CHAPTER - IV

RELEVANCY AND PROBABITIVE VALUE OF EXPERT EVIDENCE

CRIMINAL JUSTICE SYSTEM is based on the fact, opinion, witnesses, evidences which are presented before the court. A criminal justice system does not function in a vacuum. All the characters, of criminal justice system- be they police, prosecutors, judges, lawyers or witnesses have to play their part properly. When certain crime is happened police has to do investigation, prosecutors have to present the facts before the court, and that is based on facts and evidences. On the basis of which judiciary gives the decision.

It is the evidences, which is most important. Evidence is something that provides the grounds for belief tending to prove or disprove the existence of a particular fact. For proving the fact in issue every case needs evidences. After hearing both the parties and the evidences produced by them judge determines the fact in issue of a case. Parties of a case give evidence to prove or disprove the fact in issue, but they cannot present evidence whatever they want. They have to follow some rules, rules which are ascertained in the evidence Act.¹

The law of evidence is the edifice on which the system of dispensation of justice tests. In fact, the purpose and object of evidence is to guide the Courts to come to a conclusion regarding a case at hand. But, in certain cases, where the questions involved are beyond the range of common experience and knowledge, evidence in form of facts pose problems as the court may not have sufficient competence to arrive at conclusion based on those facts. Thus, the need arises for experts who have the required ability and knowledge to tender evidences.²

The legal concept of evidence is neither static nor universal. Medieval understandings of evidence in the age of trial by ordeal would be quite alien to modern

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sensibilities and there is no approach to evidence and proof that is shared by all legal
systems of the world today. There must be a legal concept of evidence that is
distinguishable from the ordinary concept of evidence. After all, there are in law many
special rules on what can or cannot be introduced as evidence in court, on how evidence
is to be presented and the uses to which it may be put. On the strength or sufficiency of
evidence needed to establish proof and so forth. Evidence like those of entomologist,
odontologist, pathologist and others as discussed in chapter – IIIrd have to go through
the test of relevancy, probative value and admissibility.

4.1 RELEVANCY:

Relevancy is the quality or fact of being relevant i.e. bearing upon or is pertinent
to the matter in hand. And relevant means bearing up or pertaining to the purpose in
hand, that which is appropriate, having some reasonable connection with something. It
means, that which is logical probative and is based on logic and probability. The rules
of relevancy declare certain facts relevant; declares what is relevant? What is the
material (fact) which may be produced before a court in a case is a first question.
Relevancy means what facts may be proved before a court. In an American case of
Knapp v. State, the rule of law stated by the court was that ‘the determination of the
relevancy of a particular item of evidence rests on whether proof of that evidence would
reasonably tend to help reasonably tend to help resolve the primary issue at trial.’

According to Sir James Stephen, relevancy means connection of events as caused
and effect. What is really meant by ‘relevant fact’ is a fact that has a certain degree of
probative force. He explained that:

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\text{The word relevant means any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of other.}
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5. Relevant Law And Legal Definition, USLEGAL.
7. (1907) 522 Us 1069.
8. Supra note 6 at Pg. 9.
To establish the relevancy of any fact, it must be shown that it is a fact in issue or fact such as is declared to be relevant. The relevant facts are all those facts which are in the eye of the law so connected with or related to the facts in issue that they render the latter probable or improbable.\textsuperscript{10}

There should be relevancy in the conclusion of the expert’s report and the findings should not be based on mere assumption or premise but on relevant data. The data could be his own or from the published work of accredited authors.\textsuperscript{11}

\section*{4.2 LOGICAL AND LEGAL RELEVANCY:}

Evidence is logically relevant only when the probability of finding that evidence given the truth of some hypothesis at issue in the case differs from the probability of finding the same evidence given the falsity of the hypothesis at issue.\textsuperscript{12}

When a fact is connected with another it is logically relevant but it is legally relevant if the law declares it to be relevant. If it is not declared by the law to be relevant, it is not admissible in evidence. Every fact that is legally relevant is also logically relevant but every logically relevant fact may not be necessarily legally relevant.\textsuperscript{13}

Logical relevance refers to whether the evidence actually seems to have probative value i.e., is the evidence likely to affect the jury’s mind as to a fact in issue and legal relevance is a weighing exercise where the probative value of the evidence is measured against opposing considerations, such as potential to confuse, danger of wasting time, or potential of creating prejudice.\textsuperscript{14}

Logical relevance is the relationship between offered evidence and a fact in issue that suggests such evidence makes the issue more or less public and legal relevance is the quality of offered evidence whose probative value outweighs its prejudicial effect.\textsuperscript{15}

Legal relevancy, which is essential to admissible evidence, requires a higher standard of evidentiary force it includes logical relevancy, and for reasons of particular convenience,

\textsuperscript{11} Kumar K., “The Expert And The Lawcourt”, \textit{The Practical Lawyer SCC (Jour)}, (1987),Vol. 4, (7).
\textsuperscript{13} Supra note 8.
\textsuperscript{15} Prof. Cook, \textit{Evidence Outline}, Pg. 2; Scribd Inc.
demands a close connection between the fact to be proved and the fact offered to prove it. All evidence must be logically relevant - that is absolutely essential. The fact, however, that is logically relevant does not insure admissibility; it must also be legally relevant; a fact which in connection with that facts renders probable the existence of fact in issue, may still be rejected, if in the opinion of the judge and under the circumstances of the case it be considered essentially misleading or remote.

A fact is said to be logically relevant to another when it bears such casual relation with other as to render probable the existence or non-existence of the latter. All facts logically relevant are not, however, legally relevant. Whatever is legally relevant is logically relevant but not vice versa e.g., the statement of the accused, ‘I have kept in the field the knife with which I killed A’ is logically relevant to prove the guilt of the accused, but section 27 of the Indian evidence Act which deals with the question--How much information received from the accused may be proved--provides that only so much of the information as relates distinctly to the fact thereby discovered may be proved, i.e., is relevant and hence the latter portion of the accused’s statement, viz. ‘with which I killed A’ though logically relevant is not legally relevant.

The relevance requirement includes both logical relevance (the relationship between the evidence and the fact in issue it is being used to establish) and legal relevance (the probative value). The logical relevance of the evidence is determined by asking the following questions:

(a) Does the proposed expert opinion evidence relate to a fact in issue in the trial?

(b) Is it so related to a fact in issue that it tends to prove it?

Every fact legally relevant will be found to be logically relevant but every fact logically relevant is not necessarily relevant under the Act. Common sense or logical relevancy is as a rule wider than legal relevancy. A Judge might, in ordinary

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17. Best, W. M., Evidence, Pg. 251.
transactions, take one fact as evidence of another and act upon it himself, when in Court he would rule that it was legally relevant.21

4.3 RELEVANCY AND ADMISSIBILITY:

The expression relevancy and admissibility are used as synonyms, but their legal implications are distinct and different for more often than not, facts which are relevant may not be admissible, for example communication made by spouse during marriage or between an advocate and his client though are relevant are not admissible.22 In the same way facts which are admissible are not relevant like question permitted to be put in cross examination to impeach the credit of witness or to test the veracity of witness, are admissible but are not relevant.

