

A Study on the Admissibility of expert evidence in Indian Evidence Act

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Abstract:

The opinion of experts are generally admissible as evidence under Section 45 of the Indian Evidence Act. This evidence usually plays an important role in many cases where technical aspects are involved. This is particularly true in medico legal cases. The rationale behind the same is that it is not practical to expect the Judges to have adequate knowledge in medical issues. Hence, the parties bring in experts who are qualified and sufficiently equipped in that field as witnesses to prove their stand.

But there are various problems and challenges in admitting expert evidence. In many cases, there has been misuse of expert evidence. This is mainly because of the lacuna in law and the ambiguity in the definition of an 'expert'.

There is also strong ignorance in India. The parties do not realise that producing expert evidence is their right. Generally, people are of the opinion that it is the duty of the court to call an expert witness. Hence, this right is not exercised. The court can call an expert, but it is not necessarily bound to call any expert for their opinion.

In this paper, the researcher has tried to analyse the concept of expert opinion in comparison with the law relating to expert opinion in the United Kingdom. The researcher has also focused on the challenges regarding the admissibility of expert evidence and how it has lead to miscarriage of justice in certain cases.

This is a doctrinal study and the researcher depends on secondary data like books, websites, journals and case laws to provide a comprehensive and holistic approach towards the study.

Keywords: Evidence, Expert, Opinion, Admissible, Relevancy, Exclusionary Rule

Introduction:

The general rule is that the opinion of persons or the beliefs of the witnesses are not admissible in the Court.¹ It is based on the concept 'Best Evidence Rule'. The cardinal principle of the evidence law of evidence is that the best evidence should be adduced and presented before the court of law. In simpler terms, best evidence means that evidence which is got through a direct source. This kind of evidence is admissible.

This rule is to ensure that justice is delivered and the Judge's time is also not wasted.² Witnesses are those people who report the facts. The term 'facts' here means and contains only facts. Opinion, beliefs, ideas, etc are not brought into its ambit. It should be understood that these facts must be perceived by the witness through one of his five senses³. But hearsay evidence⁴ is generally not admitted in the Court of law. This evidence must be out of the direct knowledge of the person. Evidence of an eye witness is usually considered as a direct evidence.⁵ Such evidences are considered unreliable and hence is not admissible. Hearsay Evidence simply means the evidence of an unexamined person.

In some cases where the technical aspects are questioned, then in such cases, an expert opinion⁶ can be brought in by either of the parties to the suit. Such evidence are known as expert evidence. The earliest use of an expert witness in English law came in the year 1782. A court was hearing a litigation which was related to the silting-up of Wells harbour in Norfolk. The Court in this case accepted the evidence from a leading civil engineer. The Court's decision to accept the civil engineer's evidence is widely considered as the origin of the modern rules on expert testimony. But there existed ambiguity on its usage which was later put to rest by Lord

¹ Hodge Malek QC, *Phipson on Evidence*, 16th Rev. Ed., Sweet & Maxwell, 2005, p. 475.

² In *Folkes v. Chadd* (1782) 3 Doug K.B. 157, as cited in Colin Tapper. *Cross and Tapper on Evidence* (8th ed. Butterworths, London 1995). p.555, Court observed, "if on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary and it may waste the court's time."

³ Saunak Rajguru, *Evidentiary Value of Medical Witness*, Lekhoj Research Journal of Law & Socio-Economic Issues, Vol 1, Issue II, Lekhoj Publications, ISSN: 2456-4524, p. 4.

⁴ Taylor defined it as "evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person".

⁵ Paul Starrett, *Interview & Interrogation with Eyewitness Evidence*, LawTech Publishing Group, 2015.

⁶ Opinion is estimation, a belief or assessment, a view held as probable, what one thinks about a particular question or topic, an assessment short of grounds of proofs, a formal statement of reasons for the judgment, a formal statement of professional advice.

