EXPERT WITNESSES

An exposition into the role of the Expert in our judicial system and the challenges associated with their use.

A. INTRODUCTION

1. The use of expert evidence has been the source of some discontent in civil and criminal matters. The engagement of experts has been associated with greater legal costs and delay, and even an unnecessary increase in the complexity of matters where they are excessively or improperly used. There is also concern regarding experts being unable to maintain their independence from the parties who engage and pay them.

2. In civil matters, the Civil Procedure Rules (CPR) are geared at addressing these problems. Part 32 of the CPR which deals with **"Experts and Assessors",** advances the overriding objectives of the Rules by enabling the Court to deal with cases justly through a reduction in the time and expense previously associated with the appointment and use of experts; and, most significantly, by **guiding Judges** in achieving that objective.

3. The achievement of that objective is however premised on:
    a. the proper use of expert witnesses,
    b. the ability of all parties involved in the process to hold the adversarial mindset in abeyance, and,
    c. confining the use of experts to their appropriate role and function in the judicial process.

    This involves an acceptance and application of the objectives of Part 32 by the litigants, lawyers, experts, and, Judges.

4. In criminal matters, the **Judicature (Case Management In Criminal Cases) Rules,** was enacted in 2011. However there are no express provisions pertaining to the certification and appointment of experts, or in relation the mutual disclosure of expert reports. A legislative or other regulatory framework is arguably still

necessary to address the problems associated with use of experts in this practice area.

5. This paper will focus on some recurrent issues in relation to expert witnesses and new perspectives on the way forward in civil and criminal cases.

(i) Is an Expert Required? – when is it necessary and appropriate to appoint an expert, and who, is an Expert?

(ii) Are Experts to attend a trial in a civil matter for cross examination in every instance, in view of the specific provisions of Part 32 of the CPR?

(iii) The role of the expert in criminal matter - the right to a fair trial and mutual disclosure of expert reports.

(iv) The judicial perspective - the role and use of Experts in assisting the court in criminal and civil cases.

B. IS AN EXPERT REQUIRED?

i. What circumstances require the use of an expert?

6. At a trial, be it criminal or civil, the court is primarily interested in the factual evidence, that is, evidence of things within the knowledge of the witness – something he saw or something he heard. The only relevant opinion in a court room is that of the arbiter of fact (judge or jury).

7. Sometimes, however, opinion evidence is necessary to assist the court in determining the probable result or consequence from facts already proved. This opinion evidence is invariably provided by an expert. An expert is required when the arbiter of fact (judge or jury) needs assistance in interpreting and/or drawing conclusions from proved facts in a subject area in which a layman's knowledge and reasoning do not provide the greatest likelihood of arriving at the correct conclusion.

8. The circumstances that require the use of an expert are many and varied and abound in matters at both the civil and criminal Bars. For example:

a. in a personal injury case, expert evidence will be required to establish that, on a balance of probabilities, the claimed injury resulted from a given set of factual circumstances attributed to the Defendant, and the existence and/or extent of permanent partial disability. You will also need to prove what the Claimant's earning potential would have been, had he not been hurt.
b. In a murder or manslaughter case, expert testimony will be required by the prosecution to prove, beyond a reasonable doubt, that someone died and the cause and approximate time of that death. A pathologist who examined the body may be a primary witness to the fact that it is a dead body, but an expert witness as to the cause and time of death.
c. In an action for breach of contract the claimant will need to prove the financial position he would have been in had the contract been performed. This may require the testimony of, for example, a Valuator or a Quantity Surveyor.
d. If parties to a contract agree it is to be governed by foreign law, then in litigating the matter in Jamaica the relevant aspects of the governing foreign law must be proved as a fact at trial. This is done by having an expert in the foreign law give evidence to the Jamaican court of what the relevant foreign law is, in his opinion.
e. In an action for damages for professional negligence, the Claimant will seek, through expert witness testimony, to prove that the Defendant did not act with the requisite competence of a professional in his field. The Defendant will want to establish the opposite and so will usually seek to adduce opposing expert evidence that his actions did meet the requirements of a competent professional.

9. The circumstances that require the use of an expert will vary from matter to matter, but will always have one thing in common: the need for speculation by the arbiter of fact (be it Judge or Jury) within a specialist area as to the cause or outcome of an essential element in the case.

10. Although parties may prove the opinions of experts in evidence, neither Judge nor Jury is obliged to adopt the views of an expert if uncontradicted[1].

11. According to Cross on Evidence, *"The testimony of an expert is likely to carry more weight than that of an ordinary witness, so higher standards of objectivity and accuracy are required of expert witnesses, especially when the expert is testifying for the prosecution in a serious criminal case[2]"*.

ii. Who is an Expert?

12. *"An expert witness is one who has made the subject upon which he speaks a matter of particular study, practice or observation; and he must have a particular and special knowledge of the subject."*[3]

13. In describing the functions of experts, one Judge put it this way:

> *"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or Jury to form their own independent judgment by the application of those criteria to the facts proved in evidence[4]."*

14. A critical feature of an expert witness is his independence. He must have absolutely no interest, one way or another, in the outcome of the case[5]. The sole purpose of an expert witness is to impartially provide assistance to the court by delivery of his professional opinion. It is irrelevant whether he is called by the Claimant or Defendant, as his duty to impartially assist the court overrides any obligations to the person by whom he is instructed or paid[6].