A communication to a legal adviser, or a criminal confession improperly obtained may, undoubtedly, be relevant in a high degree. They are nonetheless inadmissible.23

It is preferable to use the term relevant and admissible simply, meaning by the former that which is logically probative and by the later that which is legally receivable, whether logically probative.24

Relevant means that which is logical probative. Admissibility is not based on logic but on law and strict rules. Many facts having no bearing in the facts to be proved are admissible. The proof of loss of original deed has no effect on the decision of issue but this is admissible to evidence before secondary evidence about the contents of the relevant document may be given.25

Sec. 5-55 of Indian Evidence Act, 1872 deals with the question of relevancy and section 56 and onwards deals with admissibility. And the facts which are allowed to proved under section 5-55 of Act are called relevant facts. Admissibility presupposes relevancy, and evidence of irrelevant facts should therefore be rejected. It is for this reason, inter alia that evidence of similar facts is sometimes refused.26

22. Supra note 16 at Pg. 258.
24. Supra note 16 at Pg.261.
25. Supra note 6 at Pg. 41.
26. Supra note 21 at Pg. 351.
In *Ram Bihari Yadav v. State of Bihar* the Supreme Court speaking through Mohd. Quadari J. said that, more often the expression relevancy and admissibility are used as synonym but their legal implications are different because more often than not facts which are relevant may not be admissible.

No matter should be proved which is not relevant; somethings which are relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence. Such matters are inadmissible. Admissible evidence is thus that which is (1) relevant and (2) not excluded by any rule of law or practice. It may be that an item of evidence is admissible on one ground and inadmissible on others; if so, it will be admitted evidence may also be admissible for one purpose and not for another.

Admissibility also denotes the absence of any applicable rule of exclusion, hence facts should not be received in evidence unless, they are both relevant and admissible. Admissibility is a quality standing between relevancy, or probative value. On the one hand, and proof, or weight of evidence, on the other hand, admissibility signifies, that all the particular fact is relevant and something more – that it has also satisfied all the auxiliary tests and extrinsic policies.

A dying declaration made by a person, who is dead as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in a case in which cause of his death comes in question is relevant under section 32 of Indian Evidence Act, 1872. Though dying declaration being a specie of hearsay evidence (which is not relevant and admissible) is an indirect evidence and is an exception to the rule against admissibility of hearsay evidence is relevant and admissible. Indeed it is substantive evidence and like any other substantive evidence, requires no corroboration for forming the basis of conviction of an accused.

The legal admissibility of the facts is for the most part determined by their logical relevancy to the issue, or that connection between the two which, in the ordinary course of events, render the latter probable from the existence of the former. But relevancy being founded on logic and human experience, and admissibility on law, which may

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28. *Supra note 10 at Pg. 165.*
29. *Supra note 26 at Pg. 351.*
change in different jurisdictions and periods, the two theories do not fully coincide.\textsuperscript{30} Thus, many facts which is ordinary life and relied on as rendering other facts probable, the law, on grounds of policy or precedent rejects, e.g. as being too remotely connected or too slight in probative force, to form the basis of judicial decision; or as tending to confuse the jury by a multiplicity of issue, or as creating unfair surprise and prejudice to the parties; or as infringing some safeguard of public or personal privilege.\textsuperscript{31}

Whenever a fact is construed to be relevant, normally, such evidence becomes admissible in the court of law,\textsuperscript{32} unless explicitly declared to be inadmissible by a specific statutory provision as in the Sec. 126 of Indian Evidence Act, 1872. Similarly, an irrelevant fact is always inadmissible, unless a statutory provision indicates to the effect that a fact is admissible irrespective of the fact whether it is relevant.\textsuperscript{33}

If evidence is relevant, it is admissible and the court is not concerned with how the evidence was gathered.\textsuperscript{34} Where the fact in issue is whether the complainant filled the office of the food inspector at the time of filling the complaint, evidence of the food inspector, that he filled that office, would be a relevant fact for proving the fact in issue and he would be giving direct evidence of that fact. If the direct evidence is challenged, the order of appointment may be produced to prove that fact in issue.\textsuperscript{35}

‘Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although prime facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility.’\textsuperscript{36} It is safe to use the term relevant as meaning logically probative, and admissible as meaning legally receivable, whether logically probative or not.\textsuperscript{37}

Relevancy must be distinguished from admissibility, of which though the primary, it is by no means the sole condition. A fact may be relevant and yet, on grounds

\begin{itemize}
  \item \textsuperscript{30} Supra note 16 at Pg. 74.
  \item \textsuperscript{31} Phipson, \textit{Phipson on Evidence}, 13th, edn. Pg. 74.
  \item \textsuperscript{32} \textit{Indian Evidence Act}, 1872, Section 30.
  \item \textsuperscript{33} Supra note 1 at Pg.105.
  \item \textsuperscript{34} \textit{Public Prosecutor v. Kalagana Rao} (1969) 2 Andh. WR 449, Pg. 453.
  \item \textsuperscript{35} \textit{State of Kerala v. V. P. Enadeen} AIR 1971 Ker 193.
  \item \textsuperscript{36} \textit{R. v. Mohan} (1994) 2 S. C. R. 9.
  \item \textsuperscript{37} Supra note 21 at Pg. 351.
\end{itemize}
of convenience or policy, evidence of it may be inadmissible. Indeed this exclusion of matter otherwise relevant has been called the distinguishing feature of the English law of evidence. It is correct then, in deciding whether evidence if a fact us admissible, to ask first whether the fact is relevant and, thereafter, whether are any rules or discretions, based on convenience or policy, which nonetheless make evidence of the relevant fact inadmissible.38

4.4 PROBATIVE VALUE:

Probative value is defined in the UAE dictionary as the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in.39

The probative value of the evidence is weight to be given to it which has to be judged having regard to the facts and circumstances.40 Evidence that is otherwise logically relevant ‘may be excluded if its probative value [logical relevance value] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.41

Courts must weigh the probative value of the evidence against the harm likely to result from its admission. Rule 403 is a loose liberal standard, but not an open door. Relevant evidence may be excluded if it’s value is substantially outweighed by either:

1. The danger of
   a. Unfair prejudice
   b. Confusion of the issues
   c. Misleading the jury

2. Consideration of
   a. Undue delay
   b. Waste of time
   c. Needless presentation of cumulative evidence

38. Supra note 31 at Pg. 106.
40. Supra note 16 at Pg. 258.
Evidence has a probative value it tends to prove an issue. However, probative value may refer to whether the evidence is admissible. Rules of evidence generally state that relevant evidence, which tends to prove or disprove an alleged fact, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. A trial court must use a balancing test to make this determination, but rules of evidence generally require that relevant evidence with probative value be excluded only if it is substantially outweighed by one of the dangers described in the rules.\textsuperscript{42}

