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MENTALLY ILL OFFENDERS VIS-A-VIS INVESTIGATING THE CHALLENGES OF ADMISSIBILITY OF OPINION EVIDENCE IN NIGERIA.

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ABSTRACT

In cases requiring abstruse or technical knowledge which are outside the knowledge and understanding of the court or jury, opinions of those deemed knowledgeable in those faculties are often sought. This is in consonance with the rule that the testimony of experts constitute exception to the generally accepted rule that when a court is to form an opinion on a relevant fact in issue, opinions of other persons are irrelevant and inadmissible. But the judiciary has maintained a

Introduction

Black's Law Dictionary says evidence is:

> Something (including testimony, documents and tangible object) that tends to prove or disprove the existence of an alleged facts…[31]

The dictionary cited James B. Thayer to have defined the concept to include:

> … any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof as the basis of inference in ascertaining some matter of fact.[32]

Ochem[33] also cited Aguda to have described judicial evidence as "the means by which the facts are proved, but excluding inference and argument". The Nigeria Evidence Act[34] says:

> Evidence is said to be the means by which facts in issue are established by judicial tribunal, such evidence could be oral, hearing, documents, things and facts which a court will accept as the

[31] Garner, B. A. Black's Law Dictionary (9th edition) USA, Thompson West Publishing, 2009, p635.
[32] James B. Thayer, "Presumptions and the Law of Evidence" *3. Harv. L. Rev.* 141, 142, p.9 (1889)
[33] Ochem, C. E., "Relevance and Admissibility of Electronically Generated Documents under the Nigerian Law of Evidence" – *Being a Thesis submitted to the College of Law, Igbinedion University, Okada,* in partial fulfillment for the award of Doctor of Philosophy in Law (Ph.D.) 2012, p.31.
[34] Evidence Act, No. 18, 2011 with cases and materials, p129.

skeptical and cautious attitude toward the admissibility of opinion evidence of experts. This stems from the controversial and conflicting testimonies of experts. This paper appraises the admissibility of opinion evidence as it concerns mentally ill offenders. It presents various legal commentaries and judicial decisions on the concept – both expert and non-expert opinion evidence. The paper distinguishes between professional witnesses and expert witnesses. The paper also states that the courts have often favoured traditional methods of assessing culpability of the mentally-ill offender. It concludes however that the courts have often rejected opinion evidence of experts because of the unreliable and conflicting testimonies of psychiatrists and other experts – regarding such testimonies as probative, advisory, not essential and do not tie the hands of the court.

> facts in issue in a given case. It could be oral, documentary in which the court may be legally received in order to prove or disprove some facts in dispute.

From the various definition, it is clear that the concept is of vital significance in every trial process – whether civil or criminal. However, there are various types of evidence. They include "Real Evidence (Direct), Circumstantial Evidence (Indirect), Oral Evidence, Documentary Evidence, Electronic Evidence and Hearsay Evidence".[35]

On its part, opinion simply refers to ideas, belief or judgment based mainly in feeling. It exists in the thinking imagination and understanding of the maker and therefore, it is essentially judgmental.

Opinion evidence refers to evidence of what the witness thinks, believes or infers in regards to facts.[36] When this type of evidence is expressed by an expert, it may be used only if scientific, technical or specialized knowledge, and will aid the trial of fact in understanding the evidence or determining a fact in issue".[37]

In common law jur8isdictions, the general rule is that a witness is supposed to testify as to what was observed and not to give an opinion on what was observed.[38]

A central feature of the English Rule of Evidence, which constitutes the foundation of the Nigeria Law of Evidence is that in litigation before the court, witnesses must restrict their testimonies to the fact as observed by them. Consequently, witnesses are expected to give direct evidence of their own perception". [39]

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[35] Ibid

[36] "Opinion Evidence", from Wikipedia, the Free Encyclopedia, available @ http://en.wikipedia.org/wiki/opinionevidence accessed on 11/08/2021.

[37] "Opinion Evidence", available @ http://legaldictionary, the Free Encyclopedia.com/opinion evidence accessed on 14/06/2018.

[38] Ibid.

[39] Kamila, O. K. "Critical Appraisal on Opinion Evidence" – *Being a long essay submitted to the Faculty of Law, University of Ilorin, Nigeria, in partial fulfillment s for the award of the degree of Bachelor of Law (LL. B) Hons. In Common Law,* April 2011, p. 9.

Admissibility of Opinion Evidence

The general rule on opinion evidence is that it is not admissible. This is well expressed in *section 67*[40] of the Nigeria Evidence Act which provides that:

> The opinion of any person as to the existence or non-existence of a fact in issue or relevant to the fact in issue is inadmissible except as provided in *sections 68 to 76* of this Act.