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1 Cross on Evidence. 6th Edition. London. Butterworths. 1985. P. 441
2 *Ibid.* P. 442
3 Stroud's Judicial Dictionary of Words and Phrases. 6th Ed. London: Sweet & Maxwell: 2000. P. 880
4 *Davie v Edinburgh Magistrates* [1953] SC 34 at 40.
5 Civil Procedure Rule (CPR) 32.3 (1) and 32.4 (1) & (2)
6 CPR 32.3(2)

15. Most experts have acquired their expertise professionally after academic study, but expertise can be acquired otherwise than through academic study[7]. A stenographer who has familiarized herself with the contents of a tape recording may be regarded as a temporary expert[8]. It is for the Judge to determine whether or not a proposed witness is an expert in a particular subject[9].

16. In civil cases, the Case Management Judge considering an application of either or both parties to have an expert testify ought to decide then and there at the Case Management Conference whether the named individual proposed as an expert possesses a recognized expertise:

    a. governed by recognized standards and rules of conduct; and
    b. that is capable of influencing the Court's decision on any of the issues which it has to decide[10].

17. This must be established by affidavit evidence filed in support of the application to call an expert witness. Our Court of Appeal has expressed its approval of a 2-stage process for deciding whether particular evidence is admissible at trial as expert evidence— if the Case Management Judge orders the use of expert evidence at the trial (**Stage 1)**, a pre-trial review Judge can, and often should, prior to trial, consider whether it should actually be admitted at trial as being of assistance to the court (**Stage 2)**.[11] *"All parties should know **long before the trial** what expert evidence will be put before the trial judge and what will not[12]."* If deemed admissible, the question of how much weight to attach to the expert evidence is the sole remaining issue for the trial Judge in relation to the expert evidence adduced[13].

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7 R v. Silverlock [1894] 2 QB 766 dictum of Lord Russell of Killowen, C.J

8 Hopes and Lavery v HM Advocate 1960 JC 104

9 Cross on Evidence. 6th Edition. London. Butterworths. 1985. P. 442

10 Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg (No. 2) [2001] 1 WLR 2337. See also CPR 32.2 and 32.6 (3) (a)

11 National Commercial Bank Jamaica Ltd (Successors to Mutual Security Bank Limited) v K & B Enterprises Limited [2005] JMCA Civ. 70 (Procedural Appeal), Per K. Harrison, JA, P. 8

12 Per Lord Justice Clarke in Woodford & Ackroyd (A Firm) v Burgess [1999] EWCA Civ 620 (20 January 1999), CA.

13 National Commercial Bank Jamaica Ltd (Successors to Mutual Security Bank Limited) v K & B Enterprises

18. In the words of our Court of Appeal,

> *"The cases…establish that for the cheap and expeditious disposal of cases, it was desirable that there should be a power to rule prior to trial that evidence, be it expert or non-expert, is admissible or not admissible. This will likely avoid unnecessary expense of instructing experts, commissioning their reports, and securing their attendance at trial. Furthermore, the reasons underlying the new rules, require that expert evidence, needs to be prepared in a structured manner under the supervision of the Court. Judges sitting at first instance should therefore assert greater control over the preparation for the conduct of hearings than has hitherto been customary"*[14].

C. WHEN ARE EXPERTS TO BE CALLED UPON FOR CROSS-EXAMINATION IN CIVIL MATTERS

i. General Rule – the way in which expert evidence is to be placed before the court

19. The Court of Appeal's charge to judges sitting at first instance to exercise greater control over the use of expert evidence, includes, the manner in which the expert evidence is given.

20. In criminal cases, experts are required to attend court to give evidence in chief and to be cross-examined on this testimony.

21. In civil cases however, the general rule is that the evidence of an expert is to be embodied in a **written report**[15], unless the court directs otherwise. The usefulness of this rule in furthering the overriding objective is readily discernible as it will achieve – a **reduction or elimination of the costs and expense of calling an expert(s)** at the trial; **rendering the use of experts more accessible to all**

Limited [2005] JMCA Civ. 70 (Procedural Appeal), Pp 10 -11.

[14] *Ibid*. Page 11, Per K. Harrison, JA

[15] CPR, r. 32.7

litigants (*placing the parties on equal footing*), as well as **shortening the length of time required for the trial** of a matter.

22. The rules have intrinsic safeguards to any perceived risk or prejudice to a **party** associated with evidence being given in this manner. The role of the expert is to guide the **Court** impartially on the issues. And, therefore it is for the **Court** to determine whether a **written report** is all that is reasonably required to resolve the proceedings given the value of the claim, the complexity of the proceedings and the need to ensure that matters are dealt with fairly and expeditiously[16]. Sufficient and cogent reasons ought to be advanced at the time of certification of the expert to warrant the expert being **called at trial for cross-examination**.

