**CITIZENS AND Criminal Justice**

**Lecture No. 8: Court procedure. Prosecuting and defending a crime.**

1. **The Procedure at trial**

The following is a simplified version of the main steps in the trial process, suitable for a course such as Citizens and Criminal Justice.

The procedure at trial is broadly similar whether or not a case takes place in any of the trial courts, whether or not it is the Magistrates’ Court or the District Court or the Court of First Instance. In this sense, the justice/due process model works coherently between these different jurisdictions. Here, with some variations, all defendants have the right to be legal represented, to face their accusers, to call evidence, to cross-examine witnesses called by the prosecution (and vice versa).

* 1. **Prosecution case**

As the prosecution is making the allegation of crime and they must prove it beyond reasonable doubt, the prosecution goes first.

The prosecution witnesses are called into court one by one.

They are, in order:

* Examined-in-chief by the prosecution
* Cross-examined by the defence
* If necessary, re-examined by the prosecution.

After all the prosecution witnesses have been examined-in-chief, cross-examined and re-examined, the prosecution closes its case.

1. **The defendant as a defence witness**

The defendant decides whether or not to give evidence. The defendant cannot be forced to give evidence.[[1]](#footnote-1) This rule applies to safeguard the defendant’s rights as many criminal defendants may be at an intellectual disadvantage compared to an experienced barrister. This may portray the defendant in a poor light with a jury. Such a restriction is also consistent with the requirement that the prosecution must prove its case, rather than vice versa. The prosecution may not draw an adverse comment on the defendant’s right not to give evidence.[[2]](#footnote-2) It is also part of the justice/due process model which at times protects the rights of the defendant.

However, if the defendant elects to give evidence he can be asked questions in cross-examination designed and intended to incriminate him on the charge/s he faces and he cannot refuse to answer those questions.[[3]](#footnote-3)

There are some areas on which the defendant cannot be cross-examined e.g. his or her previous convictions unless these are admissible as similar fact evidence (see further at [13]) or have become admissible with the leave of the court in a “loss of shield" situation where, for example, the defendant has claimed to be of good character, whereas in fact the defendant is not or attacks the character of the prosecution witnesses.

So, if the defendant gives evidence, then the defendant comes into the witness box, and is examined-in-chief by the defendant’s own counsel. Then:

* The defendant is cross-examined by prosecuting counsel
* If necessary, the defendant is re-examined by defendant’s own counsel
* Any defence witnesses are called.

1. **Examination-in-chief**

The party (prosecution or defence) bringing the witness to court is responsible for getting that witness to tell his or her story in court. The witnesses are there to tell the court what they perceived through their five senses; what they saw, heard, tasted, smelt and touched. This is evidence of fact.

The party calling the witness must bring out the information from the witness in a series of structured questions, while at the same time controlling the witness, to stop the witness giving any evidence that is not admissible, such as inadmissible evidence of the bad character of the defendant.

This is done by asking open questions, as opposed to leading questions. A leading question is a question which contains the answer within the question. Generally, leading questions may not be asked in examination-in-chief. This is because the answer may not be valued highly if the answer is suggested by the question. As so much emphasis is placed on the day in court in criminal litigation, witnesses must be presented in a way which allows the decision maker to assess the quality of what the witness is saying. See further below at [10] as to the nature of leading questions.

1. **Cross-examination**

Cross-examination has been described by Wigmore[[4]](#footnote-4) as “the greatest legal engine ever invented for the discovery of truth.” It is sufficiently important to be enshrined (alongside examination-in-chief) as a right in Article 11(2)(e) of the Bill of Rights Ordinance (Cap.383).

The purpose of cross-examination is to elicit facts which support your case and which undermine that of your opponent. It has both a constructive and destructive function.

Destructive cross-examination of a witness attacks the evidence of the other party and/or the credibility of that witness. Credibility pertains to the overall believability of the evidence of a witness. Quoting from the judgment of the Hon Reys J in *HKSAR* *v Poon Ching Ki*:[[5]](#footnote-5)

*Where a witness gives evidence, the jury or (where there is no jury) the judge decides whether to accept such evidence as credible or incredible. The jury (or judge) is normally supposed to assess credibility by evaluating the totality of what each witness has said about a relevant event and the manner in which such witness has given evidence.*

Criticisms of the cross-examination are thatit can leave an unfair impression of the credibility of a witness because of the superior skill of the advocate or because of nervousness and/or poor oral communication skills of the witness. Of course, all things being equal in an adversarial system in HK, the skills of one advocate in cross-examination should be evened out by the skills of his or her opponent. This is not always the case though and sometimes there is a disparity in the skills of different barristers.

1. **Rules of evidence in criminal matters**

Various rules of evidence exist in criminal matters in order to achieve justice in cases generally and also in some cases to protect the rights of defendants. So, in this case, we might think of the due process model as operating here.

### General nature of the evidence of a witness

As previously noted, a lay or non-expert witness is usually only allowed to give evidence of facts which the witness can give direct evidence of i.e. what he thought, did or perceived through one of his five senses or his own actions. Unless the witness is an expert in a particular field, then the witness will prima facie not be entitled to give evidence of an opinion.[[6]](#footnote-6)

However, in both civil and criminal proceedings, a lay witness is entitled to render an opinion where it is difficult or impossible for that lay witness to give evidence of what the witness perceived other than by an opinion (such as whether the lighting was poor or a car was speeding) and the witness has sufficient experience on which to base his/her conclusion.[[7]](#footnote-7)

While it is not permissible for a lay witness to stray into the area of expert evidence, a lay witness may sometimes possess specialized knowledge due to, for example, work experience etc. One should therefore not always think that only the stereotypical expert is the only expert on a subject matter. The identification and comparison of handwriting is a good example to illustrate this.[[8]](#footnote-8)

## Expert evidence

### 7.1 Introduction

Expert evidence performs a vital function in allowing courts to make determinations on matters involving esoteric issues of science outside the knowledge of the tribunal.

Expert evidence can be contrasted with lay evidence where (as previously noted) the witness is usually only allowed to give evidence of facts which the witness can give direct evidence.

Also, in *HKSAR v Hui Chi Wai and Others,*[[9]](#footnote-9)the Hon Stuart-Moore VP, Mayo VP and Stock JA quoted with approval Phipson on Evidence, 14th edition, para 32-14 at 52 that, "An expert may give his opinion upon facts which are either admitted or proved by himself or other witnesses in his hearing at the trial, or are matters of common knowledge; as well as upon an hypothesis based thereon”.

**7.2 Rules of evidence concerning expert evidence**[[10]](#footnote-10)

In the Court of First Instance in criminal matters, the judge decides, based on the law, what evidence is put before the jury, including expert evidence. The jury then decides the questions of fact.

The rules of evidence concerning the reception of this evidence, in both criminal and civil matters, are designed to ensure that this evidence operates in a fair and just way. In addition to noting that expert evidence operates as an exception to the general requirement that a witness can only give evidence of what a witness perceived through their 5 senses, Young[[11]](#footnote-11) has summarized the main elements of expert opinion evidence as follows:

* It must be relevant
* It must be necessary (it is not something that a non-expert could decide on without this expert evidence)
* The evidence must be reliable, both as to:
* the reliability of the witness (whether they have acquired sufficient study or experience); and;
* the scientific/technical evidence which is being used i.e. is it a sufficiently coherent or accepted body of knowledge?