However, since it is the duty of the court or jury, as the case may be, and not that of a witness to draw inferences and conclusions from proved facts, some exceptions to the general rule have been created by the Act in *sections 68 to 76* where opinion evidence are admissible. They include "opinion of experts in *sections 68 to 74*[41] and opinion of non-expert in *sections 72 to 76.*[42]

Opinion of Experts

Courts require testimony on a variety of matters that entail specialist knowledge. Psychiatric and psychological experts may be required to assist the courts with a wider variety of "medico-legal matters in a variety of legal contest.[43] These include:

a) The state of mind of defendants in criminal cases, in relation to a variety of legal issues or tests;
b) The sentencing of offenders (usually in the context of mental disorders)
c) Psychiatric injuries that are at issue in personal injury litigation in the civil courts
d) Allegations of negligent psychiatric care
e) The mental capacity of people making various types of legal decision.[44]

No doubt, the above list is not exhaustive.

Keith Rix et al enumerate the expert's duties to the court to include "a duty to assist the process of justice, a duty to act impartially, objectively and honestly and a duty to give testimony" only in their areas or fields of expertise[45]", others include a duty "to make clear the limits of their knowledge or competence, a duty to be accurate and complete and a duty to define their areas, existence of expertise,"[46] among others.

The writers distinguish between "professional testimony: and "expert testimony"[47] They assert that professional witnesses have, or have had some professional involvement with one or more of

[40] Evidence Act, 2011.
[41] Ibid.
[42] Ibid.
[43] Keith Rix, Nigel Eastman and Goven Adshead, "Responsibilities of Psychiatrists who provide Expert Opinion to courts and Tribunals". The Royal College of Psychiatrists, College Report CR193, February 2015, available at https://workrepsych.ac.uk>docs>college-reports>college>report>cr193 accessed on 11/10/2021
[44] Ibid.
[45] Ibid p6.
[46] Ibid.
[47] Keith Rix, Nigel Eastman and Goven Adshead, "Responsibilities of Psychiatrists who provide Expert Opinion to courts and Tribunals". Opcit p7.

the parties involved, or with witnesses.[48] For example, if a psychiatrist is asked to give evidence as to the mental state of a person whose admission they recommended, they are giving professional evidence.[49]

On its part, expert witnesses give opinion evidence (which is the core of this paper) and are "necessarily qualified by study or experience to be able to assist the courts concerning matters that are outside the knowledge and experience of the court,"[50] However, "the courts decide whether experts evidence is required or justified", and whether a particular "expert" is "qualified by study or experience to assist the court".[51]

The primary aim of litigation, whether civil or criminal "is to decide issues of fact and of law"[52] and in most jurisdictions, "issues of fact are decided by juries and issue of law by judges"[53]. For several centuries, decisions about issues of fact in certain cases have been assisted by experts.[54] Hence, Saunders J, as early as 1554 in the case of *Buckley v Rice – Thomas* (quoted in *Cross and Tapper)* said that "if matters arise in law which concern other sciences or faculties, we commonly apply for the aid of that service or faculty which it concerns"[55]

In cases difficult to understand or needing technical knowledge, experts where initially assisted to "serve on juries" and later in the middle ages, "they began to testify as witnesses"[56] Testimonies from experts in various fields became common place in England during the latter half of the eighteenth century following the rapid development in special branches of science and technology associated with the industrial revolution.[57] For example, the values upon opinion evidence was founded in the landmark case of *Folker v Chadd.*[58] In this case, the opinion of an engineer was sought in the issue of whether an embankment has caused the setting up of a labour. Lord Mansfied said:

> The opinion of scientific men upon fact 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 judge or jury. If on the process facts a judge or jury can form their own conclusion without help, then the opinion of an expert is unnecessary.

In the context of psychiatric opinion evidence in England, the judiciary has maintained a skeptical cautious attitude towards the admissibility of opinion of expert.[59] This paved way for the decision

[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid p8.
[52] R. D. Mackay, Andrew M. Colman, and Peter Thorton, "Evidential Issues in the Admissibility of Expert Psychological and Psychiatric Testimony" available at https://word.academia.edu/13830213/witness-testimony-psychological-investigation-and-evidentialperspective-A guide for legal practitioners and other professionals, accessed 11/10/2021.
[53] Ibid.
[54] Ibid.
[55] Cross R and Tapper C, Cross and Tapper on Evidence (8th edition), London, Butterworth's, 1995, 14
[56] Ibid.
[57] Ibid.
[58] (1782) 3 Doug KB 157
[59] R. D. Mackay, Andrew M. Colman and Peter Thorton "Admissibility of Expert Psychological and Psychiatric Testimony" opcit, p2.

in the Court of Appeal in the case of *R. v Turner.*[60] This case established an important rule governing the admissibility of psychological and psychiatric evidence.[61] The rule stated thus:

> Those who call psychiatrists as witnesses should remember that the facts upon which they test their opinions must be proved by admissible evidence.

