**An Chúirt Uachtarach**



**The Supreme Court**

O’Donnell CJ

MacMenamin J

Charleton J

O’Malley J

Woulfe J

Supreme Court appeal number: S:AP:IE:2021:000014

[2020] IESC 000

Court of Appeal record number: 2019/ 120 PP

[2020] IECA 362

Circuit Criminal Court Bill number: LHDP0035/2017

In the matter of section 34 of the Criminal Procedure Act 1967, as amended,

Between

The People (at the suit of the Director of Public Prosecutions)

Prosecutor/Respondent

- and -

AC

Accused/Appellant

**Mr Justice Peter Charleton, judgment delivered on Wednesday 3 November 2021**

1. Section 25 of the Non-Fatal Offences Against the Person Act 1997 enables a limited exception to the rule against the admissibility of hearsay evidence in criminal trials. The course of this appeal, however, has extended beyond the issue of whether the trial judge correctly admitted evidence under that section by way of a certificate. Argument has been made as to the nature of, and admissibility of, opinion evidence generally and, furthermore, the disturbing notion that the admissibility of evidence is not based on the rule of law but is somehow at the discretion of the trial judge. While Woulfe J in the main judgment takes a different view, and while this judgment concurs with his reasoning on the central issue, it is here considered prudent also to address those matters, though the remarks following on the distinction between opinion evidence and testimony as to fact are not determinative of the appeal.

**The issue**

2. In February 2018, the accused was tried in Dundalk Circuit Criminal Court on what were alternative counts arising out of an incident in a bar on 19 June 2016. That incident involved him taking up and swinging a bar stool into the face of the victim, causing him facial fractures and an eye injury. As between the charges, the issue for the jury, once convinced that the victim had been attacked in that way, was how badly had the victim been hurt. Some crimes are event offences, such as assault or dangerous driving, and some may be event and consequences offences, such as dangerous driving causing death or assault causing a particular degree of harm. Sections 2, 3 and 4 of the 1997 Act classify assaults as to gravity as between: applying force, or making the victim reasonably apprehend same, the basic definition under s 2, carrying on summary prosecution a Class C fine with a possible sentence of 6 months imprisonment; an assault causing harm to the victim under s 3, carrying on summary prosecution a Class C fine with a possible sentence of 12 months imprisonment or on indictment to a fine or imprisonment not exceeding 5 years; and an assault causing serious harm to the victim, which is triable only on indictment and carries a fine or imprisonment of up to a life term. Section 1(1) provides that harm is defined as “harm to body or mind and includes pain and unconsciousness” while serious harm is “injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ”.

3. Essentially, once the assault evidence was accepted, the choice for the jury was as between assault causing harm and assault causing serious harm. Proof of harm or of serious harm does not necessarily depend upon a scientific analysis, though a prosecution may be more secure with expert assistance. The definition of the cascade of these three offences requires a jury to find that there was an assault and that the result was either harm to the body or mind, which could also cause pain or unconsciousness or both, or that the assault brought about a substantial risk of death or seriously disfigured the victim or left him or her with substantial loss or impairment of body mobility as a whole or that any organ of the body was substantially impaired. These are ordinary words and subject to a commonsense analysis by a jury.

**The certificates produced**

4. Here, the prosecution produced two certificates in pursuit of their contention that this was a serious harm assault. One came from an emergency medicine practitioner in Our Lady of Lourdes Hospital in Drogheda. That was admitted without controversy. This consultant had seen the victim and, in the ordinary way of a doctor reviewing a patient and writing up a report, had reviewed the test results and clinical notes. All of these are admissible as part of that witness’s narrative as to fact. Essentially, that report detailed the injuries of the victim. In addition, a second certificate came from a distinguished professor of ophthalmology in Dublin. He had never seen the patient. What he had done, as this seems to have been his brief, was to give an opinion as to the nature of the harm done. In doing so, he had reviewed the clinical notes and reports. In good faith he set out his view that the injury had left the victim with substantial impairment of the eye and eye socket that took the impact of the heavy stool.

