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Critique of Admissibility of Expert witness in justice delivery among courts in Nigeria in comparison with United States of America and United Kingdom

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Abstract

The Use of expert witnesses is now an integral part of justice administration and delivery across the globe. In an increasingly complex society, faced with complex multi-dimensional challenges and increasing crime rates, the need for expert witnesses to solve these challenges has become inevitable. It follows that in the adjudication of conflicting claims, the courts are bound to confront more expert witnesses in the immediate future. However, the courts are now being confronted with divergent and not-up-to-standard expert opinions. It has become increasingly necessary to have definitive rules and standards that regulate the admissibility of expert witnesses in Nigeria to be able to separate a scientific based expert report from a sham. Unreliable, biased and questionable evidence can be inadvertently admitted and relied upon by a court of law when there are no clearly defined admissibility standards or regulations. This paper focuses on providing a step-by-step analysis of the factors that the court takes into consideration in deciding whether or not to admit an expert witness and to evaluate the effectiveness of such criteria. This paper adopts the use of comparative doctrinal methodology to evaluate the requirements of the admissibility of expert evidence in Nigeria and its inadequacies. By way of a comparative study, lessons are drawn from the admissibility criterion of expert witnesses in the United States of America and the United Kingdom. The paper recommends more robust requirements for the admissibility of expert witnesses in Nigeria and a review of the current practice.

Keywords: Expert witness; opinion evidence; admissibility; Daubert standards

1. Introduction

The difficulties the Nigerian Criminal System is battling with are not unconnected with the fact that law enforcement agencies primarily rely on confessional statements that are obtainable through the application of force. This type of evidence, which is most likely to have been obtained by oppression, is inadmissible under S. 29 of the Evidence Act, 2011. This is unlike evidence based on expert opinion or forensic science which is empirical and verifiable. Evidence derived from expert opinion or forensic science is more credible and much more difficult to challenge by the defense counsel. At present, the Evidence Act and the Nigerian legal framework do not have robust provisions on the admissibility of expert evidence, though there are specific provisions on finger prints analysis, handwriting analysis, medical report, that may offer support for the admissibility of expert evidence. Expert witnesses in courts, help the judge to process technical information (O'Brien, Hawkins & Loesch, 2022). Nigeria's test for admissibility of expert witnesses is limited to credibility, relevance and qualification of an expert witness. However, in the United States of America, the requirements for the admissibility of expert witnesses are more robust. There are standards that the expert witness must meet concerning relevance, qualification and the methodology adopted. The judges are the gate keepers in ensuring that the admissibility standards are met. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-96 (1993)

Research Design and Methodology

The study adopted a doctrinal research methodology design which involved the analysis of legal texts, statutory provisions, and jurisprudence and published books. The research design and methodology helped in highlighting the inadequacies of the current regime of admissibility requirements of expert witnesses in Nigeria exacerbated by the



emerging deployment of artificial intelligence and a corresponding increase in the numbers and complexity of expert evidence. A comparative analysis was adopted in the interrogation of the evidentiary and admissibility standards in the USA and the United Kingdom to gain valuable lessons from their successes.

1.1 Who is an Expert Witness?

An expert witness is particularly skilled in the field which is likely to be outside the experience and the knowledge of a judge. An expert witness can assist the court in reaching a conclusion by providing the court with a statement of opinion on any admissible matter calling for expertise. Ngwuta, in *Omisore & Anor v. Aregdele besola & Ors* (2015) LPELR-24803(SC) described an expert witness as the “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,” (Pp. 111 paras. E). In *Aighbadion v. State* (1998) LPELR-5246(CA) (Pp. 9-14 paras. F) the court held that whether a person will pass as an expert or not is a matter of law to be decided by the judge. The term expert witness is elusive because there is no guideline from the above statutory provisions on how to identify an expert with any degree of certainty. There is no provision that the special skill attributable to an expert must be acquired through formal education, professionally or otherwise. It is enough that the person claiming to be an expert has the skill that he professes or asserts to have. The Supreme Court in the Locus classicus of *Seismograph Series Ltd. v. Onokpassa* (1972) ANLR (Reprint) 347 at 357-359 emphatically held that in determining who an expert witness is, the posers set out below will be answered in the affirmative:

- a. Is he paritus?
- b. Is he skilled?
- c. Has he an adequate knowledge?

