fact decide whether a particular case calls for expert evidence. Finally, the National Assembly (parliament) could codify the new limits of admissibility. As Landsman accurately predicted, 'a great deal is likely to happen during the next decade'[103] in the domain of expert evidence. Any development in scientific thinking and techniques shall not be kept from the court.[104]

[97] G H GudJonsson, *Psychology and assessment*. In R. Bull and D. Carson (eds) (1995b) 55-66;.
[98] *Royal Commission on Criminal Justice. Report CMND*. 2263 (London: HMSO. 1993.).
[99] M Redmayne, 'The Royal Commission's Proposal on Expert Evidence' (1994) 2, *Expert Evidence* 157-63.
[241] I Freckelton, *Psychiatry and Psychology: Mistrusted Guests at the Legal Table*: *Contemporary Operation of the Common Knowledge Rrule*. In D. Greig and I Frecklton (eds) 49-68. 1990 .
[101] D H Sheldon & M.D Mc Cleod, 'From normative to positive re-examined'.(1991) *Criminal Law Review* 811-201.
[102] P Thornton, 'The Admissibility of Expert Psychiatry and Psychological Evidence' 35, *Judicial training Medicine, Science and The Law* 143-9.
[103] *Ibid*.
[104] 2006 EWCA Crim. 417.