In law, evidence has probative value if it is sufficiently useful to prove something in a trial. Thus, testimonial evidence (i.e., testimony by a witness under oath) that is not probative in immaterial and not admissible or will be stricken from the record by defense’s objections. Similarly, the analysis of forensic evidence must be relevant to have probative value; it must establish evidentiary fact to be beneficial.\textsuperscript{43}

\section*{4.5 RELEVANCY AND PROBATIVE VALUE OF EXPERT EVIDENCE:}

Earlier the Courts required the opinion of expert evidence in some limited field like handwriting, fingerprints etc. But with the vast development in the field of science and technology now such a question arises before the court of which court may not have the full knowledge about it. Judge might be an expert in law but not in the field of science and technology. So, courts need the help of expert opinion to clarify the point arises before it. Today the role of expert has been widened and the Courts take their assistance in various aspects viz entomology, odontology, internet crimes, pathology, DNA.

It is trite law that for evidence to be admissible, it must be logically relevant to a disputed issue of fact or a collateral fact (or at least contribute to an explanation of the background of the case so that the disputed issues can be resolved in their proper context). The test of logical relevance will almost always be satisfied for any evidence


tendered by the prosecution or defence, for it is highly unlikely that a party will wish to adduce evidence having no logical bearing on a matter in the proceedings.  

4.5.1 AMERICA:

About relevant evidence Prof. Cook says relevant evidence is evidence that makes a fact more or less likely to be true that it would be without the evidence (looking for probative value). Article IV. Relevance and Its Limit deals with rules regarding relevancy Rule 401 of Federal Rules of Evidence, laid down the test for relevant evidence in the following words:-

Evidence is relevant if:

a) It has any tendency to make a fact more or less probable than it would be without the evidence; and

b) The fact is of consequence in determining the action

Thus relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are a presupposition involved in the very conception of a rational system of evidence. Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by the rules. Sec. 402 of FRE laid down rules regarding general admissibility of relevant evidence as:

Relevant evidence is admissible unless any of the following provide otherwise:-

- the United States Constitution;

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45. Supra note 15.
• a Federal Statute;
• these rules; or
• other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible

Rule 403, of FRE further provides for excluding relevant evidence for prejudice, confusion, waste of time, or other reason in the following wordings:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:-

• unfair prejudice,
• confusing the issues,
• misleading the jury,
• undue delay,
• wasting time,
• or needlessly presenting cumulative evidence.

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance and these circumstances entail risks which range all way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.49

Federal Rules of Evidence governed the admissibility of lay and expert testimony under Rule 701 - 05. Rule 701 lay down the opinion testimony by lay witness in the following words:-

If the witness is not testifying as an expert, the witness testimony in the form of opinions or inferences is limited to those opinions or inferences which are

(a) rationally based on the perception of the witness and

49. Notes of Advisory Committee on Rules (1972), Advisory Committee Notes, Federal Evidence Review.
(b) helpful to a clear understanding of the witness testimony or the
determination of a fact in issue.

The first requirement of Rule 701 restricts witness's testimony to matters within
his personal knowledge and observation and thereby increases its reliability. The
second requirement, that opinion evidence is admissible only when it is helpful to the
fact finder's determination of truth, further guards against the admission of
inappropriate or unnecessary opinion testimony.\textsuperscript{50}

Parties have traditionally relied on the opinions of expert witness to help
establish facts that were too complex, specialized, or technical for lay witness to explain
and such testimony is allowed as an exception to the general ban against opinion
evidence. Federal Rule 702 retains this practice by allowing expert testimony, opinion
or otherwise, whenever the expert's answer 'will assist the trier of fact to understand
the evidence or to determine a fact in issue'\textsuperscript{51} and stated that:-

A witness who is qualified as an expert by knowledge, skill, experience,
training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized
knowledge will help the trier of fact to understand the
evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and
methods; and

(d) the expert has reliably applied the principles and methods to
the facts of the case.

The Advisory Committee's Note states that 'it seems wise to recognize that
opinion are not indispensable and to encourage the use of expert testimony in non-
onopinion from when counsel believes the trier can itself draw the requisite inference.\textsuperscript{52}
For example, expert opinion testimony as to whether a party was walking fast should be

(1975), Vol. 36, Pg. 126.


\textsuperscript{52} Supra note 48.
rejected since the subject matter is easily understood by both prejudicial and time-wasting.  

American law, in particular has struggled with the problem of devising criteria for dealing with expert opinion evidence, two cases like Daubert and Kumho Tire are the landmark cases.  

The first of these landmark decisions is Fyre. In 1923, the Court of Appeals of the District of Columbia was called upon to determine the admissibility of the results of a systolic blood pressure deception test as indicative of the truthfulness of defendant. The test was based on a scientific theory which seems to be that the truth is spontaneous while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure. In this case Court held that:-

*The rule is that the opinions of the experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.*

The Supreme Court’s landmark Daubert v. Merrell Dow Pharmaceuticals decision on the admissibility of expert evidence requires that after determining the category of evidence- scientific, technical, or specialized- the court must next assess the relevance and reliability of the evidence under Federal Rule of Evidence 702, the trail judge must ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable. This standard of evidentiary reliability was founded in the fact that the ‘scientific’ implies a grounding in the methods and procedure of science and

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53. Supra note 50 at Pg. 129.
55. Fyre v. United States, 293 F. 1013, D. C. Circ., 1923
56. Supra note 54 at Pg. 267.
‘knowledge’ connotes more than subjective belief or unsupported speculation. Thus, Rule 702 assigned to the trial judge a ‘gate-keeping’ role. The judge was duty-bound to ensure ‘that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand’ whether or not the hypothesis or theory relied on was established.\(^{59}\)

The decision in *Kumho* represents the next step in an evolution of the principles guiding the admission of expert testimony. After the long period of being guided by the general acceptance standard announced in *Frye v. United States*, the U. S. supreme Court in *Dauber* expanded the parameters under which expert testimony would be considered, by accepting in the Federal Rules of Evidence; the key principles being, whether the nature of the question being considered is beyond the scope of knowledge we attribute to the fact finder and whether the testimony being offered is capable of assisting the finder of fact.\(^{60}\)

### 4.5.2 AUSTRALIA:

In Australia, ‘expert evidence is admissible with respect to a relevant matter about which ordinary persons are not able to form a sound judgment, without the assistance of those possessing special knowledge or experience in that area and which is the subject of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience.’\(^{61}\)

In Australia, Sec. 55 of Part 3.1 of the Evidence Act 1995\(^{62}\) regarding the relevant evidence state that:

1. The evidence that is relevant in a proceeding is evident that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

2. In particular, evidence is not taken to be irrelevant only because it relates only to:

   (a) the credibility of a witness; or

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59. Richmond, *The admissibility of expert evidence in criminal proceedings in England and Wales: A New approach to the determination of evidentiary reliability*, 2009, Pg. 34.
(b) the admissibility of other evidence; or

(c) a failure to adduce evidence

For relevant evidence to be admissible Sec. 56 of the evidence Act further laid down as:-63

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

Regarding the admissibility of evidence of an opinion Sec. 76, Part 3.364 which deals with opinion states:-

(I) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(II) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note: Specific exceptions to the opinion rule are as follows:-

- Summaries of voluminous or complex documents
- Evidence relevant otherwise than as opinion evidence
- Lay opinion
- Expert opinion
- Admission
- Exceptions to the rule excluding evidence of judgements and convictions
- Character of and expert opinion about accused persons.