The defendant in this case *Turner* killed his girlfriend, after she told him that she had being sleeping with two other men and that the child she was carrying was not his. He pleaded provocation. Although he showed no signs of mental disorder, the defence wished to introduce psychiatric evidence to show that he had enjoyed deep emotional relationship with the deceased", that he was likely to have "experience an explosive outburst of blind rage after her confession".[62] After examination, a psychiatric report on the evidence that the expert witness intended to give, the trial judge ruled the evidence inadmissible on the ground that it dealt with matters of "common knowledge and experience within the experience of the jury.[63] On appeal, arguing that the trial judge had erred in law in refusing to admit the expert evidence, the appeal was dismissed. Lawton L. J. in justifying the dismissal said:

> 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 qualifications does not by that fact alone make his opinion on matters in human nature and behavior within the limits of morality any more helpful than that of the jurors themselves, but there is a danger that they may think it does.[64]

The *Turner* rule has been adopted in excluding expert psychological and psychiatric evidence in several criminal cases since 1975.[65] Consequently, the courts have been "comparatively indulgent in their readiness to admit expert psychological and psychiatric testimonies in cases involving pleas of diminished responsibility.[66] This is so, as, according to the courts, "psychiatric diagnosis may be both an art and a science, but its conclusions are clearly subject to the vagaries of time and location".[67] This also illustrates how the courts have reacted with doubt and suspicion at some of the psychiatric evidences they have received[68].

[60] (1975) QB 834 at 840 (CA).
[61] R. D. Mackay, et al., "Admissibility of Expert Psychological and Psychiatric Testimony" opcit, p3.
[62] Ibid p3.
[63] Ibid.
[64] (1975) QB 834 (CA) p 841.
[65] R. D. Mackay, et al., "Admissibility of Expert Psychological and Psychiatric Testimony" opcit, p3.
[66] Ibid.
[67] Jill Peay, "Responsibility, Culpability and the Sentencing of Mentally Disordered Offenders: Objectives in Conflict" *Criminal Law Review* (3) pp152 – 164 @ Sweet and Maxwell, © 2016 available @ http://eprintsr/se.ac.1146422/1
[68] Ibid.

However, while experts offering testimony dates back to 1908, or earlier, one significant United Sates of America case law on the issue started in 1923.[69] The case, *Frye v U.S.*[70], which became known as "*the Frye Rules*" for the admission of expert testimony asserted that a technique or procedure has to have "gained general acceptance in the particular field in which it belongs" in order to be allowed into evidence. In that case, Jane Frye, a young African American was arrested in Washington, D. C. for the murder of a prominent white physician. After several days of police investigation, he confessed to the murder. Days before his trial, Frye repudiated his confession, claiming that he had been coerced by a promise of half the $1,000 dollars' reward should he confess. William Moulton Marston, a psychologist administered his systolic blood pressure test to Frye and concluded that Frye was telling the truth and was innocent. Marston claimed that his use of the systolic blood pressure measure as a lie detector method was the "end of mankind's search for a test of deception".[71] The presiding judge ruled to exclude the lie detection evidence because it was not based upon a well-recognized and scientific principle.

This ruling was eventually upheld by a Federal Court of Appeal yielding the *Frye* standard for expert testimony. This means that where an expert's opinion is not based on "generally accepted" procedures, it would not be admissible.[72] This issue arose in the case of *Daubort v Merioll Dow Pharmaceuticals Inc.*[73] This case involved the question of whether the drug Benedstin, marketed by Merrel Dow caused serious birth defects when ingested by pregnant women. The plaintiffs sought to admit expert testimony about the dangers of Benedstin to assert that the drug company should have known about the dangers and warn pregnant women against its use. However, the data upon which the expert based their opinions had not been formally published in a scientific journal or otherwise. The original trial court therefore refused to consider the expert testimony claiming that the data had not been scrutinized by others within the field and thus could not possibly be "generally accepted.[74] The court further noted that the rule requires that the information be "scientific" which implies a grounding in the methods and procedures of science" and that it must be "knowledge" which means more than "subjective or unsupported speculation"[75] The court also noted that the information "must assist the trial of fact" which suggest that the testimony of the expert must "have a reliable basis in the knowledge of the discipline.[76]

On his part, Sharma[77] asserts that the expert is expected to bring the technical evidence to the level of a layman by using "simple, clear and understandable language" adding that "technical terms are avoided both in the report and in the statement before the court, and if technical terms are used they should be carefully explained".[78]

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[69] Meyer R G. and Weaver, C. M. Law and Mental Health – A Case Based Approach (New York), The Guilford Press, 2006, 39.
[70] 295 F. 1013 (D. C. Cir. 1923).
[71] Ibid, 40
[72] Ibid.
[73] 509. U.S. 579, 1993.
[74] Ibid, 41
[75] Ibid.
[76] Ibid.
[77] Sharma, B. R. Forensic Science in Criminal Investigation and Trials (4th edition), New Delhi, India, Universal Law Publishing Co. PVT Ltd. 2003, 483.
[78] Ibid.