**The context of s 25**

5. What s 25 of the 1997 Act does is to enable, not require, the prosecution to dispense with the necessity to call a doctor, someone on the General Register of Medical Practitioners under s 26 of the Medical Practitioners Act 1978, and instead to rely on an evidential certificate which the legislation admits as an exception to the rule against hearsay. Thus:

In any proceedings for an offence alleging the causing of harm or serious harm to a person, the production of a certificate purporting to be signed by a registered medical practitioner and relating to an examination of that person, shall unless the contrary is proved, be evidence of any fact thereby certified without proof of any signature thereon or that any such signature is that of such practitioner.

6. The choice is on the prosecution as to what proofs are produced at the trial. Live evidence from an expert may have more impact and, furthermore, an expert may usefully explain the methodology in science, or any arcane discipline outside the general scope of everyday human experience, whereby a conclusion has been reached. Some authorities require an expert to give an exposition of the art or science whereby he or she has reached a view; *Davie v Magistrates of Edinburgh* [1953] SC 34 at 40. The better view, however, is that since such an exposition might require, in many cases, the presentation of a university-level course, what an expert needs to do is to explain the reasons for and logic behind an opinion and not every single step in reaching it, nor does a court need to attend to see a practical experiment or examination carried out; *The People (DPP) v Pringle* (1981) 2 Frewen 57, 87-88. What matters is that a court or jury is enabled on the entirety of the evidence of an expert to accept or reject the basis for a calculation or opinion.

7. Section 25 is within the ambit of legislation which dispenses with the hearsay rule in circumstances that dictate the inherent reliability of what is recorded by persons who have no issue with the parties or with the controversy in a case. Thus, sections 21 and 22 of the Criminal Justice Act 1984 enable proof, where not objected to, by certificate or by formal agreement as between the prosecution and the defence. Formerly, prosecution statements detailing the preservation of a crime scene were thought to require each officer who noted all comings and goings to be produced in court. In reality, this was never necessary. A misconstruction of the reasonable doubt standard also burdened a trial with such evidence as the absence of any road accident involving the hearse taking the body of a murder victim to a post mortem examination. Mathematical proof and proof to a standard that a reasonable person would not doubt the soundness of accepting a fact essential to a conviction are different. While proving what can be proven is sensible, absence due to illness or death of a witness with a formal role does not upset proof to the criminal standard: though the defence may make whatever factual argument to the jury as seems sensible, the jury being entitled to take a commonsense view as to the weight to be given to any evidence or to similarly consider the absence of any proposed testimony.

8. More radical, since the reform does not depend on the consent of the accused, is s 16 of the Criminal Justice Act 2006 enabling the admission in evidence of a formal statement made prior to trial where a witness is available for cross-examination by the accused but has given evidence materially inconsistent with the prior narrative, has refused to give evidence or denies ever making that statement; see *The People (DPP) v Rattigan* [2013] IECCA 3, [2013] 2 IR 221 and for the relevant formalities *The People (DPP) v O’Reilly* [2018] IECA 262.