63. Ibid.
64. Id at Pg. 50
According to the Note apprehended to the Sec. 76,\textsuperscript{65} which gives the list of the specific exception to the opinion rule, the expert opinion is exception to the opinion rule. And about Sec. 79\textsuperscript{66} says:--

*If a person has specialized knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.*

Contrast the Australian provision with the American provisions, Rule 702 makes no reference to field of expertise nor a designated standard of specialized knowledge. There is no specific reference to scientific knowledge in the Australian legislation but rather it applies to ‘specialised knowledge.’\textsuperscript{67}

In *Matika (Australia) Pty Ltd v. Sprowles*\textsuperscript{68} for the expert evidence to be admissible, Heydon JA mentioned the following criteria:

*If evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of ‘specialised knowledge’; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert, the opinion proffered must be ‘wholly or substantially based on the witness’s expert knowledge’; so far as the opinion is based on facts ‘observed’ by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on ‘assumed’ or ‘accepted’ facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached that is the expert’s evidence must explain how the field of ‘specialised knowledge’ in which the witness is expert by reason of ‘training, study or experience’, and on which the opinion is ‘wholly or

\textsuperscript{65.} Evidence Act 1995.
\textsuperscript{66.} Supra note 62 at Pg. 51.
\textsuperscript{68.} (2001) NSWCA 305.
substantially based’, applies to the facts assumed or observed so as to produce the opinion propounded.

In this it was further held that it is not permissible to conclude from those matters alone that an author of a report has any specialised knowledge, except to the extent that the report states (or it otherwise appears from admissible evidence) what that knowledge is. Nor is it permissible, by reason of those matters alone, to conclude that any specialized knowledge that the author of a report has is based on any training, study or experience of the author. Thus, it is not permissible to conclude, simply because a person expresses an opinion on a particular subject, referring to particular technology, that that person has any specialized knowledge in relation to that subject. There must be specific evidence as to specialized knowledge of the person in relation to that subject and as to the training, study or experience upon which that specialized knowledge is based. For that the further requirement is that an opinion be based on specialized knowledge would normally be satisfied by the person who expresses the opinion demonstration the reasoning process by which the opinion was reached. Thus, a report in which an opining is based is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on particular specialized knowledge.69

In Honeysett v. The Queen,70 the appellant was convicted of the armed robbery of an employer of a suburban hotel following a trial in the District Court of New South Wales. Closed –circuit television cameras (CCTV) recorded the robbery at the trail, over objection, the prosecution adduced evidence from an anatomist, professor Henneberg, of anatomical characteristics that were common to the appellant and to one of the robbers (Offender One). Professor Henneberg's opinion was based on viewing the CCTV images of the robbery and images of the appellant taken while he was in custody. The appellant appealed against his conviction to the Court of Criminal Appeal of the Supreme Court of New South Wales. He challenged the admission of Professor Henneberg's evidence, contending that it was not within the exception to the opinion rule. The Court of Criminal Appeal rejected his contention, hold that Professor Henneberg's evidence had been rightly admitted because it was evidence of opinion

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69. Supra note 68.
70. (2014) HCA 29.
based on specialized knowledge based on Professor Henneberg’s training, study and experience. On 14 March 2014, French CJ and Keane J of High Court of Australia granted special leave to appeal.

High Court of Australia states at\(^\text{71}\) para 23 held that:

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\text{Sec. 79 (1) states two conditions of admissibility: first, the witness must have}
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\text{‘specialised knowledge based on the person’s training, study or experience’}
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\[
\text{and secondly, the opinion must be ‘wholly or substantially based on that}
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\[
\text{knowledge.’ “Specialised knowledge” is to be distinguished from matters of}
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\[
\text{“common knowledge”}. \text{Specialized knowledge is knowledge which is outside}
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\[
\text{that of persons who have not by training, study or experience acquired an}
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\text{understanding of the subject matter. It may be of matters that are not of a}
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\text{scientific or technical kind and a person without any formal qualifications}
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\[
\text{may acquire specialized knowledge by experience. However, the person’s}
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\[
\text{training, study or experience must result in the acquisition of knowledge.}
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\text{The Macquarie Dictionary defines “knowledge” as “acquaintance with facts,}
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\[
\text{truths, or principles, as from study or investigation” and it is in this sense}
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\text{that it is used in Sec. 79 (1). The concept is captured in Blackmun J’s}
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\text{formulation in Daubert v. Merrell Dow Pharmaceuticals Inc. “the word}
\]

\[
\text{‘knowledge’ connotes more than subjective belief or unsupported}
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\[
\text{speculation... It applies to any body of known facts or to any body of ideas}
\]

\[
\text{inferred from such facts or accepted as truths on good grounds.”}
\]

Further regarding the admissibility court states that the second condition of admissibility under Sec. 79 (1) allows that:\(^\text{72}\)

\[
\text{It will sometimes be difficult to separate from the body of specialized}
\]

\[
\text{knowledge on which the expert’s opinion depends “observations and}
\]

\[
\text{knowledge of everyday affairs and events”. It is sufficient that the opinion is}
\]

\[
\text{substantially based on specialized knowledge based on training, study or}
\]

\[
\text{experience. It must be presented in a way that makes it possible for a court}
\]

\[
\text{to determine that it is so based.}
\]

\[\text{71. ibid.}\]

\[\text{72. Id at Para 24.}\]
Court held that Professor Henneberg’s opinion was not based on specialized knowledge. It follows that the decision to admit the evidence was a wrong decision on a question of law. The appeal must be allowed, the orders of the Court of criminal Appeal of New South Wales set aside and a new trial ordered.

4.5.3 NEW SOUTH WALES:

The New South Wales Evidence Act defines the word relevant under Sec. 55 Part 3.1 as:

1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

2) In particular, evidence is not taken to be irrelevant only because it relates only to:

   a) The credibility of a witness, or
   b) The admissibility of other evidence, or
   c) A failure to adduce evidence

Regarding the admissibility of relevant evidence Sec. 56 of New South Wales Act laid down:

1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

2) Evidence that is not relevant in the proceeding is not admissible.