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Another illuminating case concerns the attempted assassination of President Ronald Reagan in 1981 by John Hinckley.[79] Testimony in Hinckley's trial revealed his ultimate goal of capturing the admiration of movie star, Judith Foster. Lawyers for the prosecution and defence differed little on the actual facts, but surprisingly, they differed considerably over the defendant's true psychological condition.[80] There were conflicting testimonies from a wide variety of experts. Evidence presented to the Jury ranged from notes taken by Hinckley's ex-therapist to documentation of an "extensive Impatient Computerized Axial Tomographic (CAT) scans of his brain".[81] Confronted with these conflicting expert evidences, the Jury found Hinckley "not guilty by reason of insanity".[82]

Another issue worth mentioning is the dependence of psychiatric opinion of out-of-court statements. This issue was raised by the Supreme Court of Canada in *R. v Abbey*[83]. In this case, a defendant psychiatrist relied exclusively on out-of-court statements made to him by the accused in formulating his opinion as to the accused's mental state at the relevant time. These statements were admitted in evidence through the psychiatrist and treated by the trial judge as factual, even though the accused never took the stand. The court held that these hearsay statements ought to have been admitted only to show the basis for the psychiatrist's opinion and that the jury should have been so instructed. This issue had been discussed before in the Canada Supreme Court in the case of *City of Saint John v Irving Oil Co.*[84] Here, it was argued that the opinion of a qualified land appraiser in regards to the value of a particular piece of land should not be admitted because it was based on out-of-court statements consisting of interviews the appraiser had conducted with forty-seven persons who had been parties to sales of land in the area. Mr. Justice Ritchie, in delivering the judgment of the court, dismissed this argument as follows:

> To characterize the opinion, evidence a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of opinion.
>
> The nature of the source upon which such an opinion is based cannot, in my view, have any effect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion.

[79] Ibid, 121.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] (1982) 2 S.C.R. 24, 68, C.C.C. (2d) 324.
[84] (1996) S.C.R. 581. 58 D.C.R. (2d) 404.

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Later that year, the same Supreme Court dealt with the same issue again in *Wilband v The Queen*[85] This time in the contest of psychiatric opinion evidence. In this case, two psychiatrists testifying in a dangerous sexual offender proceedings had based their opinions in part on prison files containing another psychiatrist's report, the results of a psychological test and a hospital report. In response to the argument that the opinion was founded on hearsay and should not be admitted, Fauteux J. drew a distinction between weight and admissibility similar to that drawn in the earlier case:

> The value of a psychiatrist's opinion may be affected to the extent to which it may rest on second-hand source material; but goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the truth of the information but evidence of the opinion formed on the basis of that information.

Similarly, two Ontario Court of Appeal decisions *R v Dietrich*[86] and *R v Rosik*[87] further laid credence to the admissibility of such opinion evidence. In *Dietrich*, Chief Justice Gale held that once an expert was permitted to give his opinion, he ought to be permitted to give the circumstances upon which that opinion was based. The judge correctly pointed out that evidence of such circumstances "would not be hearsay" since it would be admitted solely to show the reasons for the opinion and not as evidence of the facts contained therein. He went on to suggest however that, otherwise, unproven statements admitted through a psychiatrist as evidence of the basis of the opinion "would lend weight to that opinion…"[88]

In *Rosik*, a defence psychiatrist had based his opinions regarding the capacity of the accused to intend murder solely on out-of-court statements made by the accused to the psychiatrist and others as to what quality of drugs and alcohol he had ingested on the day in question. The court held that the basis of the opinion "was admissible and did not offend the hearsay rule".[89]

From the foregoing judicial decisions, Wardle[90] asserts that two propositions seem to have arisen. First, is that testimony by an expert as to the basis of his opinion consists of second-hand material not proved is hearsay and such material is admitted in evidence "not to prove the truth of its contents but to indicate the basis of the opinion".[91] According to Wardle, the second proposition is that the value of an expert opinion may be affected to the extent to which it is based on second-

[85] (1967) S.C.R. 14 (1967) 2 C.C.C. 6 (1967). It is pertinent to state that when there is conflict of opinion between two experts, it is the duty of the court or judge to accept one and reject the other, or in the alternative invite other expert entirely. Like the Nigeria case of *Ngige v. Obi* (2006) 1 UNNLR (pt. 999). In this case, which was an election petition matter, the 1st respondent called a handwriting expert to testify. On determining of probative value of expert evidence, the court held that "expert evidence is necessary founded on training and experience… the weight to be attached to expert evidence depends upon the skill of the experts. On whether expert evidence is binding in court, the court further held that a court is not bound by the evidence of an expert witness. It has an opinion on the matter, that is it must exercise judicially and judiciously in the light of other available evidence". The court added that "the tribunal acted rightly where it examined the documentary evidence adduced and agreed or disagreed with the opinion of the 1st respondent's expert witness".

[86] (1970) 50 3 0. R. 725.1. C.C.C. (2d) 49 (CA).

[87] (1971) 2 O. R. 47. 2 C.C.C. (2a) (CA), 1970.

[88] Supra note 254.

[89] Supra note 255.