These rules are consistent with the test laid down in ***R* v *Bonython***[[12]](#footnote-12)(and approved in *HKSAR* v *Yiu Wing Construction Co. Ltd* at 13) where the Supreme Court of South Australia said:-

"Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

See further below in relation to the Daubert requirement as outlined in the US Supreme Court case of *Daubert* v *Merrell Dow Pharmaceuticals, Inc.*[[13]](#footnote-13)

A significant feature of the Daubert requirements is that the expert’s evidence must be reliable,[[14]](#footnote-14) which can be contrasted with the previously accepted test in *Frye* v *US*,[[15]](#footnote-15) that laid down a test of general acceptance in the field prior to permitting admissibility of that evidence.[[16]](#footnote-16) Daubert allows acceptance, although it does not require it.[[17]](#footnote-17)

It should be noted that Frye operated (arguably sensibly in the context of that case and the law as it stood then) to exclude a form of lie detector test, (which was based on the supposed increased blood pressure of a suspect during an interrogation) evidencing that a suspect was being untruthful.[[18]](#footnote-18) The reasoning in Daubert was dependent upon the applicable legislation governing the case, being Rule 702 of the Federal Court Rules which then stated, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The Supreme Court held, that based on the inclusion of the words “scientific knowledge… will assist the trier of fact” that the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but has evidentiary reliability, which includes matters such as the scientific validity of the reasoning, whether it was subject to peer review and publication and any known error rate.[[19]](#footnote-19)

Subsequent to Daubert, two Supreme Court decisions in the US refined and clarified the tests used in Daubert.

Firstly, in *General Electric Co*. v *Joiner*,[[20]](#footnote-20) the Supreme Court held that the “gatekeeping” role of courts (deciding what goes before a jury) extended to determining, not just whether or not the data or facts relied on by an expert in giving the expert’s opinion were of a kind reasonably relied upon, but whether or not that type of methodology or reasoning were applicable to the case before the court. In this case, the expert’s opinion, which was based on the extrapolation of data used in animal studies was not a proper basis for the expert’s opinion as to whether the plaintiff has suffered from cancer as a result of exposure to the plaintiff’s toxins.[[21]](#footnote-21)

Secondly, in *Kumho Tire Co., Ltd* v *Carmichael*,[[22]](#footnote-22) that technical knowledge (such as that based on personal experience or professional studies) should also be subject to the same requirements of reliability “gatekeeping” tests as scientific knowledge.[[23]](#footnote-23)

Use of the Frye test, as opposed to the Daubert test, is more likely prima facie to exclude new or novel science as it may not have achieved general acceptance in the scientific community. On the other hand, the Daubert test will critically examine all evidence, whether novel or established. So, in Frye, the scientific community is the gatekeeper of expert evidence, whereas in Daubert, it is the court.[[24]](#footnote-24)

In[*Wang Din Shin* v *Nina Kung*,[[25]](#footnote-25)](http://www.hklii.org/cgi-hklii/disp.pl/hk/jud/eng/hkcfi/2002/HCAP000008A%5f1999%2d38605.html?query=%7e+teddy+wang)Yam J accepted the Daubert requirement of reliability in a civil case (which operates in USA at the federal level) at Chapter 20.6 and expanded further upon this at Chapter 20.8 laying down four principles, all of which need to be met, to determine if a court will “accept the evidence of a specific scientific theory, novel or not:

(a)    The person propounding the scientific theory must have the necessary qualifications, expertise, experience and integrity to ensure that the Court can have confidence that his testimony is worthy of consideration.

(b)     The theory must have a sound scientific basis, comprehensible to the Court.

(c)      The theory should have gained widespread support amongst that sector of the scientific community which would be likely to utilise it or its results.

(d)     The methods used to carry out the scientific test should be safe and reliable, and follow an established protocol, i.e. one that has been published, disseminated and acknowledged to be reproducible.”

**7.3 Probity of expert evidence**

However, Erica Beecher-Monas[[26]](#footnote-26) states that “All too often, the defence fails to challenge prosecution experts, even when their testimony is highly controversial. As an example of this problem, the now discredited technique of voiceprint analysis was once a widely used identification method that was never empirically tested. Yet, in an overwhelming 80 per cent of cases in which such evidence was admitted, no opposing expert testified for the defence.

Permitting experts to testify beyond their expertise – a frequent occurrence in criminal trials – only makes matters worse…Forensic dentists identifying scratch marks and forensic anthropologists claiming to identify the wearer from the shoe prints are egregious examples of untested pseudo-science admitted into the courts”.

If this failing exists, judges may not be effective in screening unreliable evidence from juries.

This deficiency is compounded by the apparent willingness of juries to more readily accept the evidence of experts, especially those with impressive qualifications and presentation skills, especially if they have difficulty understanding the evidence.[[27]](#footnote-27)

Regrettably, there have been many travesties of justice involving expert evidence in the common law world. Two notable ones have been cases involving Mark Dallagher and Sally Clark. In this regard, the legal system in England and Wales (at the time of those cases) focused largely on the test for helpfulness under the *Turner Rule* as the criterion for the principle for admissibility allowing expert evidence if it exists outside typical knowledge.[[28]](#footnote-28) The lack of clear guidance seems to have contributed to a number of injustices.

**7.4 Mark Dallagher**

Mark Dallagher was convicted of murdering an elderly lady, Dorothy Wood, after allegedly breaking into her home. The basis of the conviction was an ear print left on the window of her home, which according to an expert prosecution witness, matched that of the defendant. Mr. Dallagher spent 7 years in jail before he was released after DNA evidence proved it was not him. The novel ear print evidence used in the case was found on appeal to be scientifically reliable on an application of a somewhat superficial reference to the Daubert test,[[29]](#footnote-29) even though the experts conceded that “there were very few people working in the field, and that the comparison work was in its infancy”.[[30]](#footnote-30) but the ear print evidence was ultimately discredited on the retrial as a result of the contrary DNA evidence.[[31]](#footnote-31) This of course raises concerns about the mere fact of the existence of even Daubert like tests as effective gatekeepers to the admissibility of unreliable evidence if they are not correctly or comprehensively applied.

## 7.5 The Sally Clark case

Sally Clark was a mother of two babies who died on separate occasions, possibly from Sudden Infant Death Syndrome. Ms Clark was charged with murder and later imprisoned. At her trial (‘the criminal trial’), one of Britain’s most eminent pediatricians gave evidence as to the statistical likelihood of the chances of two siblings dying of such a disease. According to his evidence, these statistics were so high as to strongly suggest that the deaths were not due to natural causes. Ms Clark, who was also a solicitor, was found guilty and jailed. Subsequently she was exonerated by the Court of Appeal in a 2nd appeal (‘the criminal appeal’).[[32]](#footnote-32) The court stated in obiter (where the court gives a non-binding opinion) that:-

* The statistical analysis of the pediatrician (in which he was not an expert) was flawed
* While the criminal appeal was granted for reasons connected to a failure by another doctor to reveal results of his testing on one of the children, Harry, (which revealed the presence of a bacterial infection in the child’s body) the pediatrician’s presentation of flawed statistical evidence would likely have resulted in a successful appeal.

It was later noted, by Lord Justice Auld in the Court of Appeal at 155 in a related disciplinary matter,[[33]](#footnote-33) that there was no objection in the criminal trial to the pediatrician’s statistical analysis, either on the ground of irrelevance or that it was unfairly prejudicial. There was also no robust cross-examination about these statistics.

Sally Clark later died in circumstances believed to arisen from her wrongful conviction. Views may differ on how blame should be attributed or otherwise for what transpired here. Certainly, a number of lives were either destroyed or irretrievably harmed from what took place.