The first step in considering whether expert evidence should be adduced is the relevance rule laid in Sec. 56 of New South Wales Evidence Act. By reference to Sec. 55 (1) it is clear that evidence will be excluded where there is no chance that it could rationally affect the assessment of a fact in issue. Regardless of the eminence of any qualification held by a potential witness, where the party attempting to call that witness cannot identify the fact or facts in issue to which his or her evidence relates, the

74. ibid.
Evidence will be inadmissible. Further, Justice Robert McDougall says that the structure of the Act dictates that even after the test for relevance in Sec. 55 has been met evidence might be excluded pursuant to Sec. 76 (1), in which it is laid that:

*Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.*

Subsection (2) of the same section allows for certain exceptions the rule in Sec. 76(1) including, relevantly, expert evidence pursuant to Sec. 79., Sec. 79 subsection (1) states:

*If a person has specialized knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.*

Expert evidence is subject to all rules of admissibility. The rules of admissibility are exhaustive and apply at each stage of a witness’s evidence (including cross-examination) and to any document or other evidence. Evidence will only be excluded under Sec. 56(2) where it lacks any probative force, because it could not rationally affect the assessment of a fact in issue. Relevance is a wide test. There is only a requirement that the connection between the evidence and the fact in issue be logical.

Problem of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning. Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand.

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75. McDougall, R., *Speech on: Some Thoughts on Calling Expert Evidence*, Supreme Court of New South Wales, 13th Nov., 2009, Pg. 4-5.
4.5.4 ENGLAND:

Methods for testing the reliability of expert opinion evidence are crucial, with particular focus on what is termed ‘evidential reliability’ or rather ‘trustworthiness’. Evidential reliability concerning the scientific opinion evidence offered by expert witnesses will form the focus of this commentary as opposed to other areas of concern such as expert qualification and evidence relevance.\(^78\) Evidence from experts is admitted on the grounds that it meets the ‘helpfulness’ test and assists decision makers on issues outside ordinary experience.\(^79\)

Assumption of truth in assessment of relevance or probative value is a reference to its relevance or probative value on the assumption that it is true. In assessing the relevance or probative value of an item of evidence for any purpose, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true.\(^80\)

Part 33 which deals with expert evidence of the Criminal Procedure Rules, 1998 is replaced by The Criminal Procedure Rules, 2015 Part 19. And Expert according to Rule 19.1:-

*Is a person who is required to give or prepare expert evidence for the purpose of criminal proceedings including evidence required to determine fitness to plead or for the purpose of sentencing.*

Further Rule 19. 2(1)\(^81\) states that an expert must help the court to achieve the overriding objective by giving opinion which is (a) objective and unbiased; and (b) within the expert’s area or areas of expertise. He has to define expert’s area or areas of

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79. Id, Pg. 5.  
80. Section 109, Part II- Evidence, Chapter 1- Evidence of Bad Character, *Criminal Justice Act 2003*, Pg. 73.  
expertise in his report and when giving evidence. (Rule 19.2 (3) Rule 35.1 of The Civil Procedure Rules, 1998\textsuperscript{82} defines expert as:-

A reference to and ‘expert’ in this Part is a reference to an expert who has been instructed to give or prepare evidence for the purpose of court proceedings. And further under Rule 35.3 of the Civil Procedure Rules, 1998 Supreme Court of England And Wales County Courts, 1998 No. 3132 (L.17), Statutory Instrument states that:-

(1) it is the duty of an expert to help the court on the matters within his expertise.

(2) this duty overrides any obligation to the person from whom he has received instructions of by whom he is paid.

The Criminal Procedure\textsuperscript{83} CPD V Evidence 19A.1 states about the admissibility of expert opinion as:

Expert opinion evidence is admissible in criminal proceedings at common law if, in summary,

(i) it is relevant to a matter is issue in the proceedings;

(ii) it is needed to provide the court with information likely to be outside the court’s own knowledge and experience; and

(iii) the witness is competent to give that opinion.

Further 19 A. 2 laid down that:-

Legislation relevant to the introduction and admissibility of such evidence includes Sec. 30 of the Criminal Justice Act 1988, which provides that an expert report shall be admissible as evidence in criminal proceedings whether or not the person making it gives oral evidence, but that if he or she does not give oral evidence then the report is admissible only with the leave of the court; and CrimPR Part 19, which in exercise of the powers conferred by Sec. 81 of the Police and Criminal Evidence Act 1984 and Sec. 20 of the Criminal Procedure and Investigations Act 1996 requires

\textsuperscript{82.} Supreme Court of England And Wales County Courts, 1998 No. 3132 (L.17), Statutory Instrument.
\textsuperscript{83.} Criminal Practice Directions 2015 Division V Evidence.
the service of expert evidence in advance of trial in the terms required by those rules.

In Vernon v. Bosley 84 Hoffmann LJ stated that:-

Although a judge has no discretion to exclude admissible evidence, his ruling on admissibility may involve a balancing of the degree of relevance of the evidence against other considerations which is in practice indistinguishable from the exercise of a discretion. A ruling on a admissibility which involves a weighing of relevance against other factors should not be disturbed unless it involves some error of principle.

A common law discretion not to admit logically relevant evidence on the ground of insufficient probative value has been recognized in England and Wales in recent years, in the context of both civil and criminal proceedings. 85

The Turner test ensures that the expert evidence is admitted only when it has sufficient probative value, in the sense that the evidence is likely to help the court resolve a disputed issue. The purpose of other limbs is to ensure that such expert evidence is admitted in criminal proceedings only when it satisfied a minimum threshold of general reliability, what might be called ‘reliability in the round’. 86

In R. v. Turner 87 the court said:-

An expert opinion is admissible to provide the court with scientific information which is likely to be outside of the experience of a judge or jury. If, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such case, if it is dressed up in scientific jargon it may make the judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion any more helpful that of the jurors themselves; but there is a danger that they may think it does.

84. (1994) PIQR 337.
85. Supra note 44 at Pg. 72.
86. Law Commission, Expert Evidence In Criminal Proceedings In England And Wales, March 2011, Pg. 16.
87. (1975) 1 ALL ER 70.
The Criminal Division of the Court of Appeal in England and Wales (the court) has had an extensive relationship with forensic evidence in criminal cases.\textsuperscript{88}

Part 33 (now Part 19) of the Criminal Procedure Rules provides the standard for admissibility of any kind of expert forensic evidence. In \textit{R. v. Reed & Anor}\textsuperscript{89} the court on the conclusion on the admissibility of the evidence of expert Valerie Tomlinson, summarized the kinds of evidence that could be admissible under the rules as follows:-

\begin{enumerate}[(a)]
\item Expert evidence of a scientific nature is not admissible where the scientific bases on which it is advanced is insufficiently reliable for it to be put before the jury. If the reliability of the scientific basis for the evidence is challenged, the court will consider whether there is a sufficiently reliable scientific basis for that evidence to be admitted, but, if satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted, then it will leave the opposing views to be tested in the trial.
\item Even if the scientific basis is sufficiently reliable, the evidence is not admissible unless it is within the scope of evidence an expert can properly give.
\item Unless the admissibility is challenged, the judge will admit that evidence. However, if objection to the admissibility is made, then it is for the party proffering the evidence must prove its admissibility.\end{enumerate}

Lord Bingham of Cornhill in \textit{O’Brien v. Chief Constable of South Wales Police}\textsuperscript{90} states – Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether judge or jury) is called upon to decide. In \textit{Director of Public Prosecution v. Kilbourne}\textsuperscript{91} Lord Simon of Glaisdale observed: ‘Evidence is relevant if it is logically probative or disprovable of some matter which requires proof relevant (i.e.