23. In the United Kingdom the attendance of experts at trial for cross-examination is now the exception rather than the rule. Experts have been called upon to attend trial for cross-examinations in circumstances where **(a)** it is **not possible to achieve clarification or extension of an expert report by the putting of questions**[17], **(b)** there are unresolved **issues pertaining to the expert's objectivity and impartiality**[18] **(c)** the case is one involving professional negligence, and, **there are competing opinions from various experts concerning the acceptable standard of care**.

ii. **Putting Questions to Expert**

24. Putting questions to an expert in lieu of his attendance at trial is a useful time and cost saving exercise[19].

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16 *Baron v. Lovell* [2000] PIQR P 20, CA. It is also for the Court to determine: (a) whether expert evidence is required at all, to resolve the issues in dispute between the parties – see CPR, r. 32.2, *Casey v. Cartwright* [2007] 2 A.E.R. 78, CA and *Grobbelaar v. Sun Newspaper,* The Times, August 12, 1999; (b) whether more than one expert in the same field is required to assist the Court on a particular issue - as where the reports involve considerable overlap and duplication – *Cooperative Group Limited v. Jon Allen Associates Ltd* [2010] EWHC 2300 (TCC). See also *Calden v. Nunn* [2003] WLR 270906 (CA)– where the court directed the puting of questions in lieu of appointing a second expert. It is now somewhat generally accepted that it is only in matters of professional negligence that more than one expert of the same discipline would be required to give a written report and (c) the nature of the expert evidence that is necessary to resolve the matter

17 Civil Procedure, Volume 1 [Whitebook] paras. 35.5.1 and 35.6.1

18 *Society of Lloyds v. Clementson (No. 2)* The Times, February 29, 1996

19 See dictum to this effect in *Fredericks v. Kingston University* [2009] WL 3829348, CA

25. As a general principle, questions may only be put to the expert once, and ought to be for the purposes of clarification of the expert report. The word "clarification" is not defined or explained in the rules. "*However it would seem that questions should not be used to require an expert to carry out new investigations or tests, to expand significantly on his or her report, or to conduct a form of cross-examination*[20]." If the questions are neither proportionate nor directed at clarification of the report, the court may direct that they need not be answered by the expert[21]

26. The relevant provision is CPR, r32.8 and provides that:

> *"32.8 (1) A party may put written questions to an expert witness instructed by another party or jointly about his or her report*
>
> *(2) Written questions under paragraph (1)-*
> *(a)may be put once only:*
> *(b)must be in order to clarify the report; and*
> *(c)must be put within 28 days of service of that expert witness's report,* ***unless-***
>
> *(i) the court permits; or*
> *(ii) the other party agrees"*

27. The proviso to section 32.8 (2) has been applied to subsections 2 (b) – *the clarification point* - in the United Kingdom because of the specific format of their rules. Therefore, in *Mutch v. Allen*[22] a personal injury matter where the questions put to an expert went beyond the scope of clarification, the court nonetheless directed the expert to answer the questions. However, our provisions are slightly different. In our rules, the proviso appears immediately below the requirement that the questions to the expert ought to be put within 28 days of service of the report. A juxtaposition of both provisions will illustrate this.

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20 Civil Procedure, Volume 1 [Whitebook] paras. 35.5.1 and 35.6.1

21 *El Naschie v. Macmillan Publishers Ltd* [2012] EWHC 1809 (QB) – see small pronouncement to this effect by Sharp J at para 37 of the decision

22 [2001] WL 15056 (CA)

(2) Written questions under paragraph (1)-	*(2) Written questions under paragraph (1)-*
(a)may be put once only:	*(a)may be put once only:*
(b)must be in order to clarify the report; and	*(b)must be put within 28 days of service of the expert's report; and*
*(c)must be put within 28 days of service of that expert's report **unless***	*(c)must be for the purpose of clarification of expert witness's report, **unless***
(i)the court permits; or	*(i) the court permits,*
(ii the other party agrees"	*(ii) the other party agrees*

28. Therefore, *Mutch v. Allen* is arguably inapplicable to our jurisdiction and it may therefore be contended that our judges have no residual discretion to allow questions which fall outside the realm of clarification, but, can allow questions to be submitted outside the 28 day period.

29. The Court is more likely to allow questions to be put to an expert after the 28 day period has passed if this would obviate the need for the expert to be called at the trial. Further, the Court may also allow questions to be put at a very late stage in the proceedings[23] (*even during the course of trial*[24]) if it would also achieve this objective.

iii. **The expert's objectivity and impartiality**

30. Since the decisions in *Field v. Leeds City Council*[25], *Factortame Ltd. v. Secretary of State for the Environment*[26] and *Armchair Passenger Transport Limited v. Helical Barr plc*[27] it now well settled in the United Kingdom that an expert's connection to the parties or interest in the outcome of the matter does not automatically disqualify him from giving evidence in the matter. The admissibility of, and weight to be given

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23 *Calden v. Nunn* [2003] WLR 270906

24 See however *Matthias v. Gale* Claim No. GDAHCV 2006/0291 a decision of the High Court of Grenada and the West Indies Associated States where the court refused to permit late questions on the basis that it threatened the trial date

25 [1999] CPLR 833, CA

26 [2002] 4 AER 97 CA

27 [2003] EWHC 367 QB

to his evidence will normally depend on the nature and extent of the connection and interest[28] and this is usually explored at the trial itself.