Sadly, these types of cases have been by no means rare in the common law world,[[34]](#footnote-34) resulting in the UK in 11 successful appeals, between 2002-2010, based on unreliable prosecution expert evidence going before the court.[[35]](#footnote-35) An apparent cause is the rapid growth in novel forms of forensic science (ranging across such diverse, esoteric and in some cases, rather curious ‘disciplines’ of ear-print identification, facial mapping, voice identification, lip reading and Sudden Infant Death Syndrome) combined with a tendency of some of its proponents to render opinions which at times seem to lack appropriate circumspection relative to the untested nature of their areas of expertise.[[36]](#footnote-36)

Subsequently, a practice direction was amended in the criminal jurisdiction in England and Wales to incorporate more effective Daubert type requirements like peer review, publication, methodology, type of reasoning etc. as well as a specific confirmation to scrutinize those requirements.[[37]](#footnote-37) This is an important reform because of jurors’ alleged tendency to uncritically accept expert evidence.[[38]](#footnote-38) From the defendant’s perspective, this can be problematic in the common law realm as the prosecution usually has greater resources with which to retain expert evidence.[[39]](#footnote-39) The question then arises as to judge’s ability to effectively scrutinize these Daubert requirements.[[40]](#footnote-40) For example, can judges determine the efficacy of different forms of scientific reasoning used in different forensic disciplines; say probabilistic reasoning in DNA as compared to categorical conclusion scales in handwriting?[[41]](#footnote-41)

**7.6 Shoeprint evidence**

A major US report published in 2009 formed the view that shoeprint evidence which is based on evaluation of impression evidence, in particular, mass-produced items (e.g., shoes, tires) which pick up features of wear that, over time, individualize them, is not a reliable scientific method of proof. Concerns about this method include that:[[42]](#footnote-42)

* Continued wearing of the shoe after the crime may change its features which then creates uncertainty in the accuracy of the opinion rendered by the scientist
* There is no established criterion about the degree of positive matching needed to establish a reliable match.

Shoeprint evidence is admissible in Hong Kong.[[43]](#footnote-43) In various cases it has been shown, by the plethora of other probative evidence, to be accurate.[[44]](#footnote-44) As a general principle, though, should limits be placed on the admissibility of such evidence where it is not the strongest evidence of this type e.g. where the footprint evidence is only consistent with the footprint evidence of the accused, but there is other evidence which is probative of the guilt of the accused?[[45]](#footnote-45) As noted here by G Redmond et al, “Adding to the complexity and dangers, forensic science evidence is routinely represented – in investigations, plea negotiations, trial and appeals as independent corroboration for other strands of incriminating evidence.”[[46]](#footnote-46) This relates to a common concern with the use of jurors of forensic evidence; even if they can basically grasp the science, how can they accurately determine how much weight to give the evidence?[[47]](#footnote-47)

**7.7 Reliability of more established expert evidence**

Concerns about the reliability of even the most commonly established branches of science are not limited to the newer, less tested ones. Recently, it has come to light that the field of ballistics, even absent human error, is not as flawless in accurately matching guns to bullets as once believed.[[48]](#footnote-48) Even DNA evidence may be flawed because of contamination or other human errors.[[49]](#footnote-49)

**7.8 Challenges in understanding expert evidence**

Leaving aside concerns whether or not lawyers have the ability (especially defendant lawyers whose clients tend to have less resources to utilize expert evidence)[[50]](#footnote-50) to comprehend expert evidence, it raises the questions whether jurors can adequately do so, compared to judges. Or, in fact, whether:

* All judges in all cases are able to understand and distinguish between and correctly rule on which expert evidence should be preferred (when there is a dispute between experts)[[51]](#footnote-51)
* The general ability of advocates to effectively cross-examine on more complex areas of expert evidence.

It was said by a House of Lords Committee: “The absence of an agreed protocol for the validation of scientific techniques prior to their being admitted in court is entirely unsatisfactory. Judges are not well-placed to determine scientific validity without input from scientists.”[[52]](#footnote-52)

**7.9 Improving quality of expert evidence**

Various suggestions have been made to improve the quality of expert witness evidence (in the field of pediatric medical expert evidence in general, but this logically could be extrapolated to other fields of expert evidence in the criminal justice system in Hong Kong) including:[[53]](#footnote-53)

* Educating expert witnesses better about how to give their testimony, including instruction on cases where there have been problems with this type of evidence
* Devising a formalized system of accreditation of expert witnesses
* Capping fees on the amount of money that can be paid to experts to prevent partisanship.
* Developing a more robust system for sanctioning expert witnesses.

More broadly, other reforms in the criminal jurisdiction in Hong Kong might include:

* Establishing a regulator to verify the accuracy of the content of expert reports[[54]](#footnote-54)
* Appointment of a panel of expert witnesses which judges could utilize to determine the reliability of expert evidence.[[55]](#footnote-55) If this power was used sparingly, then costs would arguably be kept within reasonable boundaries.[[56]](#footnote-56) It is probably the case that common law courts would have this power, but if not, it could be enacted by legislation.[[57]](#footnote-57) Concerns about the quality of the experts used could be addressed by the creation of a suitable panel to draw the expert witnesses from.[[58]](#footnote-58) Employing this independent expert at a preliminary pre-trial stage would minimise disruption and delays to the trial process.[[59]](#footnote-59) In this regard, support for the use of independent experts to assist judges in determining the admissibility of expert evidence was provided by Justice Breyer in a concurring opinion to the majority in *General Electric Co*. v *Joiner.*[[60]](#footnote-60)
* Requiring the expert/s proffered by the prosecution, to either address the hypothesis’ advanced by the defence witnesses or (in the absence of these), “at least be explicit about what alternative hypotheses he or she has considered and address the likelihood of the evidence occurring under those hypotheses.”[[61]](#footnote-61) Currently, The Code of Practice for Expert Witnesses Engaged by the Prosecuting Authority in Hong Kong does not expressly contain such a requirement.[[62]](#footnote-62)
* Enactment of a comprehensive statutory authority governing the admissibility of expert evidence such as the current version rule 702 of the Federal Court Rules (US) which states:[[63]](#footnote-63)

*Rule 702 – Testimony by Expert Witnesses*

*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.*

Rule 702 also extends to Federal criminal cases.[[64]](#footnote-64)

While it is the case that in a jurisdiction as big as the US that courts have sometimes strayed outside these norms in permitting less reliable forms of expert evidence in criminal case,[[65]](#footnote-65) (as of course there is still a degree of interpretation here at the margins) it is logically more likely than not that these rules should act as a form of enhanced quality control here. According to Wong and Tsang, expert evidence is rarely challenged in Hong Kong.[[66]](#footnote-66)

Hong Kong does not have Daubert type rules or anything akin to Practice Direction 19A.5 in criminal cases. However, in the recent Court of First Instance decision in *HKSAR* v *McCall Howard* *Kenneth and Another,*[[67]](#footnote-67) the court, while primarily examining the witnesses’ expertise, affirmed the general gatekeeping role of the judge, when criticizing the methodology and statistical validity used in a psychiatrist’s report that sought to give evidence on the consumption rate of Ice users based on studies carried out in two other jurisdictions.[[68]](#footnote-68) Although the focus in these notes has been on the exercise of the judge’s gatekeeping roles with juries, of course, in Hong Kong, the decision whether to admit expert evidence, applies not just to judges with juries, but also what evidence judges will consider themselves in the District Court. Similarly, with magistrates in the Magistracy.

**7.10 Conclusion**

Fortunately, though, as yet, no travesties of this magnitude are reported to have occurred in Hong Kong.[[69]](#footnote-69) This is probably because the evidentiary quality controls for the reception of newer types of scientific evidence have been stricter in Hong Kong than in the England and Wales where so many of these occurrences have happened in the past. However, even in a more cautious jurisdiction like Hong Kong there is no room for complacency, as cases can arise where the reliability of the science that is sought to be admitted lies in something of a grey area. Quoting from Pang J in *HKSAR* v *Liu Man Fai*, “Just when a principle crosses the line between the experimental and the demonstrable stages is difficult to define.”[[70]](#footnote-70)

Furthermore, in Hong Kong, there is no formal body or process to review cases that have been finalized at the appellate level to determine if there have been miscarriages of justice, as is the case in the US, Australia and England and Wales.[[71]](#footnote-71) According to Hamer, estimates of wrongful conviction rates of 3% in comparative common law countries, while speculative, would not be utterly fanciful.[[72]](#footnote-72)

It is important of course not to overstate the problems about the reliability of expert evidence and to suggest that all such evidence is inherently unreliable or that science has not developed sufficiently as not to render this type of evidence a valuable forensic tool in the fact-finding process. Naturally then, courts exercising criminal jurisdiction in Hong Kong are reluctant to exclude relevant, probative evidence. So, the potential for injustice remains.