1.2 Duties of an Expert Witness

The Expert witness owes it a duty to the court to use his skills and expertise to help the court reach a just conclusion by giving a report or testimony which is sound, logical, unbiased and based on scientific analysis in relation to matters technical or scientific matters before the court (Chandra & Sharma, 2023). The duty is owed to the court and not his client. The principal duties and responsibilities of an expert witness have been summarized by Mr. Justice Cresswell in *National Justice Compania Naviera SA v Prudential Assurance Company Limited* [1993] 2 Lloyd's Rep 68. The duties and responsibilities of expert witnesses in civil cases include the following:

- a. The Expert witness must not only be independent he must be seen to be independent and uninfluenced by anybody (*Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).
- b. The expert witness should assist the court by providing objective and unbiased testimony within the area of the Expert witness's competencies (see *Polivitte Ltd. v. Commercial Union Assurance Co. Plc.*, [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and *Re J*, [1990] F.C.R. 193 per Mr. Justice Cazalet).
- c. The Expert witness should state the facts and reasoning underlying his assumptions and should not exclude the weakness of his/her case. (Re J sup.). [See *Dickson Arisa v The State* [1987] 7 SCNJ (Pt. 1) 76, at 84]
- d. The expert witness should not present to the court a testimony that falls outside his field of expertise.
- e. When the expert witness's opinion is based on incomplete data, he should make it known to the court that, his expert opinion is provisional and that he was faced with insufficient data. He must disclose the absolute truth. *Derby & Co. Ltd. and Others v. Weldon and Others*, The Times, Nov. 9, 1990 per Lord Justice Staughton).
- f. In the event that an Expert witness changes his opinion on a material fact, the expert witness must inform the court and the adversary party without delay.
- g. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

2. Requirements for Admissibility of Expert Witness in Nigeria

Unlike the above guidelines which are a bit robust, apart from the provisions of the Evidence Act, 2011 there appear to be no specific statutory provisions that regulate the admissibility of expert evidence in Nigeria. Reliance is normally placed on the jurisprudence of the Nigerian courts for guidance and exposition on the requirements of admissibility of expert evidence. Beyond relevancy and qualification, in the determination of whether an expert's opinion is credible, reliable and trustworthy to be relied upon by the court, it is important for the court to examine the technique or methodology the expert used to formulate his or her opinion. The court must ensure that the opinion is not induced or



biased or based on junk science. Under the Nigerian legal framework, as shown above, the term expert witness has been judicially interpreted and is of legal significance because no witness is permitted to express his opinion unless he is an expert within the terms of section S. 67 of the Evidence Act 2011 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 of the Evidence Act 2011.” However, the section neither specifies any particular academic attainment, standard or experience, which would qualify a person to give an expert witness nor sets out any criteria that will be satisfied before an individual can qualify as an expert witness. Nevertheless, a witness may qualify as an expert witness if the witness is particularly skilled in any art, science, trade or profession and in possession of peculiar skilled knowledge concerning the same. He should have relevant academic qualifications or extensive experience a special skill and superior knowledge in the art and science of a particular field. The expert witness is different from the ordinary witness because the expert witness is permitted to state his expert opinion from conclusions drawn from on verifiable facts and scientific analysis, and his extensive experience, whereas the ordinary witness is not permitted to draw any conclusion, the ordinary witness can only testify to what he saw heard, witnessed, tasted, smelled or felt. The weight that the court will attach to the expert witness’s testimony will depend on the credibility of his testimony. The Courts and Tribunals have established that when an opinion on a fact relevant to the issue is required, only the opinion of a person professionally skillful or especially skillful by experience in the area is admissible. The court is not permitted to accommodate any other opinion on the matter. *Senator Rashidi Adewolu Ladoja v. Senator Abiola Adeyemi Ajimobi & Ors* (2016) LPELR-40658(SC) Opinion evidence is the personal judgment of the witness as to the existence or non-existence of a fact in issue or a relevant fact. A witness is only allowed to state facts as observed by him. A witness is not allowed to draw inferences; it is the duty of the court to draw inferences and conclusion. In the case of *R v. Loake* (1911) 7 CR. App. Rep 7, the defense sought to call a magistrate and a friend of the accused to testify to the insanity of the accused. The court ruled that the friend’s evidence was inadmissible and that the magistrate was not an expert. This principle is applicable under the Evidence Act. See *Awaye Motors Company Ltd v. Adewunmi* (1993) 5 NWLR (Pt.292 236; *Modupe v. The State* (1998) 4 NWLR (Pt. 87) 130.

However, certain pieces of evidence can be received as exceptions to this rule. 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.” This includes instances where the court would have to form an opinion or reach a conclusion on a point of foreign law, native law or custom, a matter of science, identity of hand writing, and finger impressions. See section 68 Evidence Act, 2011.