Justice Patrick Devlin in the case of suspected serial killer Dr. John Bodkin Adams in the year 1957.⁷

The expert evidence is usually admitted based on the principle of necessity.⁸ Another prerequisite in admission of expert evidence is that the person should really be an expert. But the Judge is not necessarily bound to give a judgement based on the evidence.

Section 45 of the Indian Evidence Act of 1872 deals with the opinions of experts and they are considered relevant if it is on foreign law, science, art, identity, handwriting or finger impressions.

The aim of the present study is to do a comprehensive analysis on the admissibility of expert opinion in India and its evidentiary value.

Research Methodology:

The researcher has followed secondary data collection. This is a doctrinal study. The researcher has also utilized commentaries, books, treatises, articles, notes, comments and other writings to incorporate the various views of the multitude of jurists, with the intention of presenting a holistic view. The researcher has made extensive use of Case Laws in this paper, so as to discern a trend in the judicial pronouncements.

Research Question:

Whether there is lacuna in law regarding expert testimony in the Indian Evidence Act of 1872?

Review of Literature:

The rule for admitting evidence is that the beliefs and opinion are disregarded as they hinder the process of delivering justice. The author introduces the readers to the concept of expert evidence and how it is an exception.(Malek) The author gives a clear comparison as to why eye witness is a direct evidence and is preferred over other forms of witnesses.(Starrett) In this book, the author has particularly focused on the development of expert evidence and the case of serial killer, Dr. John Bodkin Adams where the Court relied on expert evidence. This marked the start of expert evidence.(Cullen) In this volume, the author compares law and science and how they are truly dependent on each other. Science plays a major role in crime detection as it relies on many scientific methods which helps in finding the criminal.(Reece) The term 'expert' has always been open to debates as there has been no standard definitions for the same. In this

⁷ V. Pamela Cullen, *A Stranger in Blood: The Case Files on Dr John Bodkin Adams*, London, Elliott & Thompson, 2006, ISBN 1-904027-19-9.

⁸ *Government of Virgin Islands v. Knight*, 989 F 2d 619 (3rd Cir 1993).

book, the author has tried to give a comprehensive understanding of the term, 'expert' for the readers' understanding.(Monir) In this book, the author makes a deep analysis on the requirement of an expert witness. He feels that an opinion is needed only if the expert possesses greater knowledge than the jury or the judge deciding the case.(Wigmore) The author in this book touches upon self-incriminatory evidence and its admissibility in the United States. The laws are such that no man can be forced to give evidence against himself or his spouse. (Choo) In this general, the author has tried to understand the evidentiary value of expert witness in India and the nature of such witness.(Krishna Kumari and Kumari) In this book, the author is concerned about the probative value of expert evidence and its admissibility in the Courts. He has focused on the importance given to expert opinion in India.(Dinkar) In the modern world where crimes are being conducted in a highly technical manner, the author feels that scientific methods must be employed to detect crimes. This means the value given for expert witness must be increased.(Rao and Rao)

Objectives:

1. To study about the admissibility of expert evidence.
2. To compare expert witness in India, US., and England.
3. To study the lacuna in law regarding expert witness.

Hypothesis:

The expert evidence in India is a weak evidence because of ambiguities and lacuna in law.

Lacuna In Law Regarding Expert Witness - Meaning of 'Expert':

Based on Section 45 of the Indian Evidence Act of 1872, it can be inferred that 'expert'⁹ is a person who is qualified and skilled in the field of art, science, foreign law, handwriting or finger impression. The measure or degree of qualification has not been mentioned. It can be further inferred that such 'adequate' knowledge has been gained through practice, observations or through studies. The ambiguity that exists here is that the law does not explicitly state who is an expert. Five areas or subjects have been mentioned but they are broad aspects and cover a wide range of subjects. Hence, it remains unclear.