[90] Wardle Peter, "R v Abbey and Psychiatric Opinion Evidence: Requiring the Accused to Testify" in *Ottawa Law Review, Vol.17: 116* available @ www.rdo.olr.otawa.ca/index2.php? Opinion=con.sobi2… dd accessed on 11/06/2022 p119.

[91] Ibid.

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hand material. The writer asserts that the opinion affects "the weight rather than the admissibility of the opinion evidence since the basis of the opinion is admissible under the first proposition.[92]
In sum, psychiatrists out-of-court statements may be used as evidence although statements made out-of-court are hearsay and "traditionally excluded from evidence".[93]
However, decided cases reveal that the conditions precedent to the admissibility of the evidence experts are seldom complied with. The courts have rightly rejected the testimonies of the expert psychiatrist and other medical reports. For example, the trial which led to the acquittal of John Hinckley (*supra*), the would-be assassin of President Ronald Reagan of the United States of America in 1982 produced conflicting psychiatric evidence. These conflicts in evidence of expert psychiatrists have often won distrust for expert psychiatrist evidence.[94]

The Nigeria Experience

Generally, when a court is to form an opinion on a relevant fact in issue, opinions of other persons are irrelevant and inadmissible.[95] However, the testimony of experts constitute exceptions to this rule.[96] These exceptions in turn find justification in the fact that there are certain scientific matters on which the court will be unable to determine unless assisted by the experts to reach a correct conclusion. Accordingly, *section 68* of the Evidence Act provides that:

> When the court has to form an opinion upon a point of foreign law, customary law or custom, or of science or art or as to identity of handwriting or finger impressions, the opinions upon that point of persons especially skilled in such foreign law, customary law or custom, or science or art in question as to identity of handwriting or finger impression are admissible.

The areas of knowledge in expert testimony which may be received or are admissible encompass matters scientific and medicine (medical)[97] in which psychiatry is a branch.
However, some judicial decisions in our jurisprudence suggest that the courts do not rely wholly on expert opinions in arriving at their decisions. For example, in *Edoho v The State*[98], the appellant was charged with the murder of one Akanimo Jacob Edoho. When he was first arraigned in court, he declined to respond to the charge. His plea was however taken on his second arraignment. At the trial, he relied on the defence of insanity, adding that the incident was beyond his control as he was then under the spell of witchcraft. At the end of the trial, the trial judge rejected the appellant's plea of insanity and convicted him as charged. Unsatisfied with the judgment, the appellant appealed to the Court of Appeal which dismissed his appeal and affirmed his conviction. He further appealed to the Supreme Court. On the admissibility of expert medical evidence, the

[92] Ibid at 121.
[93] Ibid.
[94] Ekaikitie, G. W. "The Defence of Insanity" – Being an LLM Thesis submitted to the Faculty of Law, Ambrose Alli University, Ekpoma, 2003, 43.
[95] Section 67, Evidence Act.
[96] Charles D. Mekunye, "Expert Testimony Revisited", Vol. 2, 1987, No. 1 Legal Practitioners Review, 192.
[97] Ekaikitie, G. W. "The Defence of Insanity" 41.
[98] (2011) Vol. 192 LRCN 39.

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court held that "it need to be borne in mind that evidence of insanity of his ancestors or blood relations is admissible but expert medical evidence, though probative, is not essential".

Similarly, in *Adamu v The State*[99], the appellant used his knife to cut the throat of his 70 years old step-mother who was sleeping and slaughtered her and she died. The appellant pleaded insanity. The trial court considered the testimony of all prosecution witnesses and the various exhibits including the statement of the appellant where he admitted that he did what was alleged. He was found guilty, convicted and sentenced to death. On appeal to the Court of Appeal, the decision of the trial court was upheld. Dissatisfied with the decision of the Appeal Court, the appellant approached the Supreme Court. On the relevance of a medical expert report, the court held that indeed, the plea of insanity is a "legal construct" and not a "medical standard". This means it is the court that determines whether the accused was insane at the time of the commission of the crime and not expert medical evidence.

This issue also arose in the case of *Alfa v. The State.*[100] Here the appellant was arraigned before the Kogi State High Court, sitting at Okpo, for committing culpable homicide. The appellant, Pastor Sunday Alfa, on 24th day of February, 2014 left his bedroom and entered the wife's bedroom and inflicted several cuts on her using a cutlass. The wife suffered several injuries and died on the way to the hospital. The trial court in its considered judgment convicted and sentenced the appellant to death by hanging. Dissatisfied with the judgement of the trial court, the appellant appealed to the Court of Appeal. On whether it is the court that determines if an accused person was insane when he committed the offence or reliance on expert medical opinion, the court held that:

> However, it is to be noted that it is solely for the judge to determine whether the accused person was indeed insane or suffering from insane delusion i.e mentally deluded, at the time of committing the offence. So, any medical report available to the court is only a guide. It does not tie and bind the hands of the court.

This again demonstrates the courts distrust for expert medical opinion.