The exceptions in sections 68 to 76 of the Evidence Act 2011 can be classified into two:

- (1) Opinion of Experts
- (2) Opinions of Non-Experts

In a court proceeding experts are relied on for opinions on severity of injury, degree of insanity, cause of failure in a machine or other device. This is because it is often difficult for the court to apply some scientific, technical, or other specialized knowledge without the assistance of an expert in that field. For example, in *Seismograph Service (Nig.) Ltd v. Esiso Akpororo* (1974) 6 SC 119 at 135, the Supreme Court stated that the evidence of an expert witness is essential in ascertaining liability for damage that has arisen from seismic operations The duty of the expert is to give accurate and verifiable scientific exposition of relevant principles, and it is the duty of the court to apply such expertise to the facts of the case.

Expert evidence is often the most important component of many civil and criminal cases today. For example, in a case of electoral malpractices expert may be used to analyze finger printing evidence, in a murder case, an expert may be used for analysis bothering DNA and blood analysis; forensic accountants and forensic engineers are other forms of experts that may be relevant to establish a case. Not forgetting experts in local laws and customs, for example, to establish whether “*idi-igi*” or “*ori-ojori*” is applicable in a Yoruba family an expert witness in Yoruba customs and tradition may be required. The Supreme Court stated in *Seismograph Services Ltd v. Ogbeni* (1976) 4 SC 85, that where the contention of each party is technical, evidence to support their respective claims must be that of an expert in that particular field.

2.1 Expert Evidence

S. 68 (1) Evidence Act provides thus:



When the court has to form an opinion upon a point of foreign law, native law or custom, or of science or art, as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, customary law or custom, or science or art, or in questions as to identity of hand writing or finger impressions, are admissible.

(2) Persons so specially skilled as mentioned in subsection (1) are called experts.

An expert under the Nigerian legal framework 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, see *Seismograph Service Ltd v. Benedict Onokposu* (1972) 1 NLR (PT.1) 343. In *Dahiru Abdullahi v. Federal Republic of Nigeria* (2018) LPELR-44719(CA) where the Appellant challenged the assertion of the trial court, Hon Justice J.K Omotoso in holding that “the scars at the back of the Appellant were as old as 15 years”. The Appellant contended that the trial judge not being an expert in the medical field ought not to have reached such conclusion without the assistance of an expert witness in that field. The Court of Appeal however held that an expert witness may not be necessary where the court has sufficient knowledge to reach a conclusion without the assistance of an expert witness, as in the instance case. The Appeal Court further held that:

In exercising his common knowledge, experience and expertise on the scar at the back of the Appellant, the trial judge at page 120 of the record held: "The learned Counsel to the Defendant seems to have forgotten that most Courts in Nigeria are presided over by Nigerians who probably had their childhood in Nigeria, some even in the villages where they were involved in football playing or any form of adolescence acts and in the process got injured. I hold that such judicial officers do not need an expert to observe healed wounds and scars to arrive at a conclusion that the black spotted scars I saw on the Defendant cannot be two months but rather look like that of between 10-15 years.

The reasoning of the Court of Appeal in this case is in consonance with judicial precedents. Expert witness is only required when the expert can provide the court with scientific or other information of a technical nature that is likely to be outside the experience and knowledge of the Judge. See Tobi, J.S.C in *Egesimba v. Onuzuruike* (2002) LPELR-1043(SC).

Furthermore, in *MTN Nigeria Communications Ltd v. Olajire A. Esuola* (2018) LPELR-43952(CA) the Court of Appeal held as follows:

The fact that heaping of sand and gravel on the Respondent's building which blocked his drainage and led to flooding needed no extra effort of an expert to be evaluated and the effects discerned. So is the fact that forceful excavation, digging and drilling inevitably caused vibrations that resulted in cracking of the walls of the building on an adjoining land. These do not need to be proved by an expert.

However, in complicated and highly professional cases, where the doctrine of *res ipsa loquitur* is relied on by a party to prove his case, the evidence of an expert would be necessary to assist the Court in determining the dispute justly and fairly. See *Ojo v. Gharoro* (2006) 10 NWLR (Pt. 987) P. 173 @ 187. For example, in the *Siesmograph Services Ltd* case borders on a claim for damages arising from nuisance caused by the activities of the Appellants/ Respondents in the course of carrying out oil exploration exercise. Obaseki JSC stated:

Where are unable to agree with the learned trial judge that the evidence of an expert is not absolutely necessary to prove damage alleged to be caused by vibrations radiating from seismic operations taking place within a reasonable distance from the property damaged. These are phenomena beyond the knowledge of the unscientific and untrained in seismology and civil engineering.