31. Therefore the expert's connection to the parties or interest in the matter may result in the expert being called at the trial for cross-examination[29]. It does not normally affect the certification process itself, as the *"question whether someone should be able to give expert evidence should depend on whether (i) it can be demonstrated whether that person has relevant expertise in an area in issue in the case; and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence[30]."*

32. The United Kingdom authorities cited above, have been applied in several local decisions[31] where experts were permitted to give evidence in spite of their relationship or connection to the parties in the proceedings.

iv. **Matters involving competing expert opinion and where the experts are unable to agree on a position**

33. A peculiar problem is posed by professional negligence matters where the applicable test is: *what is the standard or practice accepted at the time as proper by a responsible/competent/reasonable **body** of opinion in the particular field.* Each party will invariably call its own expert in this regard, and the Court will be required to determine which of numerous experts' evidence is more reliable and conclusive. Seeing and hearing the expert may assist the Court in making this determination. This problem will usually not arise in less complex matters such as the typical running down matters.

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28 Armchair Passenger Limited v. Helical [2003] EWHC 367 QB

29 *Society of Lloyds v. Clementson (No. 2)* The Times, February 29, 1996

30 Per Walker LJ in *Field Leeds City Council [1999] CPLR 833* at page 841

31 *Eagle Merchant Bank of Jamaica Limited et al v. Paul Chen Young and others* S.C. Claim No. C.L. 1998/E095; Wayne Lewis v. Conrad Douglas, SC decision in CLAIM NO. 2009 HCV 6538; SEC. Our Part 32.3 and 32.4 of the CPR is similar to the UK Practice Direction on Experts and Assessors which supplements their Part 35 governing the appointment of Experts.

34. Our Civil Procedure Rules were designed to keep cross examination at a minimum. However, the procedure has not been utilized in the way intended by the CPR. Experts are routinely called upon for cross-examination. A practice direction may be necessary to give further clarity to the civil bar and judges on the issues concerning the appointment, questioning and cross-examination of experts.

D. THE ROLE OF THE EXPERT IN CRIMINAL MATTERS – THE RIGHT TO A FAIR TRIAL AND DISCLOSURE.

35. This section of the paper will discuss the use of expert evidence in criminal procedure. In exploring this area, we will – discuss expert evidence within this context; examine the duty of the prosecution to disclose expert evidence in pre-trial proceedings, and, discuss the oft repeated contention that the accused should also have a duty of disclosure. The Accused's duty to disclose will be examined against the background of the accused's Right to a Fair Trial and Right Against Self-incrimination in keeping with **section 16 (2)** and **section 16(6)(f)** of **The Charter of Fundamental Rights and Freedoms (Constitution Amendment) Act, 2011,** respectively.

36. Expert evidence is only allowed if it concerns a technical subject outside the jury's competence. Expert evidence is often times utilized in cases requiring *inter alia* Ballistics evidence, medical evidence, scientific/forensic evidence and handwriting evidence.

37. In the case *of* ***Lowery v. R***[32] expert opinion was needed to determine whether Lowery was a psychopath. The court referred to the evidence of a Dr. Springthorpe, a psychiatrist, who was called to give evidence in regard to a visit he had paid to the accused Lowery in order to "interview and assess" him. On the basis of a history given to him and of his own examination, Dr. Springthorpe's view was that Lowery was not a psychopath and he found no evidence that Lowery was a sadist.

38. The *Lowery* decision also underscores that the expert opinion is to be based on

[32] **[1973] 3 All E.R. 662**

what the expert personally observed.

39. In the Kilancholy murder trial[33] where the accused had been diagnosed with schizophrenia, expert evidence (psychiatrists and a forensic psychologist) was required to determine whether this condition had impaired or contributed to the accused's actions on the day of the triple murder of the children

40. Thus the current legal position in relation to reliability of the expert evidence is that the expert evidence in question must be sufficiently well established to pass the ordinary test of relevance and reliability, that is to say, it must be sufficiently reliable to be suitable for a jury to understand and consider. It must be noted however, that because questions of fact are within the sole purview of the Tribunal of Fact (the jury), it is open to the jury to reject the opinion of an expert and draw their own conclusions bearing in mind the evidence of the case. See **R v *Carletto Linton and others.***[34]

41. Further, an expert's role is to provide an independent opinion on the relevant facts, and, to set out the facts on which this opinion is based. An expert witness should never assume the role of advocate for the party for whom he is called, but he should at all times remain absolutely objective.

i. Duty of the Prosecution to Disclose Expert Evidence

42. In Criminal cases, expert reports which are going to be relied on by the Prosecution must be disclosed to the Defence in good time to enable the Defence to prepare for trial and, if necessary to consult with their own experts. This duty of disclosure is very strict one, and must be followed in all matters.