9. A statement made by a person as to what that person has observed, other than one which is made by that person as a witness while giving testimony, is inadmissible as evidence of any facts stated. Thus, no witness can depose as evidence facts that are unknown to him or her but which come to the witness from a source outside that witness’s own experience. Recounting by a witness of what another person has informed them of breaks the hearsay rule but only where that second-hand information is presented as proof of the facts passed on by that absent individual. What a person absent from testifying in court has said may be of importance in itself as a fact and may be recounted by a witness for the purpose of testifying as to experiencing the fact of that utterance. Hence, in a defamation case, a newspaper may join issue with a plaintiff who asserts his reputation has been damaged by claiming the truth of a printed allegation of fraud on the public purse. The plaintiff may prove that on the day the article in question was published people reacted by shunning him or her or came up and said words to the effect that they did not know he or she was a fraudster. That is not proof for the newspaper that the plaintiff perpetrated fraud, justifying the defamation, but is evidence as to how badly the asserted defamation impacted on the plaintiff. Nor is it ordinarily possible for a witness to testify to a fact and then to go on to call in evidence other people to whom he or she has told that fact. That infringes the rule against self-corroboration since the repetition of a fact recounted by a witness is itself hearsay. Similarly, records made by individuals who are long dead or who are unidentifiable due to the confusion inherent in large systems are hearsay where those records are offered as proof of what is stated therein: that a car had a particular chassis number on leaving a factory, that a patient was seen in a hospital on a particular day, that blood analysis of someone undergoing a post-mortem examination disclosed a particular concentration of alcohol or drugs.

10. Simply because there is a record of what is recorded as a fact does not make that record admissible as evidence of that fact. In *The People (DPP) v Prunty* [1986] ILRM 716, on a charge of kidnapping, the Court of Criminal Appeal held that the records of the Department of Posts and Telegraphs of what number would engage what public telephone box, from which ransom demands and instructions for delivery were made, was a breach of the hearsay rule. This followed the House of Lords ruling in *Myers v. Director of Public Prosecutions* [1965] AC 1001 that on a charge of theft, proof of a vehicle’s chassis number could not be testified to from records of the factory producing them. The exceptions to the hearsay rule developed over centuries by the common law were, according to that decision, closed. A different view was taken by this Court in *Ulster Bank v O’Brien* [2015] IESC 96, [2015] 2 IR 656; inherent reliability, the basis for extending exceptions to the hearsay rule from the *res gestae* admission of spontaneous utterances during the course of an event, such as a stabbing, to facts recorded in public records, where the scrutiny of documents open to everyone would likely correct errors, remains a basis for appropriate common law extension. As Kingsmill Moore J remarks in *Cullen v Clarke* [1963] IR 368 the exceptions to the hearsay rule are possibly more ample than the rule itself. These are listed in that case and in Sandes, *Criminal Law and Procedure in the Republic of Ireland*  (3rd edition, Dublin 1951) passim and *Charleton & McDermott’s Criminal Law and Evidence* (2nd edition, Dublin 2020) chapter 3.

11. Without those exceptions, the proof of events would be rendered impossible in many cases and, more importantly, a tidal draw would be established against the efficacy of the trial procedure. Hence, the exceptions introduced many years after the *Prunty* case in the form of s 5 of the Criminal Evidence Act 1992 applies to criminal litigation. This legislation enables information contained in a document to prove facts where a record was compiled in the ordinary course of business by a person who might reasonably be supposed to have had personal knowledge of the matters dealt with and s 30 of that Act enables a copy of such document, widely defined, to be produced. Under s 6 a certificate may be substituted for a witness to prove the records and computers, presumed to be operating correctly as a matter of general law, as part of a business operation. Since business has little reason for the recording of incorrect facts, records generated are of similar legal firmness to what sense and the common law would admit. The relevant civil exceptions are set out in Chapter 3 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

12. The breadth of the exception under the 1992 Act extends to the examination of “a living or dead person” by “a registered medical practitioner” who may since have died or become unavailable; though, as in s 16 of the 2006 Act, the interests of justice may undermine admissibility in extreme cases. Since a submission was made in the course of this appeal that medical records had to be compiled within the public hospital system to be admissible, it is worth pointing out that what is done in the ordinary course of business, the gravamen of reliability in the 1992 Act, is in no way at all limited to commerce. Rather, the hearsay exception extends under s 4 to “any trade, profession or other occupation carried on, for reward or otherwise, either within or outside the State”. Doctors, physiotherapists, radiologists and others are such professionals and medicine and the keeping of records may of itself be an occupation. It might also be noted that while medicine is a healing art, it is funded and can be provided on a private and commercial basis. The definition also extends to “the performance of functions by or on behalf of” publicly funded persons and bodies, to “any institution of the European Communities”, to national and local authorities nationally and internationally, and to “any international organisation.” Section 11 of the Act, in that regard, in providing for proof of a resolution of the Oireachtas, either house, is not necessary given the overall wording and breadth of definition in s 5.