It is worth mentioning that the courts have "consistently ruled that inferences as to a normal person's state of mind can be drawn from the person's conduct and the surrounding circumstances" without the assistance of expert evidence[101]. Hence, where the issue concerns the knowledge or intention of a normal person, the "*Turner*" rule must prevail".[102] In *R v Coles,*[103] the trial judge refused to admit expert psychological testimony in answer to a reckless arson charge on the ground that the 15-year-old defendant's mental capacity, though lower than average, did not disclose any evidence of abnormality. In upholding this decision, the English Court of Appeal ruled that the evidence in question "related solely to the characteristics of the defendant" that could be evaluated competently by a jury through reference to the facts "without the assistance

[99] (2014) 32 WRN 1. S.C.
[100] (2016) 14 WRN 115 CA.
[101] R. D. Mackay, Andrew M. Colman, and Peter Thorton, "Admissibility of Expert Psychological and Psychiatric Testimony" opcit, 10.
[102] Ibid.
[103] (1994) Crim, LR, 820.

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of expert evidence.[104] This is a clear-cut application of the *Turner* rule of the inadmissibility of expert opinion evidence.

Similarly, in *R v Davis and Others,*[105] a case dealing with the admissibility of expert evidence in relation to the reliability of testimony given by very young children, the Court of Appeal had no hesitation in adhering to the *Turner* rule. The court said:

> It is fundamental that experts must not usurp the function of the jury in a criminal trial… particular circumstances arise when there are characteristics of a medical nature in the make-up of a witness, such as mental illness, which would not be apparent to the jury or the effect of which would not be known to the jury without assistance. These circumstances do not arise in the case of ordinary children who are not suffering from any abnormality.

Suffice to say that the *Turner* rule continues to prevail or dominate the issue of the admissibility of expert psychological and psychiatric testimony.[106] The implication of this is that if the mental process of an accused person are not claimed to be abnormal, then the jurors "must use their own knowledge and experience to decide the issue in question".[107] This is well illustrated within the broad area of *mens rea* where it is only in exceptional cases that expert evidence is permitted to assist jury.[108] Such an exceptional case arose in the case of *R v Toner.*[109] In this case, the court decided that the possibility of a mild attack of hypo glycaemia lay outside the ordinary experience of jurors in the sense that they would not be able to make a judgment about how such a medical condition might have affected the accused's mental state in relation to *mens rea* without the aid of expert evidence.[110] However, such cases are exceptional and rare.[111]

Opinion of Non-Experts

Non-expert opinion refers to the opinion given in "restricted circumstances" by laymen or persons who do not possess any expertise. These circumstances mainly concern matters of everyday life where a person may be expected to give opinions and which opinions may be safely acted upon by others.[112] Such circumstances cannot be definitely laid out, but cases in which non-expert opinions have been admitted include "apparent age of a person, apparent age of objects, speed, weather, drunkenness, identification of handwriting and eye witness identification".[113] Others are "identification of physical objects, the general body condition or emotional state of a person, the

[104] R. D. Mackay, Andrew M. Colman, and Peter Thorton, 10.
[105] (1995) 94/4098/52.
[106] Ibid
[107] Ibid.
[108] Ibid.
[109] (1991) Crim. LR 627.
[110] R. D. Mackay, Andrew M. Colman, and Peter Thorton, "Admissibility of Expert Psychological and Psychiatric Testimony" opcit, p10.
[111] Ibid.
[112] "Opinion Evidence" from Wikipedia, the free encyclopedia, available at http://en.wikipedia.org/wiki/opinion-evidence, accessed on 11/06/2022.
[113] Ibid.

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general condition of objects, the approximate value of objects, approximate distance, time and ability to speak and understand language".[114]

However, the issue of the need for expert opinion or evidence in respect of psychiatric offenders has occupied the attention of judges, courts, legal commentators, authors. In contrast, that of non-expert opinions or evidence has received scant attention. This is probably because in most litigations, the courts have continued to seek expert opinion even when non-experts such as relations, friends or parents of the accused have testified.

For example, in the case of *New Jersey v Timmendequas,*[115] a seven year old Megan Kanla lived with her parents in Hamilton township, New Jersey. Across the street lived 33-year-old Jesse Timmendequas. Timmendequas had already spent time in prison for the "aggravated sexual assault" of a young girl in 1980, and "sexual assault and attempted aggravated assault" in 1982.

Neither the Kanlas nor any of the other nearby families had any way of knowing about Timmendequas' history. Children regularly played freely around the neighbourhood as was Megan in the evening of July 29, 1994. Megan's mother testified later that around 5:30pm that day, she slept off and while she was sleeping, Megan left with the intention to visit a friend down the street. Timmendequas drew her into his bedroom where he began to touch her. When Megan screamed and tried to escape, he strangled her with a belt until she lost consciousness. He had hit Megan's head with a piece of furniture during the strangle. To avoid getting blood stains on the carpet, he placed a plastic bag over Megan's head. He then sexually assaulted her until he was interrupted by his roommate's return. Believing Megan to be dead, Timmendequas placed her body in a toy box and carried it downstairs. He drove to a local Country Park, where he again sexually assaulted Megan before dumping her in some tall weeds.