### Some specific types of objection

The following are a list of the common types of situations which may call for an objection to be made in both criminal and civil cases.

1. Relevance.
2. Leading questions.
3. Hearsay.
4. Similar fact evidence.
5. The prejudicial effect outweighs the probative value.

### Relevance

**9.1 General**

Relevance is central to the admissibility of all evidence in both civil and criminal matters.[[73]](#footnote-73)

In determining the relevance of a fact, the test is whether it:

* Either directly or indirectly is probative of a fact in issue
* Affects the reception of a legal issue
* Affects the weight of evidence (e.g. the credit of a witness).[[74]](#footnote-74)

While evidence is relevant if it satisfies any or all of these tests, it is not necessarily admissible.[[75]](#footnote-75)

### Leading questions

Leading questions generally are not permissible in examination-in-chief.[[76]](#footnote-76) Leading questions are permissible in cross-examination and most questions in cross-examination are framed in this manner.

A leading question is a question which:-

1. Either suggests the answer; and/or;
2. Assumes the existence of a fact which is in dispute.

Have you stopped beating your dog?, would breach both rules, as it suggests the witness is beating his dog and/or assumes the witness beats his dog.

There are various exceptions to leading questions. The more straightforward ones include:

* Questions which are introductory in nature
* Questions which are not in dispute
* Questions in cross-examination
* Questions asked of a witness who is declared to be hostile.

### Hearsay evidence

Hearsay, is at its most basic level, the recounting of what another person said to the witness. As to hearsay in the legal context, the situation is a bit more complex as we will see below.

### General effect of the hearsay rule

In attempting to explain the manner in which the rule against hearsay operates, Mr. Justice McHugh NPJ, while delivering the judgment of the Court of Final Appeal in [*Oei Hengky Wiryo* v *HKSAR,*[[77]](#footnote-77)](http://www.hklii.org/cgi-hklii/disp.pl/hk/jud/eng/hkcfa/2007/FACC000004A%5f2006%2d56019.html?query=%7e+oei+hengky+9+february+2007)provided a very apt quotation from Lord Reid on this point:-

*As Lord Reid pointed out in Myers v. Director of Public Prosecutions [1965] AC 1001 at 1019:*

*“It is difficult to make any general statement about the law of hearsay evidence which is entirely accurate.”*

His Lordship went onto state though:[[78]](#footnote-78)

*However, a reasonable working definition of the hearsay rule is that an oral or written assertion, express or implied, other than one made by a person in giving oral evidence in court proceedings is inadmissible as evidence of any fact or opinion so asserted.*

Further guidance may be obtained on this issue from the seminal case of *Subramanium* v *Public Prosecutor.*[[79]](#footnote-79)The appellant was found carrying ammunition in the then British colony of the Federation of Malaya, now Malaysia. At that time Malaya was in the grip of a hard fought and deadly communist insurrection. The appellant was held to be in breach of legislation enacted to combat this insurrection and he was sentenced to death. His defence was one of duress. Consistent with this defence he attempted to give evidence of conversations with terrorists that may have supported this defence. The trial court ruled that the appellant was not entitled to give any evidence of these conversations as it would infringe the rule against hearsay. On appeal to the Privy Council, it was held that the appellant was entitled to give evidence about the conversations with the terrorists if it went to his state of mind. For instance, if the appellant was in possession of the ammunition because the terrorists stated they were going to kill him unless he joined their group and carried the ammunition for them. Such a statement could have been admissible if its purpose was not intended to prove the truth of what being asserted (that the terrorists were going to kill the appellant if he did not bring in the explosives) but related to his state of mind (that he was concerned he would be killed by the terrorists if he did not bring in the ammunition). Therefore, the conversations were potentially relevant and should not have been automatically held to have been inadmissible.

The rule against hearsay was expressed by the Privy Council in *Subramanium* at 969 as follows:

*Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained within the statement. It is not hearsay and inadmissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made*.

In *Secretary of Justice* v *Lui King Hong*,[[80]](#footnote-80) this statement in *Subramanium* was cited with approval by Lord Hoffman at [32].

At its most basic level hearsay evidence is not difficult to spot: *“Mrs Green told me that she saw Jimmy running away from the scene.”*

This is clearly hearsay as the witness didn’t see Jimmy run away from the scene herself. The witness is asking you to believe that Jimmy did indeed run away from the scene and that Mrs Green saw it and that Mrs Green told the witness she saw it. It could be admissible though as part of the res gestae, an exception to the rule against hearsay. Namely, if it was made contemporaneously.

Consider now the evidence from Mrs Green, *“I saw the defendant speaking to the victim and the defendant said to the victim, ‘You are an idiot. Get away from me!’”* This statement may be relevant to illustrate that the defendant was in close proximity to the victim and the defendant’s state of mind at this time. It does not infringe the rule against hearsay as it does not go to the truth of what is being asserted; it is not being advanced to prove that the victim was “an idiot”.

**12. Hearsay in criminal proceedings**

In criminal proceedings in Hong Kong the common law rule against hearsay still applies. Even if a statement is regarded as hearsay evidence it may still be permitted into evidence if it falls within one of the exceptions to this rule.[[81]](#footnote-81) Usually, this is on the basis that although hearsay is unreliable (as the witness cannot be cross-examined as to the truth of the statement) some utterances are so reliable that they might be regarded as inherently trustworthy.

Exceptions under the common law include:[[82]](#footnote-82)

1. *Res gestae* statements. These relate to the witnesses’ accounts of contemporaneous events e.g. someone said to the witness immediately after the crime, “I just saw Bob Chang stab Billy Wong and run away from the scene.”
2. Dying declarations.
3. Statements made in public documents.
4. Voluntary admissions or confessions by an accused against himself.

There are over 100 statutory exceptions to the rule against hearsay,[[83]](#footnote-83) but a few of the more notable ones are:

1. Certain documentary evidence in relation to criminal trials being:
2. Documents in the nature of business records: s.22 Evidence Ordinance (Cap.8) (“EO”).
3. Computer records: s.22A EO.

An interesting case arose on appeal before the Court of Final Appeal (CFA) in 2015 in the case of *HKSAR* v *Lau Shing Chung Simon*.[[84]](#footnote-84) Providing a simple description of the case, here, a police inspector was convicted by a magistrate of common assault for slapping his girlfriend. His defence was that she had legally consented to this slapping as a means of exorcism, by removing ghosts which had possessed her, as long as the slapping was not too severe. In this regard he had sought to adduce evidence of WhatsApp messages which was suggestive of this consent. In other words, that these messages went to the state of his mind. The magistrate refused to allow the admission of these messages as he found that to do so would have infringed the rule against hearsay and they were not put before the court in accordance with the provisions of s.22A (2) EO.[[85]](#footnote-85) The magistrates’ decision to exclude this evidence was not overturned on appeal by the Court of First Instance.[[86]](#footnote-86) The police officer appealed to the CFA from the CFI’s decision.

The CFA found that the magistrate erred in finding that the evidence of the WhatsApp messages constituted hearsay evidence, as they clearly did not go to the truth of anything being asserted because, as previously noted, they were relevant to the appellant’s state of mind. As a result, whether or not the threshold question of whether there was proof of appropriate measures being taken pursuant to allow the admission of these computer records (as an exception to the hearsay rule) did not apply.

Quoting from the CFA judgment (with footnotes removed and highlighting sections setting out the rationale in bold and underlined).