13. It is worth recording, finally, that this jurisdiction has interpreted the decision in *R v Christie* [1914] AC 545 as enabling what is said to the accused, a primary party and therefore any statement by him or her against interest being admissible, and in the presence of the accused, as well as what is said by the accused, as being part of the admissible narrative. In addition, to dissolve any doubt that may arise, there is nothing in the hearsay rule which prevents putting a question to a witness as to what another witness proposes to testify to. A medical expert may comment on what the patient gave as a history to the injury or illness and the consistency of this with objective findings; *R v* *Bradshaw* (1986) 82 Cr App R 79. There, the issue was as to whether the accused needed to be called where he was asserting to psychiatrists who examined him a form of diminished responsibility supposedly generated by erotomania; a delusion of love. That might not be outside the realm of ordinary human experience but the court stated that a doctor may not state what a patient told him about past symptoms, as evidence of the existence of those symptoms, because that would infringe the rule against hearsay, but the doctor may give evidence of what the patient told him in order to explain the grounds on which he came to a conclusion with regard to the patient’s condition. Where an accused makes a decision not to give evidence, especially where the accused bore a persuasive burden, as in psychiatric defences of insanity and diminished responsibility, relying on doctors’ evidence may leave a jury with a mere opinion as to symptoms and no admissible evidence as to the underlying facts.

14. Called as to the state of a person examined, or an object scrutinised for that purpose, regard may be had by an expert to existing tests and relevant notes for the purpose of giving a view on a relevant state of affairs. Reference to existing scientific or other expert literature is not a breach of the hearsay rule but the expression of an existing body of thought that informs an expert analysis.

**Opinion and fact**

15. In the argument before this Court, a sharp distinction has been sought to be drawn as between an opinion that a witness might give and a statement of fact. Opposing views were taken as to whether s 25 of the 1997 Act could authorise anything other than a statement of fact, an opinion being variously contended as other than a fact and as being within the ambit of the section. In reality, it is difficult to draw a sharp dividing line as between factual and opinion evidence and the authorities do not establish such a line; *The People (DPP) v Walsh* (1989) 3 Frewen 248. A statute could draw that distinction by way of a definition or description but the section in question does not.

16. A working definition of an opinion is that it is a belief, judgment or view that a person forms, and for these purposes seeks to express in testimony, either through objective or subjective reasoning, about any topic, issue, person or thing. This may be a rational or irrational process. An opinion may be important or it may be just the expression of everyday banter. A poor view is taken of those who are described as opinionated. In a prosaic sense, opinions are expressed all the time as subjective viewpoints: a dress is nice, a person is detestable, a political party has worthwhile policies, a particular greengrocer sells fruit and vegetables on the point of turning rotten. But an opinion, so called, may not be that but, instead, a rational and scientific expression of fact using an arcane discipline that may take years of study and experience to acquire. For an expert getting to the point of expressing a viewpoint, which may often be incorrectly described as an opinion, may engage calculation, the application of knowledge, a comparative study of relevant literature and the application of professional judgment.

17. Opinion evidence has been analysed as dangerous in the exposition of a witness since it may undermine the duty of the court to reach its own conclusion of fact. The danger arises in the usurpation of the role of fact finding where a witness opines on the ultimate issue and this may be why strictures against opinion evidence developed; Landon (1944) 60 LQR 201. An expert may come close to or cross over the line of the ultimate issue. In psychiatrically defending a killer, for instance, it is impossible, as it may be in other cases, not to give an opinion that because of a mental disorder the accused did not know the nature and quality of a homicidal act; the very issue for the jury. The law has always treated the approach to this with sense. Expert assistance may be needed to inform a court or jury as to the proper approach to the ultimate issue, provided an expert is not made into the 13th juror; *The People (DPP) v Kehoe* [1992] ILRM 481. Opinion and fact are difficult to sort out from each other as defined categories.