Furthermore, in *Idudhe v. Eseh* (1996) 5 NWLR (Pt. 451), the respondent sued the Appellant for damages for nuisance. The Appellant had installed a grinding machine which was alleged to be causing the nuisance. The respondent called an expert witness who testified that the machine-made excessive noise. The Appellant did not call any witnesses. The trial court gave judgment for the respondent. The Appellant appealed; the Court stated:



It is trite law that evidence of opinion of experts on scientific matters is admissible whenever the Court has to determine issues within that field. But the expert must first satisfy the court that he is specially skilled in the particular field in question.

In the case of *Egesimba v. Onuzuruike* (2002) LPELR - 1043 (SC), the Supreme Court held that the evidence of an expert witness is only necessary if, by the nature of the evidence, scientific or other technical information outside the experience and daily common knowledge of the trial Judge is required. In *Bayo Ayadi & Ors v. Mobil Producing Nigeria Unlimited* (2016) LPELR-41599(CA) Ibrahim Shata Bdlia, JCA (Pp. 12-14, paras. E-C) held that the requirements of the law as regards admissibility of expert opinion is significantly based on the discretion of the trial judge as provided by the provisions of Section 68 of the Evidence Act 2011. The court must be satisfied as to the qualifications or credentials of the expert witness on the subject matter. The expert witness is also required to state the reasons for his opinion. Expertise is not measured only in terms of educational attainments. There is no requirement that the necessary skills be acquired through formal education. See *Sharing Cross Educational Service Limited v. Umaru Adamu Enterprises Limited & Ors* (2015) LPELR-24661(CA). An expert is a person who in the opinion of the Court has sufficient practice or experience in a particular field of knowledge as a professional or amateur. The test is the knowledge and experience of the witness in the area he is to testify on. For the purpose, it may not be necessary to show that the witness acquired or undergone formal education or training in an organized institution of learning in the area in which he has the adequate knowledge and experience, although that would be a crucial factor or point if his claim to expertise is based on such formal training in the area or field of knowledge in question. In *Said Ajani v Comptroller of Customs* (1952) 14 WACA 34, the appellant was charged and convicted for illegally exporting currency out of Nigeria. To prove that the notes were legal tender in French West Africa, the Comptroller of Customs called a bank manager as expert witness. The manager testified that he has 24 years banking experience in Nigeria, in affirming the judgment of the West African Court of Appeal, the Privy Council stated:

...the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a quest of foreign law...

Where, therefore, it was established that a branch bank manager, who had been engaged in banking business in Nigeria for 24 years, had to, and did, in the course of his business keep in touch with current law and practice with regard to notes that were legal tender in French West Africa, his evidence that number of French colonial bank notes which the appellant had admittedly attempted to export from Nigeria were at the time legal tender in French West Africa was admissible to, and did, prove that fact, and the appellant had therefore contravened section 22 (1) of the Exchange Control Ordinance, 1950, of Nigeria, which prohibited the exportation, amongst other things, or 'any notes of a class which are ... legal tender in the United Kingdom ... or in any other territory.

In *Saidon Africa Limited v. Access Bank Plc* (2017) LPELR-49868(CA) Mohammed Lawal Garba, JCA (Pp. 38-40, paras. B-D) held: "the question of whether a person is specially skilled to be called and treated as an expert in the subject of which a Court has to form an opinion, is one of fact to be determined by the Court on the basis of peculiar circumstances, and factors such as the qualification, amount and quality of knowledge and practical experience of a witness... a university degree therefore is not the sole determinant of or a sine qua non to the question whether a witness qualifies to be called and treated as an expert under the provisions of the Evidence Act".

A witness might even hold a university degree but may not be qualified as an expert witness in the material field. In *Arewa Textiles Plc & Ors v. Finetex Limited* (2002) LPELR-5361(CA), despite the fact that the witness who was called to identify a piece of wax material manufactured by Nichemtex holds a University degree in Accounting and M.Sc Business Administration both from Ahmadu Bello University, and has been working in the textile industry since 1967, the court held that since the witness had no special training in Textile Technology and had spent most of his time in the company in the administration or finance department. He is not qualified as an expert witness to identify a piece of wax material manufactured by Nichemtex. Also in *Action Congress of Nigeria v. Rear Admiral Murtala H. Nyako & Ors.*, (2012) LPELR 19649 the Supreme Court rejected the purported expert witness of a graduate of Economics, a consumer Banking officer and a retail financial analyst. The court rightly held that he was not qualify to be an expert in the art of establishing multiple registration and voting in elections.