\textsuperscript{89} (2009) EWCA (Crim) 2698.
\textsuperscript{90} (2005) UKHL 26.
\textsuperscript{91} (1973) AC 729,756.
logically probative or disprobatative) evidence is evidence which makes the matter which requires proof more or less probable.’

The expert must be able to provide impartial, objective evidence on the matters within his or her field of expertise.92 said that for an expert to be qualified to give evidence as an expert, he or she must be able to provide an objective, unbiased opinion on the matters to which his or her evidence relates. In *Toth v. Jarman*,93 the Court of Appeal recognised that an expert witness ‘should provide independent assistance to the court by way of objective unbiased opinion and that where an expert witness ‘has a material or significant conflict of interest, the court is likely to decline to act on his or her evidence, or indeed to give permission for his or her evidence to be adduced.’

Relevance require the judge to conduct a cost-benefit analysis to determine ‘whether its value is worth what is costs’, which includes weighing the probative value against the prejudicial effect.94

Both in UK and US jurisdictions, the fundamental rationale for calling expert assistance is to assist the judge or trier of fact to understand the technical issue at hand. For that expert must possess sufficient knowledge and expertise, having either through experience or by study. In the UK, this requirement is set out in the Civil Procedure Rules (CPR) and Practice Direction (PD) 35, and in the US under the Federal Rules of Evidence (FRE), 702.95 Both in UK and US, expert should at all times ensure that their purported evidence is supported by relevant validation and must pay special attention to the methodology and facts that they are relying upon.96

In Australia the use of experts is governed by practice directions and statute much the same as in the UK. The expert has an overriding duty to the court and as in UK they are not advocates of the party instructing. Experts in Australia are not required to demonstrate impartiality and an expert taking a particular strong view, so long as it is

92. *Supra note* 86 at Pg. 14.
93. *(2006) EWCA Civ 1028.*
96. *Id* at *Pg. 18.*
based on their knowledge and expertise is not seen as necessarily lacking objectivity; this is supported by the expert’s declaration at the end of the report.97

4.5.5 CANADA:

The law of evidence in Canada generally holds that witnesses are only permitted to testify as to their own observations. For example, in a bank robbery case, a lay witness may properly testify as to distinct marking that they notice in the accused, as well as what they remember from the particular event, it would be improper for a lay witness to go a step further and state at trial, ‘in my opinion, the person seated with Defence counsel committed the robbery.’ Expert witnesses are an exception to the general evidentiary rule that prohibits opinion evidence. Individuals who are properly qualified as ‘expert’ are entitled to present opinions and conclusions on issues that they are qualified to comment upon.98

Sec. 37 subsection 6.1 of the Canada Evidence Act,99 says about the evidence that which may be received by the court in evidence before it as:-

*The court may receive into evidence anything that, in the opinion of court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence.*

Under Sec. 279, of Federal Court Rules100 regarding the admissibility of expert evidence it is said:-

*Unless the Court orders otherwise, no expert witness’s evidence is admissible at the trial of an action in respect of any issue unless:*-

(a) The issue has been defined by the pleadings or in an order made under rule 265;

(b) An affidavit or statement of the expert witness prepared in accordance with rules 52.2 has been served in accordance with subsection 258(1) or an order made under rule 265; and

99. As Amended on JUNE 19, 2017, Minister of justice, Canada.
(c) The expert witness is available at the trial for cross-examination.

Rule 52.2 deals with expert affidavit or statement which set out in full the proposed evidence in court, expert’s qualification, the area of his or her expertise, which is accompanied by certificate signed by expert. Rule 52.2(1) explains that:

(1) An affidavit or statement of an expert witness shall

(a) set out in full the proposed evidence of the expert,

(b) set out the expert’s qualification and the areas in respect of which it is proposed that he or she be qualified as an expert;

(c) be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witness asset out in the Schedule and agree to be bound by it;

(d) and in the case of a statement, be in writing, signed by the expert and accompanied by a solicitor’s certificate.

Further 52.2 (2) laid down that if an expert fails to comply with the Code of conduct for Expert Witness, the Court may exclude some or all of the expert’s affidavit or statements.

The three major cases of Canada in which Canadian Supreme Court got three chances to settle the issue relating to expert evidence and the relevancy, probative value and admissibility of expert evidence and these are R. v. Bealand and Phillips, R. v. Lavallee, R. v. Mohan.

In R. v. Bealand and Phillips the Canadian Supreme Court consider the admissibility of expert result of a polygraph examination. In this the respondent were charged with conspiracy to commit robbery. After completion of the evidence at trial, the respondents made an application to reopen their defence in order to permit each of them to take a polygraph examination and submit the result in evidence. The trail judge denied the motion, holding that the results of such an examination were inadmissible,

101. Ibid.
105. Supra note 102.
and respondents were convicted. A majority of the court of appeal allowed their appeal from conviction, granted an order reopening the trail and directing that the results of the polygraph examination be submitted to the trial judge a ruling as to their admissibility the appeal is to determine whether evidence of the results of a polygraph examination is admissible in light of the particular facts of this case. Held, that appeal should be allowed.

Lamer and Wilson JJ. In this case stated that polygraph evidence goes directly to the issue of an accused’s credibility and should have been admitted in the case. However, Dickson C.J and Beetz, McIntyre and Le Dain JJ quoted that the results of a polygraph examination are not admissible in evidence. The polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witness. The admission of such evidence would offend well established rules of evidence, in particular, the rule against the admission of past or out-of-court statement by a witness and the character evidence rule. Mr. Justice McIntyre, speaking for the majority, set down two principles:-

1. the admission of polygraph evidence would run counter to the well established rules of evidence,
2. the admission of polygraph evidence will serve no purpose which is not already served, and, further, if allowed would disrupt proceedings, cause delays and lead to numerous complications.

On appeal the, the Court of Appeal overturned the trail judge by holding that in light of all circumstances the polygraph evidence was admissible. The Crown appealed this verdict to the Supreme Court of Canada. The only issue before the Supreme Court was the admissibility in evidence in a criminal trial of the results of a polygraph examination of an accused. The court reversed the ruling of the Court of Appeal.