18. In reality, opinion is expressed as an inference from fact by witnesses all of the time. The two exceptions given in the texts to the rule against the general admissibility of opinion are for experts and for narrative. But the reality is that good sense prevails as an overriding principle. When a witness says that he or she saw a named person at a location or that a photograph is that of a person who attacked them, that is the expression of a bundle of fact impossible or impractical of separation and repetition. “That was Ms D who was under the lamppost” is a mix of the fact of observation and internal memory from which the witness expresses a view and nothing would be gained by requiring a precise description of every individual facet making that up or imposing an ultimate issue rule, if the identity of Ms D is the key issue in the case, whereby no mention might be made of identity. Sense must prevail since it is the foundation for the rules of evidence in the first place. Heydon, *Cases and Materials on Evidence* (London, 1975) 370 gives this under the rubric of other instances:

apart from identity of person, things and handwriting are age; speed; temperature; weather; light; the passing of time; sanity; the condition of objects – new, shabby, worn; emotional and bodily states; and intoxication. The law’s hostility to opinion evidence is partly supported by the fact these are all cases where it is very easy for witnesses to make mistakes.

19. Narrative and experts, may be regarded as exceptions but in reality, opinion is woven into discourse and the utility of evidence is undermined by interruption whereby a narrative is fractured. Cross and Wilkinson, *An Outline of the Law of Evidence* (1st edition, London, 1964) (referred to here because of the exposition of the common law) note that:

In many cases, although the answer to a question does not call for specialised knowledge, it would be difficult or impossible for a witness to give his evidence without referring to his opinion. … It is impossible to draw up a closed list of cases falling within the second exception to the general rule prohibiting the reception of evidence of opinion. Items frequently included in it are speed, the identify of persons, things, and handwriting, age and the state of the weather.

**Expert opinion**

20. When the rules of evidence say that an expert may express an opinion but a non-expert may not, subject to narrative and good sense, that is not of itself sufficient to enable the application of the law. Very often what is loosely referenced as a professional opinion is the expression of fact. To give such an opinion, an expert must demonstrate qualification or experience. But, it is difficult to draw a clear line as between opinion and fact where an expert testifies. What looks like an opinion may be as much a statement of fact as a mathematical result. Hence, in analysing poor foundations in a building and running appropriate tests, an expert in stating that the instability of the concrete used is due to the chemical expansion of a particular ingredient, is expressing a fact. That fact may be challenged, as may a fact stated by any other witness as to its accuracy and as to the weight to be given to the statement. It is relevant how tests were carried out, what these showed, the state of scientific literature as supportive or contradictory, and the calculation involved, or judgment, if it comes down to that. Experts may even be challenged as to their objectivity or as to their closeness to an issue, being over attracted by a mere idea or not wanting to let down the party paying them, wearing that side’s jersey as it were. Strong views have been expressed in the past that experts may cut, press and stitch their views to the shape of a problem; WM Best, *Principles of the Law of Evidence* (11th edition, London, 1911) 491 and Pitt Taylor, *Treatise on the Law of Evidence* (12th edition, London, 1931) 59.

21. Often the evidence of an expert looks like an opinion, as opposed to a statement of fact, because of the manner of expression. That is because some steps in the exposition are short-cut. To reach a conclusion, to have arrived at a calculation, many intermediate rungs of reasoning may be engaged. For instance, that the foundations of a building have cracked and become unstable due to the presence of a particular mineral may require a chemical analysis of a concrete sample, finding the proportion of the mineral found, consulting the literature on the range of materials and proportions which establish stability, the plus or minus figures which prior research has demonstrated as tolerances, the nature of the reaction whereby changes have occurred, a consideration of whether any substance other than the target mineral might have caused the problem, possible experiments on a similarly constituted material, whether the witness has seen this issue before and in what circumstances, an analysis of comparative publications on the problem demonstrated and why this leads to support for a statement given in evidence.