*26. It follows that in finding that the records were inadmissible as infringing the common law rule against hearsay and that their admissibility depended upon compliance with the conditions stipulated by*[*section 22A*](https://www.hklii.hk/en/legis/ord/8/s22A)*(2) of the*[*Evidence Ordinance*](https://www.hklii.hk/en/legis/ord/8/)*, the magistrate erred.*

*27. The error illustrates an occasional misapprehension as to the ambit of the rule against hearsay testimony. The misapprehension is that the rule always forbids evidence of what somebody has declared, orally or in writing, out of court. That is not the rule.  The rule is that, subject to certain common law and statutory exceptions:*

*“… an oral or written assertion, express or implied, other than one made by a person in giving evidence in court proceedings is inadmissible as evidence of any fact or opinion so asserted.”*

***28. The reach of the rule may more readily be understood if the rationale for it were better appreciated. The rationale is a concern for the probative value of out-of-court statements. Sometimes the circumstances in which an out-of-court declaration is made are deemed to confer sufficient inherent reliability as to render the declaration admissible to prove the truth of what is declared and it is upon that reasoning that the common law and statutory exceptions are based. In other circumstances, however, the probative value of evidence of a fact in issue is said to be materially undermined where it cannot not tested by cross-examination and it is the inability to cross-examine the declarant to test the accuracy of his out-of-court statement that lies at the heart of the general rule.***

***29. The reason for the rule was stated by Lord Normand in Teper v The Queen:***

***“It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light, which his demeanour would throw on his testimony, is lost.”***

*30. From that rationale flows the principle against proving facts asserted by someone other than a person who testifies. But where a witness merely asserts that a statement has been made by another and thereby seeks to prove no more than that the statement was made, the witness is testifying as to a fact of which he can directly speak and about which he can be tested, in precisely the same way as he can speak and be tested as to something which he says that he himself has observed.*

*31. Therefore, as McHugh NPJ explained in Oei Hengky Wiryo v HKSAR:*

*“To determine whether the hearsay rule has been breached, it is necessary to determine the purpose for which evidence of an out-of-court statement is tendered. An out-of-court statement made in the absence of a party is not necessarily inadmissible. As long as its contents are not relied on to prove a fact recited or asserted, it will be admissible if it tends to prove a fact in issue or a fact relevant to a fact in issue.”*

The CFA allowed the appeal from the CFI on the basis that the CFI should have allowed the appeal for the reason, that amongst other things, the magistrate erred in not admitting the evidence of the WhatsApp messages.

**12.1 Potential reforms to the Rule Against Hearsay**

In November 2009, the Law Reform Commission of Hong Kong recommended that the rule against hearsay be abolished in criminal proceedings in Hong Kong.[[87]](#footnote-87) This is because, despite its potentially unreliability (it does not involve direct evidence of what occurred via the witness who witnessed– rather the evidence is ‘second hand – and cannot be subject to cross-examination) it’s rigidity excludes evidence which might be truthful and dependable. Furthermore, some of the exceptions to the rule against hearsay are complicated and unclear.[[88]](#footnote-88)

A bill based on these recommendations by the Law Reform Commission was introduced into the LegCo in July 2018,[[89]](#footnote-89) and a report by the Bills Committee of LegCo concerning it[[90]](#footnote-90) was examined by LegCo House Committee on 5th June 2020, but the bill was withdrawn to allow further consultation with the Law Society and the Bar Association.[[91]](#footnote-91) Essentially, the Law Commission’s Report recommended that hearsay evidence be admissible where it is currently allowed under existing statutory and common law exceptions (see above) if the parties agree or if “the court is satisfied that it is “necessary” to admit the hearsay evidence and that it is “reliable”.[[92]](#footnote-92)

Necessity under the proposed bill, arises where the declarant is unavailable to give evidence, for instance, where someone who has made a declaration is dead or cannot be located despite all reasonable steps being taken to find the declarant. [[93]](#footnote-93)

As to the requirement of the threshold reliability, the issues to be considered are: (*a) the nature and content of the statement adduced as the evidence; (b) the circumstances in which the statement was made; (c) any circumstances that relate to the truthfulness of the declarant; (d) any circumstances that relate to the accuracy of the observation of the declarant; and (e) whether the statement is supported by other admissible evidence.*[[94]](#footnote-94)

Additionally, other safeguards are that the court has to direct the acquittal of the defendant if:

1. *the case against an accused is based wholly or partly on hearsay evidence admitted with the permission of the court granted under section 55M; and*

*(ii) the court considers that it would be unsafe to convict the accused.[[95]](#footnote-95)*

Pursuant to s 55Q of the proposed bill, matters to be considered in deciding whether it would be unsafe to convict the accused, are: *(a) the nature of the proceedings, including whether the proceedings are before a jury or not; (b) the nature of the hearsay evidence; (c) the probative value of the hearsay evidence; (d) the importance of the hearsay evidence to the case against the accused; and (e) any prejudice to the accused which may be caused by the admission of the hearsay evidence, including the inability to cross-examine the declarant.*[[96]](#footnote-96)

Finally, pursuant to the proposed s.55M(2)(f), the prejudicial evidence of the evidence must not outweigh its probative value.[[97]](#footnote-97) As to these principles, see further below at [14].

While these proposed provisions act as protections against conviction, problematically they add to the complexity of the admissibility of the evidence, defeating an intended purpose of simplifying the process. Even more problematically, it is difficult to come to a definitive conclusion on these matters without actually conducting a cross-examination. Most obviously, it is impossible in many circumstances to know what prejudice would have been caused by the inability to cross-examine the declarant, without ever hearing the answers.

It is probably feasible in due course then that the law relating to hearsay evidence will become less restrictive to admit. It has been argued that allowance into proceedings of hearsay evidence will allow for evidence that could lead to an acquittal, not just a conviction.[[98]](#footnote-98) Furthermore, as noted above, a court can direct an acquittal if after admission of hearsay evidence it would be unsafe to convict. However, the question needs to be asked that if the nature of hearsay evidence is potentially so prejudicial that it needs such a specific safeguard, why on balance, it is allowed in the first place. Might it be better to set up Innocence type commissions to review false convictions instead?

**13. Similar fact evidence**

The prosecution is limited in the evidence which it can tender against the accused which does not arise in relation to the case with which the defendant has been charged. So, for instance, if the defendant is charged with murdering his wife, Molly, can the prosecution bring in evidence that he murdered his previous wife Janet? The answer is no, unless there was something very probative in the way in which his wives were murdered, as this type of evidence would be highly prejudicial to the defendant.[[99]](#footnote-99) Having said this, the court has moved away from a stringent test requiring striking similarities in the previous acts to a less difficult one for the prosecution.

In *HKSAR* v *Zabed Ali*, the deceased was bound and gagged and suffocated to death.[[100]](#footnote-100) The evidence against the accused was largely circumstantial and not sufficient to prove the guilt of the accused beyond a reasonable doubt. A statement was introduced in evidence against the accused by a witness based on a conversation with the accused 10 days prior to the death of the victim, the most relevant part of which is as follows:[[101]](#footnote-101)

"One day I asked him what does his father do. He said that his father was killed by a party called Sharbahara Party in Bangladesh, or something like that, when he was young."

"Then later he said that, 'I also have ... I also want to take revenge. I want to kill somebody ...'"

"He said that 'I want to take a revenge of my father's killing and I would ...'"

"I have a promise to myself that I would get back to ... I would take revenge of my father's killing. I would also kill somebody."

The Court of Final Appeal at paragraph 23 stated in relation to the admissibility of similar fact evidence, and referring to the English case of DPP v P,[[102]](#footnote-102) that if “it is concluded that the evidence is relevant to a matter in issue for reasons other than to show mere propensity on the part of the accused to commit the crime in question, that is, it is not mere propensity evidence, then the test in DPP v P has to be applied in deciding as a matter of law whether it is admissible: whether its probative force in support of an allegation against the accused is sufficiently great to make it just to admit it, notwithstanding that it is prejudicial to the accused. It is only where the test is satisfied that the evidence would be ruled admissible as a matter of law. If it is not satisfied, the evidence would be ruled inadmissible. But if in answer to the above questions, it is concluded that it is mere propensity evidence, then it would be inadmissible on the basis of the exclusionary rule that this purely concerned propensity evidence.”