When Megan's mother woke up, she could not find her. The family called the Police. Officers arrived and joined the family and neighbours in the search. Megan's mother gave them a photograph of her daughter and a description of the clothing Megan was wearing. Timmendequas himself participated in the search, handing out fliers with Megan's picture. He told Megan's mother that he had seen Megan before dinner. But when interviewed by Police, he told them that he had last seen Megan riding a bicycle at 2:30 in the afternoon – only when Police asked about the inconsistency did he mention Megan riding her bicycle in front of his home between 5:30 pm and 6:30pm. Timmendequas also gave conflicting statements concerning his whereabouts during the time surrounding Megan's disappearance. Shaking and perspiring, Timmendequas then said that he saw Megan with a friend while he was washing his boat between 5:pm and 5:30pm.

The next morning, detectives saw Timmendequas take his puppy out for a walk and brought out the garbage. The officers searched the garbage and found a rope with some knots tied to it. The rope appeared to have dried blood on it. Also in the trash was the waistband of a small pair of pants and a piece of material that matched the waistband. Mrs. Kanla (Megan's mother) later confirmed that the tattered clothing belonged to Megan. Timmendequas was immediately arrested. He confessed to the murder and eventually to the sexual assault. He led the Police to the partially clothed body. Megan's head was still covered with the plastic bag. After signing the official

[114] Ibid.
[115] 161, N. J. 515, 1999, N. J. Lexix 1607 (1999)

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confession, Timmendequas told authorities he felt he had been "slipping for a while", and "getting those feelings for little girls… for a couple of weeks or a couple of months."

At the trial, the prosecutor sought the death penalty. Timmendequas called two witnesses who presented evidence of mitigating circumstances in his background. It was also testified that Timmendequas's mother was a promiscuous alcoholic who had ten children by seven different men, and that his father was a violent drinker with a criminal history. Timmendequas was raised in poverty and was often cold, dirty, hungry and without adequate medical care. His father had reportedly sexually abused him and his brother and they both saw their father raped a 7year old girl.

Dissatisfied with these non-expert evidences, the court sought expert evidence which was provided by Timmendequas' expert, a psychologist who said that Timmendequas suffered from "pedophilla borderline mental retardation fatal alcohol effect and schizoid personality disorder". The Psychologist expressed the opinion that at the time of the crime, Timmendequas was under "extreme emotional disturbance". The psychologist said that Megan's death was caused by a "reflective response to the panic the defendant felt when the victim attempted to flee". The State presented a Psychiatrist as a rebuttal witness who testified that there was no evidence to support Timmendequas' claims of extreme emotional disturbance and diminished capacity. The psychiatrist said that the defendant's IQ showed a borderline intelligence that did not prevent him from functioning or appreciating the nature of his conduct Timmendequas himself pleaded to the Jury:

> Okay. I am sorry for what I have done to Megan. I pray for her family every day. I have to live with this and what I've done for the rest of my life. I ask you to let me live so, I, some day, I can understand and have an understanding why something like this could happen. Thanks.[116]

On May 30, 1997, the Jury found him guilty of purposeful murder, first-degree kidnapping and four counts of aggravated sexual assault. Timmendequas was sentenced to death. The Supreme Court affirmed his convictions and death sentence on direct appeal.[117]

However, non-expert opinions are admitted on the basis of convenience and in the interest of a reasonably sound "prose giving of evidence".[118] This is common in situations where the "perception and statement of fact are conclusive in themselves or a mixture of inference and fact".[119] In such cases, witnesses are permitted to give their estimate or impressions of matters which in the nature of things, cannot be proved in any other way.[120] A good example of this, is the identification of persons and things when a witness states that he recognizes an accused as being the person who committed the crime. He is stating a conclusion which he drew from the total impression made upon him and of the person he saw[121].

[116] "Opinion Evidence" from Wikipedia, the free encyclopedia, opcit.
[117] Ibid.
[118] Meyer R G. and Weaver, C. M. Law and Mental Health – A Case-Based Approach, opcit, 287-288.
[119] Ibid.
[120] Bagston R and Cross Winkens, Outline of the Law of Evidence, (7th edition) (London), Butterworth's Press, 1996 147.
[121] Carr, C. J. and Mount Bean, Law of Evidence (3rd edition) London, Butterworth's Press, 1999, pp178-179.

On its part, the Nigeria Evidence Act provides for situations where non-expert opinions are admissible. *Section 72(1)*[122] provides for when "opinions as to handwriting are admissible", *section 73(1)*[123] on "opinion as to the existence or general custom or right"; *section 74(a)(b)(c)*[124] provide for "opinions as to usages and tenets, while *section 75*[125] on "opinion on relationship".