43. In ***R v. Ward***[35] it was stated that the Prosecution was under a duty, which continued during the pre-trial period and throughout the trial, to disclose to the Defence all relevant scientific material, whether it strengthened or weakened the

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33 R v. Jeffery Perry

34 SCCA, Nos. 3, 4, 5/2000.

35 [1993] 2 All E.R. (633)

Prosecution's case or assisted the Defence case and whether or not the Defence made a specific request for disclosure[36]. In furtherance of that duty, the Prosecution was also required to make available the results of all relevant experiments and tests carried out by expert witnesses.

44. The Office of the Director of Public Prosecutions issued guidelines dated September 12, 2005 with respect to "Disclosure where the Crown is relying on DNA Evidence". These guidelines were issued in light of the cases of ***Doheny and Adams v R***[37]***; Pringle*** v. ***R***[38], and ***Michael Asserope*** v. ***R***[39]. *In the* ***Doheny*** *case "*whenever DNA evidence is to be adduced, the Crown should serve on the Defence details as to how the calculations have been carried out which are sufficient to enable the Defence to scrutinize the basis of the calculations."

45. In circumstances where DNA evidence will be relied on by the Prosecution, the entire database is to be disclosed. This was confirmed in the **Doheny**[40] decision where the court held that:

> ***"the Forensic Science Services should make available to a defence expert, if requested, the database upon which the calculations have been based."***

46. The disclosure of the entire database is required to obviate the need for the Government Forensic Laboratory to place on each certificate the allele frequencies used for each marker to facilitate the Defence being able to scrutinize the basis of the calculations.

ii. Right to A Fair Trial and the Duty of the Defence to Disclose Expert Evidence

47. The former Director of Public Prosecutions, Mr. Glen Andrade, on June 14, 1996,

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36 See also R. v. Carey [1947] 32 CR. App. Rep. 91.

37 [1997] Cr. App. Rep. 369

38 [2003] 3 LRC 658

39 SCCA 279/01 judgment delivered 19th December 2003.

40 Ibid

issued Guidelines for Disclosure in Criminal matters. Guideline No. 12 stipulates that "where it is proposed to adduce expert evidence, the Prosecution should furnish the Defence with a copy of the report or statement of the expert. **Likewise, in the case of the Defence, a copy of the opinion or findings of the expert should be made available to the Prosecution**. This approach was adopted in the draft Disclosure Protocol which provides that:

> "***where it proposes to adduce expert evidence, the Defence must make disclosure to the Prosecution by providing to the Prosecution a copy of the expert opinion or finding."***

48. Implicit in this direction is that the evidence of the Expert can be of such complexity that either side, in the interest of justice and to ensure a fair trial, should be entitled to pre-trial disclosure of such expert evidence. The duty in this case is not solely on the Prosecution.

49. This dispute between the Defence and the Prosecution with respect to Defence disclosure on expert evidence could be attributed to two (2) concerns:- the Right to a Fair Trial and the Right Against Self-incrimination.

50. The Right to a Fair Trial as stated on sections **13(3)(1)** and **16(1)** and **(2)** of the **Charter**, is a human right to which all persons whose interests are represented at a trial are entitled. All rights are inextricably linked and indivisible and as such individual rights should not be read in a vacuum.

51. The principle of fair trial requires that the interests of the accused are balanced against all others in the course of a trial. The right to a fair trial should be determined by examining whether the proceedings as a whole are fair, rather than whether each individual sub-clause of that right is technically observed in isolation.[41]

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[41] *See Doorson v. The Netherlands (Application No. 20524/92 [1996] 22 ECHR 330 para. 67*

52. **Section 16(6)(f)** of the **Charter** states that every person charged with a criminal offence shall –

> "***not be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt."***

53. It is arguable that the accused's Right Against Self-incrimination would not be violated by disclosure from the Defence and that several benefits could be derived from this practice and would include the following:

    a. Bringing our jurisprudence on par with international standards as observed in, inter alia Canada, England, Wales, Scotland and the United States of America. The accused in those jurisdictions have a duty of disclosure with respect to Experts.

    b. A possible reduction in the backlog of cases. Mutual disclosure during the pre trial stages may contribute to a timely disposal of matters. The decision of **Regina** v. **Michael Heron, Eldon Calvert and Orette Grant** o/c the Stone Crushers Gang case is illustrative on this point. In that matter, the Crown desired to proceed under **section 31D(a)** of the Evidence Act (as amended) as the sole eye-witness in the matter was dead. The Defence had in their possession the report of a handwriting expert who analyzed the handwriting and signature contained within the said statement. It was discovered that the statement was a forgery and that it was forged by the investigating officer. Prior disclosure of this defence expert witness statement (handwriting expert) could have arguably facilitated an earlier disposal of the matter.

    c. Preventing or abating the special difficulties which may be encountered by the prosecution when the expert evidence is relied on without notice. [42]

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[42] For example the prosecution of the R. v. Andrew Leighton Coke case in which the defence relied on the expert evidence of an Ophthalmologist and Land Surveyor without prior disclosure to the prosecution.