In this case, the evidence which was rather general in nature (expression of a general intent to commit murder rather than a specific intent to kill a particular individual like the victim) was held to be inadmissible as being mere propensity evidence.

1. **The discretion to exclude admissible evidence**

Article 10 BORO guarantees the right of every accused to a fair trial.[[103]](#footnote-103) Therefore, even if evidence is admissible, consistent with the right of the accused to a fair trial, the court retains the discretion to withhold the adducing of evidence by the prosecution in criminal matters if this right is infringed.[[104]](#footnote-104) Exercise of this residual discretion, in relation to evidence which is sought to be adduced by the prosecution, can occur on the following bases to date in Hong Kong:

1. It would infringe the right to silence and common law right against self-incrimination of the accused. This concern can sometimes arise with confessions.
2. Its prejudicial effect outweighs its probative value.[[105]](#footnote-105) A helpful description of this discretion has been provided by Rosemary Pattenden:[[106]](#footnote-106)

*The common law discretion requires the trial judge to balance the prejudicial effect of evidence against its probative value. Evidence is prejudicial and hence susceptible to discretionary exclusion if there is a real risk that it will contribute to an erroneous verdict, either because its weight and credibility cannot be effectively tested by the defence or because it may be misused by the jury. Misuse of evidence covers inter alia putting more weight on evidence than it deserves or drawing false inferences from evidence or use of evidence admitted for one purpose or for some other forbidden purpose. Evidence which is prejudicial only in the sense that it incriminates the accused is not prejudicial for the purposes of the discretion.*

The risk of the prejudicial effect outweighing the probative value of evidence is more heightened before a jury rather than a magistrate or judge who is better able to deal with these matters.[[107]](#footnote-107)

Although a body of case law has developed around this concept, it should be pointed out that courts are reluctant to exclude admissible evidence, so it is rare for the residual discretion to be enforced.[[108]](#footnote-108) See, for example, the Court of Final Appeal case of *HKSAR* v *Lau Chun Kit*,[[109]](#footnote-109) which related to a charge of indecent assault against the defendant. Namely, that he brushed his hand against the buttocks of two women that he worked with. The defendant countered by arguing it had never occurred or alternatively it was an accident. Similar fact evidence was introduced at his trial in relation to six separate incidents. Leave was sought to appeal by the defendant on the basis that linking these together comprised similar fact evidence which should have been inadmissible. Quoting from the Court of Final Appeal at paragraphs 8-10, *“the applicant, submitted that it was reasonably arguable that the evidence in the present case merely went to propensity and so should have been excluded.*

*9. We do not agree. The issue was whether each contact may have been accidental. It was relevant to that issue that there were six contacts, such repetition entitling the magistrate and the Judge to find that the contact could not have been accidental. Such evidence had considerable probative force and the Judge was entitled to rule it admissible notwithstanding its prejudicial effect.*

*10. We accordingly refused leave to appeal.”*

1. **Summing up.**

After the closing speeches, if it is a jury trial, the judge sums up to the jury. The judge sums up the facts as well as giving directions as to the law.[[110]](#footnote-110)

The jury (or the judge or if it is a trial before a judge alone) decides the question of guilt.

If there is a guilty verdict then the court proceeds to sentence.

1. Section 54(1)(a) Criminal Procedure Ordinance (“CPO”). [↑](#footnote-ref-1)
2. Section 54(1)(b) CPO. [↑](#footnote-ref-2)
3. Section 54(1)(e) CPO. [↑](#footnote-ref-3)
4. John Henry Wigmore, *Evidence* §1367 (J. Chadbourn rev. 1974). [↑](#footnote-ref-4)
5. [2009] HKCA 13. [↑](#footnote-ref-5)
6. *Koninklijke Philips Electronics N.V* v *Wealthful Technology Ltd* [2002] 3 HKCFI 82. [↑](#footnote-ref-6)
7. John Reading, *Expert or Opinion Evidence in Common Law Jurisdictions – The Hong Kong Perspective* (August 2005) 4. [↑](#footnote-ref-7)
8. Section 17 Evidence Ordinance (Cap.8). [↑](#footnote-ref-8)
9. [2001] HKCA 219. [↑](#footnote-ref-9)
10. It is not the purpose of these notes to examine in detail all the evidentiary rules concerning expert evidence but to highlight some of the essential rules which apply here. [↑](#footnote-ref-10)
11. Simon NM Young, *Hong Kong Evidence CaseBook*  (Hong Kong: Sweet and Maxwell 2011) 776. [↑](#footnote-ref-11)
12. (1984) 38 SASR 45. [↑](#footnote-ref-12)
13. 509 U.S. 579, 113 S.Ct. 2786 (1992), available at https://www.law.cornell.edu/supct/html/92-102.ZS.html. [↑](#footnote-ref-13)
14. Ibid para 7. [↑](#footnote-ref-14)
15. DC Circuit Court of Appeal 1923. [↑](#footnote-ref-15)
16. Ibid paragraph 8. [↑](#footnote-ref-16)
17. Daubert (n 13) paras 29-30. [↑](#footnote-ref-17)
18. Frye (n 15). [↑](#footnote-ref-18)
19. Daubert (n 13) paras 7-13. [↑](#footnote-ref-19)
20. 118 S.Ct. 512 (1997). [↑](#footnote-ref-20)
21. Albert J Grudzinskas Jr, “*General Electric Co*. v *Joiner:* Lighting Up the Post-Daubert Landscape?” 26(3) *Journal of American Academy Psychiatry and Law* (1998) 497, 497-503. [↑](#footnote-ref-21)
22. 119 S.Ct. 1167 (1999) [↑](#footnote-ref-22)
23. Albert J Grudzinskas Jr, “*Kumho Tire Co.,* *Ltd* v *Carmichael*” 27(3) *Journal of American Academy Psychiatry and Law* (1999) 482, 482 – 487. [↑](#footnote-ref-23)
24. Christine Funk, Expert Institute website, *Daubert v Frye: A National Look at Expert Evidentiary Standards* 2-3, available at https://www.theexpertinstitute.com/daubert-versus-frye-a-national-look-at-expert-evid... [↑](#footnote-ref-24)
25. [2002] HKCFI 1338; HCAP000008A/1999, 21 November 2002. [↑](#footnote-ref-25)
26. Erica Beecher-Monas, *Evaluating Scientific Evidence. An Interdisciplinary Framework for Intellectual Due Process* (Cambridge: Cambridge University Press 2007) 98-99. [↑](#footnote-ref-26)
27. Bradley D McAuliff, Robert J Nemeth, Brian H Bornstein and Steven D Penrod, “Juror Decision-making in the Twenty-first Century: Confronting Science and Technology in Court”, Chapter 3.1 in David Carson and Ray Bull (eds.), *Handbook of Psychology in Legal Contexts* (Second Edition Chichester New York: John Wiley and Sons: 2003). [↑](#footnote-ref-27)
28. Jane L Ireland and John Beaumont, “Scientific Expert Evidence in the UK: Proposing an Abridged Daubert” 17(1) *Journal of Forensic Practice* (2015) 3, 3-12, available at www.emeraldinsight.com/doi/abs/10.1108/JFP-03-2014-0008*;* CRonal Huff and Martin Killias, *Wrongful Conviction. International Perspectives on International Justice* 40, availableathttps://books.google.co.uk/books?isbn=159213646X. [↑](#footnote-ref-28)
29. *R* v *Mark Dallagher* [2002] EWCA Crim 1903 para 29. Here, the English Court of Appeal failed to fully apply the strictures in Daubert referred to above such as peer review: Ibid Ireland and Beaumont 7. [↑](#footnote-ref-29)
30. Ibid 14. [↑](#footnote-ref-30)
31. Bob Woffindin, “Ear Print Landed Innocent Man in Jail for Murder” *The Guardian* (23 January 2004), available at www.theguardian.com › World › UK News › Crime. [↑](#footnote-ref-31)
32. *R* v [*Clark* [2003] EWCA Crim 1020](http://www.bailii.org/ew/cases/EWCA/Crim/2003/1020.html) (11 April 2003). [↑](#footnote-ref-32)
33. [*General Medical Council v Meadow* [2006] *EWCA Civ 1390* (26 October 2006)](http://www.bailii.org/ew/cases/EWCA/Civ/2006/1390.html). [↑](#footnote-ref-33)
34. Mike Redmayne, *Expert Evidence and Criminal Justice* (Oxford: Oxford University Press 2001) 12. [↑](#footnote-ref-34)
35. The Law Commission (Law Com No 325) *Expert Evidence in Criminal Proceedings in England and Wales* (London: The Stationary Press 21 March 2011) 175. [↑](#footnote-ref-35)
36. The Law Commission, *The Law Commission Consultation Paper No 190, The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales. A New Approach to the Determination of Evidentiary Reliability. A Consultation Paper* paras 1.5- 2.15. (7 April 2009); Lord Justice Leveson, *Speech for the Forensic Science Society and King’s College. Expert Evidence in Criminal Courts. The Problem.* (London November 2010) 7-10. [↑](#footnote-ref-36)
37. Daniel J Capra, “Rulemaking Possibilities: Efforts of the United States Judicial Conference Advisory Committee on Evidence Rules to Address the Challenges to Forensic Expert Testimony” 13(1) *Frontiers of Law in China* (March 2018) 34, 57 referring to Criminal Practice Directions 2015 [2015] EWCA Crim 1567, CPD V Evidence19A.5. [↑](#footnote-ref-37)
38. Tony Ward, “An English Daubert? Law, Forensic Science and Epistemic Deference” 15 *Journal of Philosophy, Science & Law: Daubert Special Issue* (May 29 2016) 26, 28-28. [↑](#footnote-ref-38)
39. Capra (n 37) 46-47. [↑](#footnote-ref-39)
40. Ward (n 38) 34. [↑](#footnote-ref-40)
41. A Biedermann and others, “The Need for Reporting Standard*s* in Forensic Science” 14 *Law Probability and Risk*. [↑](#footnote-ref-41)
42. Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council.