In *All Nigeria Peoples Party v. Usman* (2008) 12 NWLR (Pt 1100) 1, Aboki J.C.A. stated at pages 72 to 73 thus: "It is for the Judge to decide whether or not a person is sufficiently skilled to give expert evidence. The correct test of the relevance of the witness's opinion as that of an expert is whether he is special skilled in the particular field in question where the evidence of the opinion of an expert is relevant.... The party calling an expert witness has a duty to elicit from him in the witness box, evidence of the basis of his claim as an expert e.g. professional training, academic background and experience. And it is the duty of the opposing counsel where appropriate, to cross-examine the expert effectively in order to raise doubt as to the witness expertise..."

The Adversary must be given the opportunity to cross-examine the expert witness and possibly challenge his qualifications. The party relying on the opinion of an expert must call the expert to testify; otherwise, the expert evidence may amount to hearsay. See *Shell Development Company v Isaiah* (1997) 6 NWLR (Pt. 508) 236. Where the opposing party intends to challenge the qualification, experience or report presented by the expert witness the opposing party must do so at the trial through cross-examination, otherwise he would have lost the opportunity to do so because the adverse party cannot be heard on appeal challenging the status of the expert witness. See *Azu v Ogundare* [1993] 7 SCNJ (Pt. 1) 150; *Michael John Aouad and Anor v IGP* (1950) 14 WACA 449. The expert witness must be competent and diligent, though he may refresh his memory by referring to his report. The report must not contain fundamental flaws. The court will reject an expert witness with many flaws or human errors. See *Maku & Anor v. Al-Makura & Ors* (2015) LPELR-41814(CA) (Pp. 34-39 Paras. D) For example, in *Oladimeji v State* (1998) 11 NWLR (Pt. 573) 179 a medical practitioner had performed a post-mortem examination but his report failed to identify the corpse and linked the examined corpse to the deceased, the medical practitioner could not as well remember the name of the deceased. The effect was a reduction in the weight attached to the doctor's testimony with conflicting opinions of experts is at liberty to accept one and reject the other after evaluating both. See *Ozigbo v. Commissioner of Police* (1916) 2 S.C. 67. And a judge is not compelled by law to admit unreasonable and illogical evidence no matter the qualification of the expert who gave the evidence. See *Aladu v. State* (1998) 8 NWLR (Pt.563) 618.

In a criminal trial, the Court must be wary of admitting a report prepared by an expert not at the instance of the police but at the behest of the complainant. According to Edozie JCA in the case of *Waziri v. State* (1997) 3 NWLR (Pt.496) 689 "such an expert report must be taken with a pinch of salt. Where the expert report is not complete or is unreasonable the court is entitled to reject it. *AG Federation v Ogunro* (2001) 10 NWLR (Pt 720). An expert must be specially skilled in the field he is giving evidence *A-G of the Federation v Abubakah* (2007) All FWLR (Pt. 375) but needs not be professionally qualified *Damina v Akpan* (2011) All FWLR (Pt.580) 1298 CA.

2.2 Expert on Foreign Law

Opinion of a person sufficiently skilled in foreign law is relevant to a fact in issue, when the court is to form an opinion on several technical matters including foreign law. Section 69 provides:

Where there is a question as to foreign law the opinions of experts in their profession who are acquainted with such law are admissible evidence, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question which books the courts having received all necessary explanations from the expert may construe for itself.

An expert in foreign law does not necessarily mean the expert needs to be qualified to practice in a foreign country. His evidence is relevant and admissible if his experience or training qualifies him to be an expert. See *Ajani v Comptroller of Customs* (Supra). The expert in foreign law may give his qualification and produce to the court books which he declares to be works of authority upon the foreign law in question.