Our courts seem not to see anything "sacrosanct or compelling" about opinion evidence and in appropriate cases have rejected same.[126] Atsegbua[127] asserts that the exclusion of opinion evidence is "one of the important exclusionary rules in the law of evidence". He quoted Wigmore to have stated that:

> The rule excluding opinion evidence is a senseless rule. No harm could be done by letting the witness offer his inference except perhaps the waste of moment's time, whereas the application of the rule wastes vastly more time. The rule is so pedantically applied by most courts that it excludes the most valuable testimony.[128]

One Nigerian indigenous case illustrating how unreliable opinion evidence can be is *The State v Alexander Okafor and Sons*[129] where the accused was charged for murder. The deceased, a young school girl had died in the process of an abortion and her corpse buried. As no autopsy was performed before the body was buried, exhumation became imperative and this was done about three weeks after burial. Part of the evidence of the doctor who conducted the postmortem reads as follows:

> I looked at the corpse while lying inside the grave. The trunk and the abdomen were in the state of decomposition and were stinking. The internal organs were, to me, no longer identifiable, having as it were, turned into a soft stinking mess. I am inexperienced. This was my first mortem exhumation exercise. I felt I could not help nor be able to find out the cause of death. I therefore released the corpse to the owners and we left.

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[122] This section states that "when the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is admissible"

[123] This section provides that "when the court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of such customs or right, opinions of persons who would be likely to know of its existence if it existed are admissible".

[124] This section states that when the court has to form an opinion as to: (a) the usages and tenets of anybody or men or family, (b) the constitution and government of any religious or charitable foundation, (c) the meaning of words or terms used in particular districts or by particular classes of people, the opinions of persons having special means of knowledge on the matters specified in this section are admissible.

[125] This section provides that "when the court is to an opinion as to the relationship of one person to another, the opinion expressed by conduct as the existence of such relationship of any person who is a member of the family or otherwise, has special means of knowledge on the subject, is admissible – provided that such opinion shall not be sufficient to prove a marriage in proceedings for a divorce or in a petition for damage against an adulterer or in a prosecution for bigamy."

[126] Kamila, O. K. "Critical Appraisal on Opinion Evidence" opcit, p.23.

[127] Atsegbua, L. The Law and Evidence, opcit, p.93.

[128] Ibid.

[129] AA/27c/77 of 14th December 1977 (unreported).

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A situation such as this has often given the courts justification for disregarding expert and non-expert opinion evidence.

Conclusion

The controversy surrounding the admissibility of opinion evidence on psychiatric matters is of much more recent origin.[130] Courts require testimony on a huge number of issues that entail specialist knowledge. Hence, when the court or jury is confronted with matters beyond their knowledge or comprehension, it becomes imperative to seek the assistance of experts in the relevant field of human endeavour - even when traditional methods such as testimonies of relations, parents, friends have been admitted in evidence.

Consequently, the courts require the expert to provide an "objective, independent and impartial opinion".[131] But the courts have often frowned and rejected the opinions of experts.

The testimony of experts is an exception to the inadmissibility of opinion evidence rule. This finds justification in the fact that there are certain scientific matters on which the courts or jury will not be able to adjudicate unless assisted by experts to reach an acceptance conclusion.

The interpretation of the principle in *Turner rule* is the assumption that human behaviour, except when it comes from some form of mental abnormality, is within the common knowledge and experience of a jury. This was expressed in *R v Chard*[132] where Roskill L.J. expressed this assumption like this:

> Where the matters in issue go outside [the jury's] 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 as in the present case, they are dealing with someone who by concession was in the medical evidence entirely normal, it seems to this court abundantly plain, on first principle of admissibility of expert evidence, that it is not permissive to call a witness, whatever his personal experience, merely to tell the jury how he thinks an accused's mind – assumedly a normal mind-operated at the time of an alleged crime (pp 270-1).

The implication of this is that normal, non-disordered behaviour is fully transparent and therefore not in need of explanation or classification by experts. But decided cases have shown that even

[130] R. D. Mackay, et al., "Admissibility of Expert Psychological and Psychiatric Testimony" opcit, p1.
[131] Keith Rix, Nigel Eastman and Goven Adshead, "Responsibilities of Psychiatrists who provide Expert Opinion to courts and Tribunals", opcit, p.22
[132] (1972) 56 G. App. R. 268.

when experts provided opinion, the courts have often regarded them as advisory, probative, a guide, not essential which does not tie the hands of the court[133].

This is not unconnected with the conflicting statements and opinions of experts. The courts have rightly rejected the evidence of psychiatric expert testimonies on ground of hearsay.[134] In sum, in the debate between judges and psychiatrists on who should have the last say, the courts have freely disregarded psychiatric or expert and non-expert opinion evidence.[135]

[133] Ibid

[134] Ekaikitie, G. W. "The Defence of Insanity" – Being an LLM Thesis submitted to the Faculty of Law, Ambrose Alli University, Ekpoma, 2003, p.43.

[135] Ibid, p. 43.

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