    *Strengthening Forensic Science in the United States: A Path Forward.* *Document No. 228091* (August 2009) 145-149, available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf. [↑](#footnote-ref-42)
43. *HKSAR* v *Lee Tong Kin* [2012] HKDC 1589. DCCC 888/2012 (5 November 2012). [↑](#footnote-ref-43)
44. *HKSAR* v *Tse Chi Shing* [2015] HKCA 382; CACC 201/2014 (14 August 2015). [↑](#footnote-ref-44)
45. *HKSAR* v *Lam Pok Yan and Another* [2000] HKCA 268; CACC 97/1999 (17 February 2000) paras 11-13. [↑](#footnote-ref-45)
46. Gary Edmond and others, “Contextual Bias and Cross-examination in the Forensic Sciences: the Corrosive Implications for Investigation, Plea Bargains, Trials and Appeals” *Law, Probability and Risk* 14 (2015) 2. [↑](#footnote-ref-46)
47. Capra (n 37) 63. [↑](#footnote-ref-47)
48. Kiki Wong and Anthony Tang, *“*Forensic Science: Friend or Foe? Part 1” *Hong Kong Lawyer* (June 2011), 26-31. This article stated that matches of marks in bullets found at scenes, as compared to ones fired from a suspect’s guns, are not (as previously assumed) definitive evidence that the same gun was used i.e. the same marks made be found on other guns produced by the same manufacturer. [↑](#footnote-ref-48)
49. David Hamer, “Wrongful Convictions, Appeals and the Finality Principle: The Need for a Criminal Case Review Principle” 37(1) *UNSW Law Journal* (February 2013) 270, 293, available at [www.unswlawjournal.unsw.edu.au](http://www.unswlawjournal.unsw.edu.au) > uploads > 2017/09 . 37-1-4. [↑](#footnote-ref-49)
50. Oriola Sallavaci, [*The Impact of Scientific Evidence on the Criminal Trial: The Case of DNA Evidence*](https://books.google.co.uk/books?id=zHfMAgAAQBAJ&pg=PA40&lpg=PA40&dq=unequal+resources+between+prosecution+and+defence+expert+evidence&source=bl&ots=luTV4OOtjX&sig=BWbPwMQPIo8_alQiuIaMUiOFivM&hl=en&sa=X&ved=0ahUKEwjQmInqtfzWAhVLOI8KHU4TC0gQ6AEILjAC) (Routledge London 2014) 40, available at https://books.google.co.uk/books?isbn=1317910915. [↑](#footnote-ref-50)
51. Forensic Science and Technology Committee, *Meeting Contents* (25 Jul 2013) 58, available at ttps://publications.parliament.uk › ... › Science and Technology. [↑](#footnote-ref-51)
52. Select Committee on Science and Technology [*First Special Report*](https://publications.parliament.uk/pa/cm200506/cmselect/cmsctech/427/42702.htm) (July 2005) 55, available at https://publications.parliament.uk › ... › Science and Technology. [↑](#footnote-ref-52)
53. Committee on Medical Liability and Risk Management, *American Academy of Pediatrics* 432-434, available at pediatrics.aappublications.org/content/124/1/428. [↑](#footnote-ref-53)
54. Tony Ward (n 38) 33. [↑](#footnote-ref-54)
55. The Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (Law Com 225) (2011) para 6.45 [↑](#footnote-ref-55)
56. Ibid para 6.69.