In the light of foregoing discussion in R. v. Lavallee1 Justice Sopinka summarize as follows the principles upon which expert testimony is properly admitted in the case:-

1. Expert testimony is admissible to assist the fact-finder in drawing inference in areas where the expert has relevant knowledge or experience beyond that of the lay person.

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106. Ibid.
108. Supra note 103.
2. It is difficult for the lay person to comprehend the batter wife syndrome. It is commonly thought that battered women are not really beaten as badly as they claim, otherwise they would have left the relationship. Alternatively, some believe that women enjoy being beaten, that they have a masochist strain in them. Each of these stereotypes may adversely affect consideration of a battered woman’s claim to have acted in self-defence in killing her mate.

3. Expert evidence can assist the jury in dispelling these myths.

4. Expert testimony relating to the ability of an accused to perceive danger from her mate may go to the issue of whether she ‘reasonably apprehended’ death or grievous bodily harm on a particular occasion.

5. Expert testimony pertaining to why an accused remained in the battering relationship may be relevant in assessing the nature and extent of the alleged abuse.

6. By providing an explanation as to why an accused did not flee when she perceived her life to be in danger, expert testimony may also assist the jury in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life.

In this case, appellant a battered woman in a volatile common law relationship killed her partner late one night shooting him in the back of the head as he left her room. The shooting occurred after an argument where appellant had been physically abused and was fearful for her life after being taunted with threat that either she kill him or he would get her.109

The Supreme Court of Canada dealt with the changing role of the expert witness and the impact of their opinion evidence in R v. Mohan110 in that case, the Court said the admission of expert evidence depends on the application of the following criteria:

1. relevance;

2. necessity in assisting the trier of fact;

109. Ibid.
110. Supra note 104.
3. absence of any exclusionary rule; and

4. a properly qualified expert.

The court further noted that expert evidence that advances a novel scientific theory or technique should be subject to special scrutiny to determine if it meets the basic threshold of reliability and necessity. And factors that will determine admissibility include: whether it can be, and has been, tested; whether it has been published and subjected to scrutiny or otherwise reviewed by other experts; it known or potential error rate; the existence of quality and control standards; and whether there is acceptance within the relevant expert community.111

In *R. v. Mohan*112 case, a practicing pediatrician in North Bay, was charged with four sexual assault on four of his female patients, aged 13 to 16 at the relevant time. The alleged assaults were perpetrated during the course of medical examination of the patients conducted in the respondent's office. His counsel indicated that he intended to call a psychiatrist who would testify that the perpetrator of the alleged offences would be part of a limited and unusual group of individuals and that respondent did not fall within that narrow class because he did not possess the characteristics belonging to that group. The Crown sought a ruling on the admissibility of that evidence. The jury found the respondent guilty and sentenced to nine months imprisonment on each of the four counts, to be served concurrently and to two years probation.

Relevance is a threshold requirement to be decided by the judge as a question of law. Logically relevant evidence may be excluded if its probative value is overborne by its prejudicial effect, if the time required is not commensurate with its value or if it can influence the trier of fact out of proportion to its reliability. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.113

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112. *Supra note* 104.
In *Mouvement Laique Quebecois v. Saguenay*,\(^\text{114}\) in May 2015 the Supreme Court of Canada held that:

> The independence and impartiality of an expert are very important fact. It is well established that an expert’s opinion must be independent, impartial and objective and given with a view to providing assistance to the decision maker. However, these factors generally have an impact on the probative value of the expert’s opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily disqualify the expert. For expert testimony to be admissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert’s lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case.

In *White Burgess Langille Inman v. Abbott and Haliburton Co.*,\(^\text{115}\) the Supreme Court of Canada has provide much-needed guidance as to the relationship of impartiality and the question whether the court should receive the expert’s evidence at all.\(^\text{116}\)

In this case there is appeal arises out of a professional negligence action by the respondents (shareholders) against the appellants, the former auditors of their company. The central allegation in the action is that the auditors failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The auditors brought a motion for summary judgment seeking to have the shareholders action dismissed. In response, the shareholders retained, a forensic accounting partner to review all the relevant materials and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the

\(^\text{114}\) 2015 SCC 16.
\(^\text{115}\) 2015 SCC 23.
shareholders. The auditors applied to strike out M’s affidavit on the grounds that she was not an impartial expert witness.117

On appeal, the Supreme Court of Canada took the opportunity to clarify the test for the admissibility of expert evidence. The court went to state that although there is broad consensus that expert witnesses owe a duty to provide independent and unbiased assistance to the court, there is no consensus on how that duty relates to the admissibility of expert evidence. The court further stated that there are two main questions that emerge from this lack of consensus:-118

1. Should the expert’s duty of independence and impartiality go to admissibility of evidence?

2. If so. Is there a threshold admissibility requirement related to independence and impartiality?

The Supreme Court answered both questions affirmatively. And with this decision it is now clear that an expert may be qualified to give expert evidence despite having a pre-existing relationship with one or both.119

Justice Cromwell, on the role of impartiality in admitting expert evidence summarized as:-

In my View, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, however, concerns about an expert witness’s independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

117. Supra note 115.
119. Ibid.
In *R. v. Bingley*\textsuperscript{120} the court stated that the modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and *White Burgess Langille Inman v. Abbott and Haliburton Co.*\textsuperscript{121} This framework guards against the dangers of expert evidence. Further stated that the expert evidence analysis is divide into two stages. First, the evidence must meet the four *Mohan* factors: relevance, necessity, absence of an exclusionary rule and special expertise. Second, the trail judge must weigh potential risks against the benefits of admitting the evidence. At the second stage, the trail judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if it risks in admitting the evidence outweighs its benefit, a trail judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process. Where the probative value of expert opinion evidence is outweighed by its prejudicial effect, it should be excluded.