2.3 Expert on Customary Law and Custom

Prior to taking judicial notice of a custom, it must have been established in several cases by litigants and affirmed by the court that as to acquire notoriety. See *Giwa v. Erimilokun*, (1961) All NLR 294 at 296; opinion of native chiefs and any person having special knowledge of the custom may be relevant and admissible as expert testimony. Also, any book or manuscript recognised by natives as a legal authority is relevant S.70. In *Ibrahim v Barde* (1996) 9 NWLR (Pt. 474) 513, in this case the court accepted a book written by D.W.4 as recognized authority to prove Suleja custom. See also *Adeseye v. Taiwo* [1956] 1 F.S.C 84 where the FSC accepted two books as recognized relevant authorities on Yoruba customs. On production of any treatise commonly offered for sale, the author must be called to



give oral evidence except the author is dead or cannot be found, or has become incapable of giving evidence or cannot be call without unreasonable delay. It is worthy of note that the requirement that customary law must be proved may not apply to customary courts, because it is presumed that those presiding are versed in the custom within the jurisdiction. However, if the presiding office is not versed in the local laws or custom of the jurisdiction, evidence of the customary law must be given, particularly if the statute establishing the does not make the knowledge of the customary law a condition precedent to appointing the presiding officers. *Iyamuse Ehigie v Gregory Ehigie* [1961] All NLR 842.

2.4 Expert on Handwriting

In accordance with S. 68 and 72 of the Evidence Act 2011 both an expert and a non-expert, including the judge can form an opinion on the handwriting or signature of a person. Expert opinion is however essential when there is a dispute as to the genuineness of a signature *Ize-Iyamu v Alonge* (2007) All FWLR (Pt.371) 1570 C.A. The opinion of a person who has special skills in hand writing or finger impression is relevant and admissible when relevant to the fact in issue. It does not matter that the expert has no formal training or special training, what matters is the skill and experience the expert possesses, no matter how acquired; he might have acquired such skills through personal study. In *R v Onitiri* [1946] 12 WACA 58, it was held that the opinion of a police officer for the prosecution to prove forgery was rightly admitted as he can be regarded as an expert in handwriting. Also, in *The Queen v Akpan* the opinion of a person skilled in the analysis of finger impressions was admitted as expert witness because he had experience and training in finger impressions. The opinion of expert and non-expert is admissible under this head. For example, the signature of a person may be proved by persons that are acquainted with it; they may have seen the party write; received communication from him; or observed communication from the party in the course of business S. 61 (1) and (2); *Salami v COP* (1960) WNLR 72; *UTB v Awanzigana Enterprises* (1994) 6 NWLR (Pt. 348) 56.

3. Requirements for admissibility of Expert Witness in the United States of America and the United Kingdom

3.1 Admissibility of Expert witness in the United States of America: The Daubert standard

The Daubert standard was set out by the Supreme Court of America in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S., earlier cited above. The evidentiary standard set down in this case offers an important evidentiary filter (Gaudet, 2010) The proposed expert evidence must be credible, relevant, reliable and its methodology must be credible before it can be admitted in evidence. Prior to the determination of this case the admissibility requirement of expert evidence in the US was her relevance or general acceptance in the community of experts ((Giannelli, 1980; Dixon & Gill, 2001), which was set in 1923 in the case of *n Frye v. United State*, 293 F. 1013 (D.C. Cir. 1923. The court held in the case that a test such as a systolic blood pressure deception test that the Appellant attempted to tender in evidence did not meet the admissibility requirement that such evidence be sufficiently established to have gained general acceptance in the expert community in which it belongs, hence, the test results were rejected as inadmissible. In 1993, the case of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, was decided by the Supreme Court. This case significantly changed the landscape of expert witness admissibility in the United States, in this case, the pharmaceutical makers were sued by plaintiffs for birth defects caused by their products. In determining whether the expert testimony in this case should be admitted in evidence, the court set down the expert admissibility standards now known as the *Daubert* standards. The standard improved the rules on the admissibility of expert witnesses. It gives the judges a gatekeeper's role in assessing expert witnesses for the purpose of guarding against the admissibility of unreliable and biased expert scientific evidence in their courts.

The courts in the US are required to hold Daubert hearings at the beginning of a case to determine whether the expert evidence should be admitted or not and whether the case should be permitted to go forward (Heinzerlin, 2005). The judges are to determine whether the theory or technique used by the expert witness has been tested; whether the theory or technique has been subjected to peer review analysis and publication (Kumar, 2011); whether there are any known or potential rate of error in relation to the particular scientific technique adopted by the expert witness; and if there is in existence and maintenance of standards controlling the technique's operation and the scientific technique's level of acceptance within a relevant expert community. Research findings reveal that Daubert has greatly impacted how judges evaluate expert witnesses. The judges now scrutinize and analyze expert witnesses' methods and findings before admitting the expert testimony in evidence (Dixon & Gill, 2001). This has led to an increased proportion of expert witnesses challenged and a corresponding increase in unreliable expert witnesses (Vickers, 2005). The National Academy of Sciences Report on Forensic Sciences has led credence to Daubert standards by corroborating the fact that in criminal cases exaggerated and flamboyant expert witnesses had contributed in no small measure to many