54. The United Kingdom Royal Commission on Criminal Justice (1993) set out a useful observation which may provide a useful guideline in relation to the disclosure of expert evidence:

> ***"If all the parties had in advance an indication of what the defence would be, this would not only encourage earlier and better preparation of cases but might well result in the prosecution being dropped in the light of defence disclosure, an earlier resolution through a plea of guilty; or the fixing of an earlier trial date. The length of the trial could also be more readily estimated leading to a better use of the trial both of the Court and of those involved in the trial; and there would be kept to a minimum those cases where the defendant withholds his defence until the last possible moment in the hope of confusing the jury or evading investigation of a fabricated defence."***

55. The recent CCJ judgment of **Frank Errol Gibson v The Attorney General of Barbados**[43] is also instructive**.** In this landmark case, Mr. Gibson was accused of murder and the prosecution was relying on the evidence of a dentist who had concluded that a bite mark on the victim had been made by the accused. The accused had pleaded not guilty and wanted to provide expert evidence which would contest that of the prosecution's dentist. The field of expertise was forensic odontology and the accused could not afford to retain an expert. Among the issues that came before the CCJ was whether the obligation in the Constitution to provide adequate facilities for the right of the accused to a fair trial required the State to fund the instruction of the expert, and if so whether the accused was obliged to disclose any report obtained from the expert. On these questions the Court ruled that the inequality of arms was so serious that failure to provide the expert investigator could adversely affect the fairness of the trial. The defence then argued that any report obtained by it from the State funded Forensic Odontologist was not disclosable to the Prosecution, but the Court held that although an accused did not have any general duty to disclose, if the Defence proposed to call

[43] [2010] CCJ 3(AJ): 76 WIR 137

the expert to give evidence then they would be obliged to share the report with the Crown. According to the CCJ, this was neither unconstitutional nor prejudicial to the defence – but was simply to promote overall fairness. They ruled that there is no right constitutional or otherwise, on the part of the defence to surprise the crown with expert evidence in the middle of a trial. A fair trial is not one that is fair only to the accused. It is a trial that is fair to all. Even in the absence of legislation requiring such disclosure, it is competent for the Court to order it as corollary to an order which the Court makes at the behest of the appellant so as to ensure the fairness of the trial.

56. In paragraphs 43 and 44 of the said judgment the Court had this to say:

> ***"We adjudged that the defence was not obliged to disclose the contents of any report from the expert if the latter was not going to be called to give evidence at the trial. But we decided that if the defence proposed to call the expert to give evidence then the defence was obliged to share his/her report with the Crown. Nothing in our decision conflicts with the legitimate interests of the Accused or with any constitutional right of his. On the contrary we consider that this part of our order further satisfies the overall objective of fairness. There is no right, constitutional or other, on the part of the defence to surprise the Crown with expert evidence in the middle of a trial. A fair trial is not one that is fair only to the Accused. It is a trial that is fair to all. Even in the absence of legislation requiring such disclosure, it is competent for the Court to order it as a corollary to an order which the Court makes at the behest of the appellant so as to ensure the fairness of the trial."***

iii. Way Forward

57. Joanna Glynn, a UK Barrister, in her article on Disclosure[44] emphatically opines that defence disclosure would only provide a valuable management tool. It would

[44] [1993] Crim. L.R. 841

enable the judge to better assess the relevance of evidence and the necessity for evidence to be adduced or to be cross-examined to at length. Glynn went further proposing that "there should be greater pre-trial defence disclosure and a tougher view must be taken of non-compliance than occurs at present."

58. The Civil Procedure Rules was amended in 2011 to incorporate the **Judicature (Case Management in Criminal Cases) Rules,** and, Rules 9 and 10 arguably empowers the Court to direct mutual disclosure of expert reports as it provides for the disclosure of any written or other material presented by each party. The Court may also require the parties (both Defence and Prosecution) to identify "..*(vi) what written evidence that party intends to introduce; (vii) what other material, if any, that person intends to make available to the Court in the presentation of the case.*"

59. If either party fails to comply with the rule or direction, the Court may[45]:

"…impose such other sanctions as may be appropriate…"

60. Learned Queen's Counsel, Gil D. McKinnon from Vancouver, Canada, in his article "Accelerating Defence Disclosure: A Time For Change,"[46] reveals the fact that in California a defendant is required to disclose to the prosecution several things, including expert reports and scientific tests. The powers of the Court to ensure compliance are also far-reaching. They include, but are not restricted to, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, an adjournment and advising the jury of any failure or refusal to disclose. Perhaps it is long overdue for the Criminal Case Management system to begin to impose that which it is empowered to do where there is non compliance by both Defence and Prosecution so as to ensure and enhance operational efficiencies within the justice system.

61. The words of the US Supreme Court in **Williams** v. **Florida**[47] is commendable for our jurisprudence in terms of the way forward:

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45 See Rule 5 (4)

46 (1996) 1 Can. Crim. L.R. 1-364

47 399 US 78 (1970)

"…***The adversary system of trial is hardly an end in itself; it is not a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least where due process is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by ensuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."***

E. JUDGES' PERSPECTIVE:

i. The importance of the expert in providing independent and impartial assistance to the Court

62. Expert evidence is extremely important in both civil and criminal matters. It is often critical in resolving matters and issues that arise in cases which require some specialist knowledge or experience. The tribunal of fact, be it judge or jury, is unlikely to have extensive knowledge or experience in certain specialized areas, for example in technological, medical or other scientific matters.