    Ibid paras 6.6-6.9. [↑](#footnote-ref-56)
57. Ibid paras 6.6-6.9. [↑](#footnote-ref-57)
58. Ibid paras 6.42-6.52. [↑](#footnote-ref-58)
59. Ibid para 6.54. [↑](#footnote-ref-59)
60. *General Electric Co*. v *Joiner* (n 20)pp 149-150. [↑](#footnote-ref-60)
61. The Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (n 55) para 7.23. [↑](#footnote-ref-61)
62. Prosecutions Division, Department of Justice, Hong Kong, *The Code of Practice for Expert Witnesses Engaged by the Prosecuting Authority*,available at https://assets.publishing.service.gov.uk/government/uploads/system/...data/.../0829.pdf [↑](#footnote-ref-62)
63. Available at https://www.law.cornell.edu/rules/fre/rule\_702. [↑](#footnote-ref-63)
64. David E Bernstein and Eric G Lasker, “Defending Daubert: It’s Time to Amend Federal Rule of Evidence 702” 57(1) *William and Mary Law Review* (2015) 1,10. [↑](#footnote-ref-64)
65. Ibid 10-11. [↑](#footnote-ref-65)
66. Kiki Wong and Anthony Tang, *“*Forensic Science: Friend or Foe? Part 2” *Hong Kong Lawyer* (July 2011) 38, 40. [↑](#footnote-ref-66)
67. [2017] HKFCI 2427; [2018] 3 HKC 361; HCCC 446/2016 (27 October 2017). [↑](#footnote-ref-67)
68. Ibid paras 26, 29 and 31. [↑](#footnote-ref-68)
69. Nevertheless, misgivings have been reported in relation to the independence and objectivity of expert evidence presented in some instances in the HKSAR: [*Secretary for Justice* v *Wembley International (HK) Ltd And Another* [2004] HKCFI 359; HCA008518B/1998, 19 March 2004](http://www.hklii.org/cgi-hklii/disp.pl/hk/jud/eng/hkcfi/2004/HCA008518B%5f1998%2d38821.html?query=%7e+hksar+v+wembley+hk)and[*Wang Din Shin* v *Nina Kung -* [2002] HKCFI 1338; HCAP000008A/1999, 21 November 2002](http://www.hklii.org/cgi-hklii/disp.pl/hk/jud/eng/hkcfi/2002/HCAP000008A%5f1999%2d38605.html?query=%7e+teddy+wang)*; HKSAR* v *Kulemesin Yuriy and Others* [2011] HKCA 466 at 165. [↑](#footnote-ref-69)
70. [2004] 2HKLRD. [↑](#footnote-ref-70)
71. David Hamer, “Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission” 37 *UNSWLJ* (2014) 217, 270-311. [↑](#footnote-ref-71)
72. Ibid 274-279. [↑](#footnote-ref-72)
73. *Nancy Ann* *Kissel* v *HKSAR* HKCFA 5 at 111 and *Chinachem Charitable Foundation Ltd* v *Chan Chun Chuen and* *Another* [2009] HKCFI 455. [↑](#footnote-ref-73)
74. Hodge M. Malek Q.C. (General Editor) *Phipson on Evidence* (London: Sweet and Maxwell. Thomson Reuters 2010) paras 7.03-7.04. [↑](#footnote-ref-74)
75. Ibid para 7.05. [↑](#footnote-ref-75)
76. *The Queen* v *Chuen Wui Shing and Another* [1993] HKCU 0645 per Keith J. [↑](#footnote-ref-76)
77. [2007] HKCFA 8 at 35. [↑](#footnote-ref-77)
78. Ibid. [↑](#footnote-ref-78)
79. [1956] 1 WLR 965. [↑](#footnote-ref-79)
80. [1999] HKCFA 8. [↑](#footnote-ref-80)
81. A helpful overview of the current law concerning exceptions to the rule against hearsay may be found in The Law Reform Commission of Hong Kong, *Hearsay in Criminal Proceedings.* *Sub-committee Consultation Paper*. (November 2005) at Chapter 3. [↑](#footnote-ref-81)
82. Ibid paras 3.15-3.42. [↑](#footnote-ref-82)
83. *LC Paper No. CB(2) 574/05-06(01)* *Consultation Paper on Hearsay in Criminal Proceedings. Executive Summary* at para 23. See *The Law Reform Commission of Hong Kong* (n 81) paras 3.43- 3.77 for a fuller list of these statutory exceptions. [↑](#footnote-ref-83)
84. (2015) 18 HKCFAR. [↑](#footnote-ref-84)
85. S.22A(1) and (2) EO provides: *(1) Subject to this section and section 22B , a*[*statement*](https://www.hklii.hk/en/legis/ord/8/s2)*contained in a*[*document*](https://www.hklii.hk/en/legis/ord/8/s2)*produced by a*[*computer*](https://www.hklii.hk/en/legis/ord/8/s2)*shall be admitted in any criminal*[*proceedings*](https://www.hklii.hk/en/legis/ord/8/s2)*as prima facie evidence of any fact stated therein if—(a) direct*[*oral evidence*](https://www.hklii.hk/en/legis/ord/8/s2)*of that fact would be admissible in those*[*proceedings*](https://www.hklii.hk/en/legis/ord/8/s2)*; and*

    *(b) it is shown that the conditions in subsection (2) are satisfied in relation to the*[*statement*](https://www.hklii.hk/en/legis/ord/8/s2)*and*[*computer*](https://www.hklii.hk/en/legis/ord/8/s2)*in question.*

    *(2) The conditions referred to in subsection (1)(b) are—*

    *(a) that the*[*computer*](https://www.hklii.hk/en/legis/ord/8/s2)*was used to store, process or retrieve information for the purposes of any activities carried on by anybody or individual;*

    *(b) that the information contained in the*[*statement*](https://www.hklii.hk/en/legis/ord/8/s2)*reproduces or is derived from information supplied to the*[*computer*](https://www.hklii.hk/en/legis/ord/8/s2)*in the course of those activities; and*

    *(c) that while the*[*computer*](https://www.hklii.hk/en/legis/ord/8/s2)*was so used in the course of those activities—(i) appropriate measures were in force for preventing unauthorized interference with the*[*computer*](https://www.hklii.hk/en/legis/ord/8/s2)*; and(ii) the*[*computer*](https://www.hklii.hk/en/legis/ord/8/s2)*was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the*[*document*](https://www.hklii.hk/en/legis/ord/8/s2)*or the accuracy of its contents* [↑](#footnote-ref-85)
86. *HKSAR* v *Lau Shing Chung Simon* (n 84) paragraph 3. [↑](#footnote-ref-86)
87. The Law Reform Commission of Hong Kong, *Hearsay in Criminal Proceedings* (November 2009) at www.hkreform.gov.hk. [↑](#footnote-ref-87)
88. Ibid *Executive Summary.* [↑](#footnote-ref-88)
89. The Evidence (Amendment) Bill 2018. [↑](#footnote-ref-89)
90. Legislative Council, *Paper for the House Committee Meeting on 5 June 2020. Report of the Bills Committee on Evidence (Amendment) Bill 2018. LC Paper No. CB(4)663/19/20* at www.legco.gov.hk › english › agenda › hc20200605. [↑](#footnote-ref-90)
91. The Law Reform Commission of Hong Kong, *Recommendations Under Consideration or in the Process of Being Implemented.* *Hearsay in Criminal Proceedings (November 2009)* No.51at www.hkreform.gov.hk. [↑](#footnote-ref-91)
92. Legislative Council (n 90) at para 14. [↑](#footnote-ref-92)
93. Legislative Council, *Report of the Bills Committee on Evidence (Amendment) Bill 201830 (June 2020) LC Paper No. CB(4)716/19-20.* [↑](#footnote-ref-93)
94. *Ibid* paragraph 17. [↑](#footnote-ref-94)
95. *Ibid* paragraph 18. [↑](#footnote-ref-95)
96. *Ibid.* [↑](#footnote-ref-96)
97. *Ibid* paragraph 14. [↑](#footnote-ref-97)
98. Legislative Council, (n 90) at paragraph 28. [↑](#footnote-ref-98)
99. Section 54 CPO (1)(f) a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless-

    (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged. [↑](#footnote-ref-99)
100. [2003] 2 HKLRD 849. [↑](#footnote-ref-100)
101. Ibid para 5. [↑](#footnote-ref-101)
102. [1991] 2AC 447. [↑](#footnote-ref-102)
103. The relevant sentence or art. 10 provides that, “In the determination of any criminal proceedings against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” [↑](#footnote-ref-103)
104. *HKSAR* v *Lee Ming-Tee* [2001] HKCFA 32. [↑](#footnote-ref-104)
105. *Secretary for Justice* v *Lam Tat Ming* HKCFA 90 at 26-30. [↑](#footnote-ref-105)
106. Rosemary Pattenden,Judicial Discretion and Criminal Litigation (Oxford: 2nd editionClarendon Press 1990)233*.*  [↑](#footnote-ref-106)
107. *Secretary of Justice* v *Lee Wai Man* [1999] 3 HKLRD. [↑](#footnote-ref-107)
108. However, for recent pronouncements on this principle, see [*Vivien Fan and Other*s v *HKSAR* [2011] HKCFA 57](http://www.hklii.org.hk/cgi-hklii/disp.pl/hk/jud/eng/hkcfa/2011/FACC000010%5f2010%2d77308.html?query=%7e+hksar+v+vivien+fan) at [84] and *Nancy Ann Kissel* v *HKSAR* [2010] HKCFA 5 at 200. [↑](#footnote-ref-108)
109. [2013] HKCFA 27. [↑](#footnote-ref-109)
110. Stefan C Lo, “The Criminal Court System” in (eds.) Wing Hong Chui and T Wing Lo, *Understanding Criminal Justice in Hong Kong* (Second Edition: Hong Kong Routledge 2017) 255. [↑](#footnote-ref-110)