A question that now arises here is who is an expert? The law has been ambiguous by simply stating under Section 45 of the Indian Evidence Act of 1872 that a person specially skilled is

⁹ expert witness: a person who is a specialist in a subject, often technical, who may present his/her expert opinion without having been a witness to any occurrence relating to the lawsuit or criminal case.

considered an expert. This is a broad term without a clear understanding. The general meaning is that the term “expert” covers ‘persons who are specially skilled’. The term implies both superior knowledge and practical experience in the art or profession, but generally, nothing more is required to entitle one to give testimony as an expert than that he had been educated in a particular art or profession.¹⁰

Various Jurists and scholars have attempted to define the term expert. Lawson has defined ‘expert’ as a person who has some special knowledge and skill in the particular calling to which the enquiry relates.¹¹ Thus, it can be understood that experts are persons who have devoted their time and study to a special branch of learning on which he/she is asked to state his/her opinion.

An American jurist, Wigmore has spoken about an expert witness as follows, “...*whenever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous: and that thus an expert's opinion is received because and whenever his skill is greater than the jury's...*”.¹² From the above statement, one can infer that expert evidence is the evidence given by experts who possess some special knowledge on subject matter is beyond the range of common knowledge of the Court.¹³

This statement clearly draws a line between expert evidence and lay opinion testimony. In both cases, only opinion is given. But an expert has more skill in his field and has years of practice and experience to his credit which sets him apart from the lay opinion testimony. Here, the exclusionary rule is applied. Hence, the lay opinion testimony is not accepted. But there are exceptions even to lay opinion testimony. Section 47¹⁴ of the Indian Evidence Act of 1872 states that in the event of identification of the handwriting of a person, *any person* who has been acquainted with the person whose handwriting is in question can give an opinion. In this case, the term ‘any person’ clearly means that the person need not be an expert. Mere acquaintance

¹⁰ Pragati Ghosh, *Evidentiary Value of Expert Evidence under Indian Evidence Act, 1872*, available at <http://www.shareyouressays.com/knowledge/evidentiary-value-of-expert-evidence-under-indian-evidence-act-1872/119180>.

¹¹ Lawson on *Expert Testimony*, 2nd Edn, p. 229 quoted by M. Monir, *Textbook on The Law of Evidence*, Universal Law Publishing, p. 201.

¹² J.H. Wigmore, *Wigmore on Evidence*, Vol VII, Chapter 67, Section 1917: Opinion Rule - History, (Little, Brown & Co, Boston, 1983).

¹³ R v. Davies, [1962] 3 All ER 97.

¹⁴ **Sec. 47: Opinion as to handwriting, when relevant-** When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

will also make him eligible to give opinion according to Section 47. But the Court has suggested three modes of proof in case of identification of handwriting in *Fakhruddin v. State of M.P.*¹⁵. Firstly, by Direct evidence, secondly by expert's evidence and thirdly, by the court coming to the conclusion by comparison.¹⁶

The next question here is how has the Court determined if a person is an expert? The test followed for the same by the Court is: "Is it peritus?"¹⁷ Is he skilled? Has he adequate knowledge?¹⁸ It is, therefore, left to the Judge to determine if a person is to be considered an expert based on the skill he possesses. But before such evidence can be considered, it must be proved that the person giving the evidence is an expert. If the Court later finds that the person who has given the evidence is not an expert, then the opinion of such persons will not be considered.

Evidentiary Value of Expert Opinion:

The nature of expert witness is corroborative and not conclusive. Expert evidence is of two types - Opinion Evidence and Data Evidence. Data Evidence is generally given more weightage and precedence over opinion evidence. But in any case sole reliance cannot be placed on expert evidence. If the Judge completely relied on expert opinion, then it weakens the case. This is because even if a person is an eminent expert in his field, he is still not considered a direct witness. He has only adduced what might have happened. He is not a direct witness. Hence, his evidence is not conclusive in nature.¹⁹

Secondly, corroborative evidence means that such evidence needs a primary evidence and it cannot survive alone. In cases where expert opinion is considered, there should be a primary evidence and the expert testimony can support it. If the expert opinion contradicts an unimpeachable eye witness or documentary evidence, then it will not have an upper hand over direct evidences.²⁰ Expert opinion is used only to help the Judge to form an independent opinion. Expert testimony by its very nature is considered weak and hence, cannot solely form the basis

¹⁵ AIR 1967 SC 1326.