63. The general rule is that witnesses may only give evidence on facts that they have personally perceived or experienced and they are not ordinarily allowed to give evidence of an opinion. There are exceptions to this general rule and opinion evidence provided by an expert, is one of them. Opinion evidence essentially consists of inferences drawn from certain facts:

64. "*As a part of the process of forming an opinion, expert witnesses may refer not only to their own research, tests and experiments, but also to works of authority, learned articles, research papers, and other similar material written by others and forming part of the general body of knowledge falling within their field of expertise"*-see

Blackstone's Criminal Practice[48]. Also see **Davie v. Magistrates of Edinburgh**[49].

65. Expert evidence should only be admitted on a topic calling for expertise. If therefore the arbiter of fact can form his or her own opinion without the assistance of an expert, based upon his or her own experience and knowledge, then expert opinion evidence would not be admissible. On the other hand, the court must appreciate where there is a need for expert evidence and accord due weight to persons qualified in the relevant field – see **Price Waterhouse (A Firm) v. Caribbean Steel Co. Ltd**[50]**.**

66. In the Privy Council decision of **West Indies Alliance Insurance Company Limited v. Jamaica Flour Mills Limited**[51] , the Judicial Committee of the Privy Council had before them for consideration a case involving a number of experts and highly detailed and technical scientific evidence. On the 12th of September 1988 Jamaica was struck by Hurricane Gilbert, one of the worst hurricanes ever recorded in our history. The eye of the hurricane passed over Jamaica Flour Mills' silos. At the time of the hurricane both silos 10 and 18 were empty. On the 25th of September 1988 silo 18 was filled with grain for the first time after the hurricane. On the next day, while silo 10 was being filled for the first time after the hurricane, both silos collapsed and unfortunately three of JFM's employees were killed. JFM was at the time insured by 39 insurance companies and sued to recover for the loss and damage to the silos on the basis that the damage was caused by the hurricane, an insured risk. It was the Defendant insurers case that JFM was unable to establish on a balance of probabilities that Hurricane Gilbert was the effective cause of the collapse of the silos, and further the Defendants alleged that the silos were badly designed and constructed and that that was what caused the collapse. In seeking to establish their case, the Claimant JFM called a number of expert witnesses who specialized in different fields, and who each explained a particular stage of what allegedly occurred. These included well qualified structural

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48 1993, F. 10.9, page 1920

49 [1953] SC 34 at 40

50 2011 JMCA Civ. 29 –delivered 29 July 2011, on appeal to the Privy Council

51 Civil Appeal No. 24 of 1998, delivered 21st July 1999

engineers, civil engineers, and experts in wind and soil engineering. The Defendants on the other hand, presented only a structural engineer and a professor of civil engineering and applied mechanics, although they did have available to them the court experts to advise them on wind forces and soil pressures whilst conducting the cross-examination of the Claimant's witnesses.. In accepting that the JFM had proved their case on a balance of probabilities, and therefore agreeing with the majority judgment in the Court of Appeal, the Privy Council agreed with then President of the Court of Appeal Rattray,P. that the evidence of the expert witnesses of the Claimant who specialized in wind and pressures on the soil was to be preferred to the evidence of the Defendants' witnesses, who did not have specialty in these particular fields. The Judge at first instance was criticized for the manner in which he rejected JFM's experts on the basis of them being unworthy of credence. It was pointed out by Rattray P. that , at page 125:

> *"Whilst the trial judge has an advantage in observing the demeanour of those witnesses who gave evidence before him, it is very less so in the case of the expert witness. The arrogant, assertive and yet truthful expert is not a stranger to judicial experience."*

67. A judge or a jury is not obliged to accept the views of an expert even if uncontradicted. The duty of the expert is to furnish information or criteria so that the tribunal can make its own independent assessment by applying the information or criteria to the facts as found proved in the case.

68. Thus, in criminal cases, the judge is obliged to give the jury a special direction with regard to the nature of expert evidence, and in particular to point out that though the jury may no doubt wish to have regard to the expert's evidence, they are not obliged to accept it. The judge should also point out that the expert's opinion is just a part of the evidence; indicate what aspect of the case the evidence of the expert relates to, and, that the duty of the triers of fact is to consider all of the evidence.

69. In In civil proceedings, Rule 32.3 of the Civil Procedure Rules 2002 "the C.P.R." makes express the fact that an expert's overriding duty is to the court. It reads:

Expert witness's overriding duty to court

32.3 *(1) It is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise.*

(2) This duty overrides any obligations to the person by whom he or she is I instructed or paid.

70. Part 32 of the CPR expressly sets out a number of principles that have been discussed in the case law, emphasizing that the expert must be independent and that there is no property in an expert witness. As stated in John O'Hare & Kevin Browne's Work, **Civil** Litigation[52], "there is no such thing as a Claimant's or Defendant's Expert"[53]. See for example Rule 32.4 where the way in which the expert witness' duty to the court is to be carried out is set out. Importantly, Rule 32.16 makes it clear that where a party has disclosed an expert report, any other party may use that report as evidence at the trial.