**4.5.6 INDIA:**

Under Indian Evidence Act, 1872 expert is covered under Sec. 45 - 51. According to Sec. 45 of Indian Evidence Act:-

*When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impression, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impression are relevant facts.*

*Such people are called experts.*

An expert witness is one who has devoted time and study to a special branch of learning and thus he is specially skilled on those points on which he is asked to state his opinion. His evidence on such points is admissible to enable the court to come to a satisfactory conclusion.\textsuperscript{122}

Word relevant under Sec. 3 of Indian Evidence Act:-

*One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.*

\textsuperscript{120} 2017 SCC 12.
\textsuperscript{121} 2015 SCC 23.
The word is used in the Act with two distinct meanings: (a) connected, (b) admissible. In the first case relevancy is logical, in the other it is legal.\textsuperscript{123}

Chapter- II of the Indian Evidence Act, 1872 deals with the relevancy of facts, under which Sec. 5 explain which facts are relevant as it laid down:-

_Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter to be relevant, and of no others._

By the use of the word _no other_ this section excludes everything which is not declared relevant under any of the Sec. 6 - 55. Thus all evidence tendered must be shown to be admissible under some of the Sec. 6 - 55 of the Act. A party trying to adduce particular evidence has to show that the evidence desired to be adduced is relevant under one or more of the Sec. 6 to 55.\textsuperscript{124}

The Indian Evidence Act exhaustively enumerates the kinds of casual connection which make a fact legally relevant to another. Hence relevancy under the Act is not a question of pure logic but of law, as no fact, however logically relevant, is receivable in evidence unless it is declared by the Act to be relevant.\textsuperscript{125}

The emphasis on the words _persons specially skilled in such subjects_ about which the opinion of experts is taken as a relevant fact is subject to the examination of such experts by the court. An expert is a person who devotes his time and study to a special branch of learning. He might have also acquired such knowledge by practice, observations or careful study.\textsuperscript{126}

In _Murari Lal s/o Ram Singh v. State of Madhya Pradesh_\textsuperscript{127} regarding the admissibility of handwriting expert evidence court held that:-

_There is no rule of law nor any rule prudence which has crystallized into a rule of law that opinion evidence of a hand-writing expert must never be acted upon unless substantially corroborated._

In this case the appellant was charged with the offence of committing the murder of the deceased. The two vital pieces of evidence on which he was convicted were: (1)

\textsuperscript{123} Supra note 21 at Pg. 350.
\textsuperscript{124} Dwijesh v. Naresh, AIR 1945 Cal. 492.
\textsuperscript{125} Supra note 18 at Pg.39.
\textsuperscript{127} (1980) 1 SCC 704.
recovery of a wrist watch which belonged to the deceased at the instance of the appellant and (2) a note written in pencil in Hindi found by the side of the dead man on the night of the occurrence stating *though we have passed B.A. we have not secured any employment because there is none to care. This is the consequence.* He was convicted by the High Court under Sec. 302 read with Sec. 34, I. P. C. The court will dismiss the appeal held that:-

‘An expert is no accomplice. There is no justification for condemning the opinion-evidence of an expert to the same class of evidence as that of an accomplice and insist upon corroboration’.

The High Court of Kerala in the case of *K. K Vijaychandran v. The Superintendent of Police*¹²⁸ in 2006, Justice K. Hema held that:-

*The evidence of the handwriting expert can be accepted without corroboration, only if it quite convincing and reliable. Just like any other piece of evidence, the court has to put the evidence of handwriting expert also the strict judicial scrutiny before acting upon the same. Only if it inspires confidence of the court, the court can accept the same and there is no rule that the evidence of a handwriting expert shall be accepted under all circumstance. It is in 1992 (1) KLT 878: “if the findings of the handwriting expert are convincing and reliable, the court can certainly act upon the uncorroborated testimony of a handwriting expert.*

Actually, the judge concerned has to form his independent opinion on the advisory or opinion of the expert upon being satisfied that such expert had the requisite information & experience of the particular subject and skill and had the adequate knowledge, so that his opinion can be taken as worthy of reliance in the process of judicial determination of such disputes.¹²⁹

The opinion of an expert by itself may be relevant but would carry little weight with a Court unless it is supported by a clear statement of what he noticed and on what he based his opinion the expert should, if he excepts his opinion to be accepted, put

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¹²⁸. CRL. A. No. 1102 of 2005.
¹²⁹. Supra note 126.
before the Court all the materials which induced him to come to his conclusion, so that the Court, although not an expert, may form its own judgment on those materials.¹³⁰

Justice S. B. Sinha in Malay Kumar Ganguly v. Sukumar Mukherjee & Ors, on 7 August, 2009¹³¹ in the Supreme Court of India held that:-

A court is not bound by the evidence of the experts which is to a large extent advisory in nature. The court must derive its own conclusion upon considering the opinion of the experts which may be adduced by both sides, cautiously, and upon taking into consideration the authorities on the point on which he deposes.

Medical science is a difficult one. The court for the purpose of arriving at a decision on the basis of the opinions of experts must take into consideration the difference between an ‘expert witness’ and an ‘ordinary witness’. The opinion must be based on a person having special skill or knowledge in medical science. It could be admitted or denied. Whether such an evidence could be admitted or how much weight should be given thereto, lies within the domain of the court. The evidence of an expert should, however, be interpreted like any other evidence.

An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.

No courts can hold different procedure than laid down by the Indian Evidence Act, only relevant and admissible evidence can be proved. Indian Evidence Act nowhere lays down that when objection about the irrelevancy and admissibility was raised, is to

be decided by the court then and there and to proceed further thereafter for recording of evidence. There is no express or implied mandate in this respect laid down by the Indian Evidence Act. By phrase ‘admissible and relevant’, it clearly means that admissible for the consideration of the judge to pronounce the judgment. It cannot be laid down therefore that the statements or documents which are not admissible or relevant, cannot be taken on the record. It is nowhere provided by the Indian Evidence Act that the material which judge thinks not relevant or inadmissible, cannot be brought on record. Evidence and material which may not be relevant or admissible cannot be precluded from placing on record.132

The admissibility of document is one thing and its probative value quite another, these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil.133 Even if a document may be admissible or an ancient one, it cannot carry the same weight or probative value as a document which is prepared either under a statute, ordinance or an Act which requires certain conditions to fulfilled.134

The value of the evidence of an expert would vary according to the circumstances and it will also depend upon the reasons given by him, in support of his opinion. The value of expert opinion should be adjudged in the same way as the evidence of any other evidence.135 That means opposite party should be given the opportunity to cross-examine the expert or to put the counter-evidence, so that they can shake the foundation on which he/she based his/her opinion regarding the facts in issue.

Relevance, admissibility and probative value of any evidence are different aspects; these all are important in their respective fields. Relevance and admissibility are closely connected and would precede in point of time than determination of probative value of such evidence is pronounced. Neither relevance nor admissibility of evidence can be postponed to be decided at convenience by the court. Before receiving any evidence during the exercise being undertaken by a party to prove his claim in the pleadings, its relevance to the points in issue as also admissibility in terms of provisions of the Indian Evidence Act, 1872 have necessarily to proceed before such evidence is

135. Supra note 16 at Pg. 2535

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taken on record. Bringing of facts and circumstances on record as evidence without deciding questions of relevance and of admissibility would not be proper.136

In, Dayal Singh & Ors. v. State of Uttaranchal in the Supreme Court of India,137 on 3rd August, 2012, Justice Swatanter Kumar regarding the value of expert evidence held that:-

Profitably, reference to the value of an expert in the eye of law can be assimilated as follows:-

The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence. If the report of an expert is slipshod, inadequate or cryptic and the information of similarities of dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may from its own judgement on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert. Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe and in so doing the court us enabled to exercise its own view or judgment respecting the cogency of reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based.