22. Usually, many steps are left out. A court, much less a jury, is not given an engineering class but truncated principles are expressed. The net result looks like an opinion but it is the statement of a fact rather than a mere point of view. That does not make such evidence unassailable. The expert may be cross-examined on any of the relevant steps, principles, contradictory literature or possible other causes. Thereby, the tribunal of fact is further informed and will not just be looking at the demeanour of the witness but the soundness of the underlying science and its proper application in the formation of the conclusion.

23. That may be further illustrated by expert statements which may have the appearance of reading the future. As often happens, a bone injury on an articular surface carries a risk of arthritis. X-ray may be the foundation of an expert statement that, on a consideration of scans, there already is arthritis. That is a fact. Into the future, if all is clear as of the date of trial, it will be an opinion where the expert says that there is a 40% chance of arthritis developing; but that same testimony will be a statement of fact that on a review of the scientific literature the consensus is that the risk is to that degree. A court may act on either basis.

**At issue here**

24. What is at issue here is the construction of what s 25 of the 1997 Act enables in terms of the admission of evidence. Woulfe J rightly approaches that from traditional principles. Hence, the state of the law prior to the enactment and the purpose of the enactment are indispensable instruments for construction as well as the requirement that a court give to legislation its ordinary meaning. In stating that “the production of a certificate … relating to an examination of that person, shall unless the contrary is proved, be evidence of any fact thereby certified” what the section contemplates is an examination and the expression of a view by a medical practitioner as to how an injury has impacted on a victim. In that context, it will be a fact that there was a fracture or a brain injury or a diminution in sight or hearing. That may be ascertainable on examination or through running tests and neither infringe the hearsay rule. Further, the medical expert cannot shy away from a description of consequences or effects which will come close to the ultimate issue since that is the purpose of the exception. If an ultimate opinion is expressed, that does not undermine admissibility but a sensible course may be for the trial judge to simply tell the jury that where an opinion is expressed by an expert, it is still for them to analyse why it is held and to be aware that in no sense are they bound by it; *R v Stockwell* (1993) 97 Cr App R 260.

25. Nor does any application of strict construction alter that approach. For strict construction to apply, an ambiguity must first be shown whereby the interpretation of legislation may lean in favour or against the accused. That is not so here. Further, as McKechnie J stated in *DPP v TN* [2020] IESC 26[119], the principle of strict construction, even where it applies “cannot be seen or relied upon to override all other rules of interpretation”. The purpose of this section was to enable a medical practitioner to examine a victim and to consult existing notes and take account of tests run by others and thereby express what the situation and consequences are. Nor are records thereby excluded since these, if relevant, may be admitted at the request of the defence, for the purpose of challenging the opinion, under s 5 of the 1992 Act. But, if the records in themselves are relied upon, as opposed to as being part of the materials looked at for the purpose of the s 25 certificate, then the prosecution may resort to a certificate under s 6 of the 1992 Act.

26. Concurring with Woulfe J and O’Donnell CJ, what is clear is that there is no warrant under the section for the admissibility of a view from an expert who has never seen the victim either as a patient or for the purposes of writing a report. In referencing “an examination” of the victim, s 25 does not promulgate an utterly changed regime whereby anyone may express an opinion on anything. The state of the law prior to the enactment must be taken into account. The expert, prior to this, would have been physically called in court and given an exposition on notes, tests and his or her conclusions. There would have been cross-examination as to the grade of impairment or the solidity of any foundation to a view expressed in the ostensible form of an opinion or fact. That would not have been admissible without the expert having met with and examined what in effect would be his or her patient. Thereby, the *Bradshaw* exception of the admissibility of what the patient said and how that gelled with signs found would be enabled.