71. In **The "Ikarian Reefer"** [54] Cresswell J., set out the duties and responsibilities of expert witnesses in civil cases as including the following:

a. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: per Lord Wilberforce in **Whitehouse v. Jordan.** [55]

b. An expert should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise: per Garland J **in Polvitte Ltd. v. Commercial Union Assurance Co Plc** [56]

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52 13th Edition, page 323,

53 Harmony Shipping Co. SA v. Saudi Europe Ltd [1979] The Weekly Law Report 1380, CA

54 [1993] F.S.R. 563, at page 565

55 [1981] 1 W.L.R. 246 at 256,

56 [1987] 1 Lloyd's Rep. 379 at 386

and per Cazalet J in **Re J**[57]. An expert witness in the High Court should never assume the role of advocate.

c. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J.*, supra).

See our Rule 32.4 where the wording is very similar.

72. In **Cala Homes (South) Limited and others v. Alfred McAlpine Homes East Limited**[58]**,** Laddie, J. expressed the matter this way:

> *"The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth. That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in the pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill…*

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57 [1990] F.C.R. 193

58 [1995] F.S.R. 818,

ii. At what stage should expert evidence be admitted by the Court

73. The general rule is that the admissibility of evidence is within the sole purview of the trial judge. However, Part 32 of the CPR empowers the judge conducting the case management conference to make certain directions in relation to the nature of expert evidence required and the way in which it will be placed before the trial judge. See also the dictum of Harrison JA in ***National Commercial Bank Jamaica Ltd (Successors to Mutual Security Bank Limited) v K & B Enterprises Limited*** as to a determination as to the admissibility of certain evidence even prior to trial [59]

74. However, when medical reports are admitted in evidence by the consent of the parties, the judge cannot thereafter rule the reports inadmissible as not having complied with Part 32 of the C.P.R. and the reports ought to be treated as being issued by an expert – See the Court of Appeal's decision in **Cherry Dixon-Hall v. Jamaica Grande Ltd**[60]**.**

75. Rule 32.2 of the CPR states the general duty of the court and the parties as follows:

> *"32.2 Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly."*

76. In **National Commercial Bank Jamaica Ltd. v. K & B Enterprises**[61] K. Harrison J.A. sagely stated:

> *"Under the former rules of court, it was not necessary for the applicant to identify the issues that really needed expert evidence and there was no restriction on the number of experts to be called. The CPR has made changes, however, with regard to the appointment of experts. Part 32.2, provides that expert evidence should be restricted to that which is*

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59 Ibid

60 2008 11 JJC 2105 delivered November 21, 2008.

61 Ibid

reasonably required to resolve the proceedings justly. In this regard, the parties have an explicit obligation to help the court to further the overriding objective."

77. In **Cable & Wireless Jamaica Limited v. Digicel (Jamaica) Limited**[62] on the hearing of an application for interim injunctive relief, the Claimant "Lime" applied to have an expert report contained in affidavit form admitted as evidence at this interim stage. A preliminary objection to this course was taken on behalf of the Defendant "Digicel" which was upheld by the court on the basis that it was generally contemplated that expert evidence be used for the purposes of trial and that the application be made at case management.

78. Since at the interlocutory/interim injunction stage it is no part of the court's function to engage in anything resembling a mini-trial, then generally it would not be appropriate for the court to require expert evidence at this stage. The court made a distinction between identifying the issues, which is what the court does at that interim injunction stage, as opposed to resolving the issues, which is what is done at trial and is where the expert evidence should really come into play provided it is reasonably required to resolve the proceedings justly.

79. It is however, important to note that the trial judge has a discretion as to the admissibility of expert reports despite failures in complying with the requirements of Part 32 of the C.P.R. – See **New Falmouth Resorts Ltd. v. International Hotels Jamaica**[63], judgment of Brooks J (as he then was), and **Eagle Merchant Bank of Jamaica Ltd. & Anor v. Paul Chen-Young and Ors**[64]**.**, judgment of Anderson J.

iii. Assessors

80. The Court may appoint an assessor to advise the judge at the trial with regard to evidence of expert witnesses called by the parties – See Section 21 fo the

62 S.C. Claim No. 2009 HCV 05568,, judgment delivered September 2nd, 2010,

63 C.L. 2002/N0900 delivered 31st October 2003

64 C.L. 1998/E095 delivered May 19, 2003.

Judicature (Supreme Court) Act and Rule 32.17 of the C.P.R. The Court may be well advised so to do in a complex case.

F. CONCLUSION

81. In sum, expert witnesses have a vital part to play in the resolution of both criminal and civil matters. In order to maximize the use and benefit of expert evidence, parties should give careful thought to examining the issues and aspects of their respective cases upon which expert opinion is required. This will assist the court in deciding what evidence ought to be admitted in the proceedings. Ultimately, the aim must be that where expert evidence is considered necessary, it be produced and admitted fairly, and in a form and manner that is independent, well-reasoned, easily comprehensible to the trier of fact, valuable and cost-effective. Greater and more thorough use of Part 32 of the CPR in civil matters, and of the Judicature (Case Management in Criminal Cases) Rules in criminal cases, should enhance these varied but nevertheless attainable objectives.

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