wrongful convictions of innocent people. The report urged for caution in the admissibility of expert witness. The report finds that relevance and qualification are not enough criteria in the admissibility of expert witnesses and further argue that expert witness must satisfy two tests. First, an expert testimony should be "founded on a reliable scientific methodology that gives the capacity to accurately analyze evidence and report findings (NRC Report, 2009:85)." Second, "the extent to which practitioners in a particular forensic discipline rely on human interpretation that could be tainted by error, the threat of bias, or the absence of sound operational procedures" (NRC Report, 2009:87) should be determined, and these potential problems should be reduced as much as possible.

3.2 Requirements for Admissibility of Expert Witness in the United Kingdom: Mixed Law and Jurisprudence

The criteria for admissibility of expert witness in the United Kingdom enjoy statutory backing and extensive jurisprudential support which is evaluated in this segment. First, the Criminal Procedure Rules 2020 Part 9.2(3)(d) mandates all expert witnesses to disclose to the instructing party anything that has the potential to undermine the expert witness's testimony or that may compromise the credibility or impartiality of the testimony. Information that should be disclosed includes, fee arrangement that will make the expert witness evidence dependent on the outcome of the case; any conflict or potential conflict of interest; adverse judicial comments; any appeal based on the deficiency in the expert's evidence in a case; any disciplinary proceedings or adverse finding of any of the expert witness report by a regulator; conviction of a criminal offence based on trust issues; lack of an accreditation or other commitment to prescribed standards; a history of failure or poor performance in quality or proficiency assessments; a history of lax or inadequate scientific methods; a history of failure to observe recognized standards in the expert's area of expertise; and a history of failure to adhere to the standards expected of an expert witness in the criminal justice system. See the Criminal Practice Directions 2023 at 7.1.4.

The general rule for the admissibility of expert witnesses in the UK is that expert witnesses should only give testimony in relation to matters within their field of competencies (Huyghe & Chan, 2013). Like in Nigeria opinion evidence is inadmissible. There are however, there are statutory and common law exceptions. For example, Section 30 of the Criminal Justice Act 1988 states that an expert's report is admissible as evidence of fact and opinion, whether or not the expert attends court to give oral evidence. And under the common law, expert witness is admissible where it will be of assistance to the court, the expert has relevant expertise, the expert is impartial, the expert's evidence is reliable; there should be a sufficiently reliable scientific basis for the expert evidence. For the court to be satisfied that there is a sufficiently reliable basis for the expert testimony to be admitted, the court will be expected to have regard to Criminal Practice Directions 2023 at 7.1.2 which provides that the factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include: the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained; the validity of the methodology employed by the expert; if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is; if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results; the extent to which any material upon which the expert's opinion is based has been peer reviewed by others with relevant expertise, and the views of those others on that material; the extent to which the expert's opinion is based on material falling outside the expert's field of expertise; the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion; if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

In addition, in considering the reliability and credibility of the expert scientific opinion, the court must be astute to identify potential flaws in such opinion which detract from its reliability, such as being based on a hypothesis which has not been subjected to sufficient scrutiny or which has failed to stand up to scrutiny; being based on an unjustifiable assumption; being based on flawed data; relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or relying on inference or conclusion which has not been properly reached.

The UK unlike the Daubert standards in the Federal courts of the US allows the use of new techniques by expert witnesses subject to the qualifications highlighted above (Heinzerling, 2005). In the case of *R v Clarke* (RL) [1995] 2 Cr App R 425, Steyn LJ stated categories of expert witnesses and techniques are not exhaustive. He stated further



that it would "be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and advances in science". Also in the Forensic Science Regulator's Code of Conduct special provision is made for novel or infrequently used methods under the Forensic Science Regulator Act 2021. Guidance for the use of new techniques by expert witness was approved by the the Privy Council in *Lundy v R* [2013] UKPC 28 in which the factors to be considered in accepting the use of new techniques were set out as: whether the theory or technique can be or has been tested; whether the theory or technique has been subject to peer review and publication; the known or potential rate of error or the existence of standards; and whether the theory or technique used has been generally accepted.