27. What is proposed by the prosecution here is that a paper exercise be conducted. Of course, in a trial, criminal or otherwise, it is permissible to call an expert on the basis of putting facts and seeking an opinion: if the evidence establishes X, Y and Z what is your view as to the consequences for Ms D? But, that is live evidence and subject to testing. The section does not go so far. Rather, it enables an examining or treating doctor to express a factual view but only on the basis of an examination by that medical person of the victim.

**Discretion**

28. Balance may on occasion be part of the law of evidence but the reception of testimony is rarely dependant on discretion. Here, there may be a misunderstanding manifest in the submissions on both sides. Evidence is receivable when, as in a civil case, it is part of the pleaded issues. Outside of that, where defamation is pleaded, negligence in sourcing material has nothing to do with the issues. In a criminal case, reasonable notice of fact is given in a book of evidence or by disclosure and a notice of additional evidence may be necessary to supplement, and make receivable in court, the facts notified as part of the prosecution case. Relevance is thereafter the criterion whereby evidence is admitted: what proposed fact tends to further the proof of a fact in issue? There is no discretion to exclude relevant evidence. Where prejudice is the effect of evidence, a balancing exercise is called for whereby the trial judge may need to exclude evidence, for instance of prior bad conduct, because it adds little to a case even though it may be logical in some weak way to further the proof of a fact in issue. But highly prejudicial evidence may be very probative; as to methods of murder and opportunity, for instance, as in *R v Scarrott* [1978] 1 All ER 672, or where a skill learned in jail accounts for the professional dismemberment of a victim’s body after death, as in *The People (AG) v Kirwan* [1943] IR 279. When an illegality has been the foundation of the finding of evidence, regard may be had to the gravity of the wrong and the consequences; what Clarke J refers to in *The People (DPP) v JC* [2017] 3 IR 417 as an “assessment”. There may, in addition, be circumstances where the protection of the fairness of taking a confession statement requires the judiciary to protect a suspect from a trick, such as a false statement of the confession of an accomplice or deceit over a fingerprint or DNA which does not exist. That is a common law exception related to the maxim *nemo tenetur se ipsum prodere*.

29. Warnings are another example of discretion. But there, there is no effect on the admissibility of the evidence. Rather, particular attention in the judge’s charge is drawn for the jury to issues which judicial experience, or legislative intervention, has identified as requiring particular care: the evidence of an accomplice; an uncorroborated confession – both require a warning as a matter of law. For the victims of sexual violence, usually referred to as complainants because consent is, except in the rarest cases, the issue and usually contested, the form of warning and whether it be made to the jury has evolved into one of apparently untrammelled discretion.

30. There are other forms of discretion, or adjudication of balance, in the law of evidence; but these are rare and in no way set up a general discretion. These principles are exceptional to the overall rule that all relevant evidence is admissible.

**Result**

31. Section 25 of the Non-Fatal Offences Against the Person Act 1997 does not permit a medical doctor who has not examined the victim of an assault to give evidence by certificate. The section enables a registered medical practitioner who has examined a patient who was the victim of an assault, after having consulted relevant notes from other practitioners and the results of tests, to certify that the victim has in consequence of the assault a particular condition. In so certifying, what is said is not necessarily the expression of an opinion, which is outside the scope of the section, but may merely be that the patient has, for example, a skull fracture, has lost sight in an eye, has brain damage and that medical science has found such conditions to be irreversible. The jury can then assess if that is an assault causing harm or causing serious harm. In this instance, and according to the analysis, certifying that a patient will continue into the future to suffer from a sight deficit and that this constitutes an injury at a particular level, does constitute the expression of an opinion and is therefore outside the scope of the hearsay exception provided by statute.