Furthermore, the UK Forensic Science Regulator Act 2021 ("the FSR Act") gives the statutory powers and the duty to prepare and publish the code of practice for forensic science activities in England and Wales. The regulator works in collaboration with the UK Accreditation Service (UKAS) to provide guidance, rules and a framework for Forensic practice in England and Wales. Forensic expert reports must include a statement to the effect that in accordance with the provisions of CrimPR19 and the Criminal Practice Direction 2023, whether the forensic science report is covered by the FSR Code and whether the expert witness has complied with the FSR Code. If the expert has not complied with the FSR Code there must be a declaration to that effect and the efforts being taken to mitigate any errors that may arise therefrom. Section 4 of the FSR Act states that the FSR Code is admissible in evidence and that "a court may, in particular, take into account a failure by a person to act in accordance with the code in determining a question in any such proceedings" (section 4(3)). The content of an expert's report or a statement prepared by an expert must comply with CrimPR 19.3(3) and 19.4. Crim. PR 19.4 does not apply to a summary of expert evidence (or SFR 1) served in accordance with CrimPR 19.3(1). CrimPR 19.4 states that an expert's report must: give details of the expert's qualifications, relevant experience and accreditation; give details of any literature or other information which the expert has relied on in making the report; contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based; "make clear which of the facts stated in the report are within the expert's own knowledge; where the expert has based an opinion or inference on a representation of fact or opinion made by another person for the purposes of criminal proceedings; identify the person who made that representation to that expert; give the qualifications, relevant experience and any accreditation of that person; certify that that person had personal knowledge of the matters stated in that representation; where there is a range of opinion on the matters dealt with in the report summarize the range of opinion, and give reasons for the expert's own opinion; if the expert is not able to give his opinion without qualification, state the qualification; include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence; contain a summary of the conclusions reached; contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty; and contain the same declaration of truth as a witness statement".

Sections 5 to 8 of the FSR Act empower the Regulator to investigate any Forensic Expert that may be undermining the code by non-compliance or providing the court with biased or compromised expert reports. The Regulator is further empowered to issue such expert noncompliance notice and such a forensic expert may be appropriately sanctioned. It should be noted, however, that the admissibility of forensic evidence remains the exclusive discretion of the court even when the forensic expert has not complied with the FSR Code.

4. Conclusion and Recommendations

This article has discussed the requirements for the admissibility of expert witnesses in Nigeria. It has been shown above that there are no elaborate statutory provisions and guidelines on the criteria to be met before expert witnesses could be admitted in evidence. This has led to instances where junk reports have been presented to the courts by incompetent or mischievous expert witnesses in the courts. This article also extensively discussed the criterion for the admissibility of expert witnesses in the US and the UK. The Daubert admissibility Standard in the US was discussed and the UK case law and statutory interventions on evidentiary and statutory standards to be met before an expert witness could be admitted were discussed. In sum, the lesson to be learned by Nigeria is that the requirement for the admissibility of expert witnesses in Nigeria is deficient and with the emerging regime of AI-led economy and application of forensic science to the administration of justice, the courts would be confronted with divergent expert witnesses, both junk and real. There is a need to properly appreciate the role and the limitations of an expert witness when called upon to testify. An expert witness brought to court at the instance of either the prosecution or the defence, is often more concerned with assisting the party who brought him to court to win the case than in assisting the court in arriving at the truth. After all, he who pays the piper dictates the tune. The court therefore needs to be weary of the expert witnesses. Expert witnesses' evidence needs to be properly evaluated by the court. The judges must be harmed



with the necessary tools to be able to distinguish between a genuine expert witness and a scam expert testimony. The Daubert admissibility Standard in the US and the UK statutory interventions are recommended to the Nigerian legislative arms of government, in the alternative the Chief Justice of Nigeria can make regulations on the admissibility of expert witnesses in Nigeria. The regulations on expert witness reports should be made to contain the methodology used by the expert in arriving at his conclusion, such methodology must be generally acceptable amongst experts in the field and if it is a new methodology, there must be a scientific basis for its adoption; the expert must be able to give details of his expertise, including qualifications, relevant experience and accreditation; give details of any literature or other information which the expert has relied on in making the report; make it abundantly clear which of the facts stated in the report are within the expert's knowledge and the expert must acknowledge the sources of those that are not within his knowledge. It perhaps should be mandatory for expert witnesses to be cross-examined except in exceptional circumstances where it will be most difficult or impossible for the expert witness to make himself available for cross-examination. In addition, the need for a regulatory body to set guidelines and best practices cannot be overstated. The body will also have the responsibility of advising the government on the modalities and process of applying expert witnesses to the Nigerian legislative framework.

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