¹⁶ *Fakhruddin v. State of M.P.*, AIR 1967 SC 1326.

¹⁷ "Peritus virtute official" i.e. the holder of some official position which requires and, therefore, presumes a knowledge of that law.

¹⁸ *U.S. Shipping Board v. Ship "St. Albans"*, 1931 PC 189.

¹⁹ *Kamala Kuer v. Ratan Lal*, AIR 1971 All 304.

²⁰ *Ratanlal and Dhirajlal, The Law of Evidence*, Wadhwa & Wadhwa Company, 21st Edition, Lawyers Edition.

for a conviction. It should be taken with due caution.²¹ Thus, it is merely an advisory opinion as the Judge is not bound to accept the expert's opinion²² even after he fulfills the test of competency.

Medical Evidence and Ocular Evidence:

In the case, where the opinion of the medical expert and the evidence given by eye witness are inconsistent, then the expert evidence is disregarded. This is true even if the said person is an expert in his field. This is because the evidence given by eye witness becomes the direct testimony. The conflict between the two evidences was discussed by the Court in *Bhagaban Barik v. State*²³. It has now become axiomatic that the medical expert evidence can supersede the direct testimony if it is so conclusive that it even rules out the possibility of the eye-witness' version being true.^{24 25}

In *Golappa Avana Naik v. State*²⁶, all the eye-witnesses stated that only one blow was given on the head of the accused. But the medical evidence on record showed that there were 4 external injuries. Hence, court held that the eye-witnesses had not seen the incident and the medical evidence persisted over the eye witness.²⁷

Foreign Law:

Generally, the law which is not in force in India is a foreign law. It becomes a question of fact. But the personal laws are not foreign law and they should be interpreted by the Judges only. This is because they are the laws of the land.²⁸ Hence, the opinion of experts will be irrelevant in such cases.

²¹ *Magan Bihari Lal v. State of Punjab*, AIR 1977 SC 1091.

²² *Law Society of India v. Fertilizers and Chemicals Travancore Ltd.*, AIR 1994 Ker 308.

²³ (1961) 27 C.L.T. 116 at 122.

²⁴ *Solanki Chimanbhai Ukabhai v. State Of Gujarat*, AIR 1983 SC 484, 1983.

²⁵ *Punjab Singh v. State of Haryana*, 1984 Cr LJ 921 (SC).

²⁶ Cr. App. No. 16 of 1967

²⁷ M. R. Zafer, *Scientific Evidence-Expert Witnesses*, Journal of the Indian Law Institute, Special Issue : Laws of Evidence and Contract, p. 64, available at http://14.139.60.114:8080/jspui/bitstream/123456789/16208/1/010_Scientific%20Evidence-Expert%20Witnesses%20%2853-77%29.pdf.

²⁸ *Aziz Bano v. Mohammad Ibrahim Husain*, 89 Ind Cas 690.

Finger- Impression:

Generally, finger impression expert's opinion is given more value because the fingerprints of any person remain the same from their birth till death and no two individuals' finger impression have been found to have the same pattern.

Footprint studies are gaining importance nowadays but the courts have been reluctant to accept that as an evidence.

Ballistic Expert:

The opinion of a ballistic expert can be taken as a conclusive proof. They can prove that a particular cartridge was fired from a particular pistol.²⁹

Procedure regarding production of expert witness:

The first question with regards to the procedure is if the court should appoint the expert or should the discretion given to the parties. There is always a possibility of the expert being biased towards the party that has called him. In *R v, Nowelly*, Justice Humphreys has stated that "the expert is not a witness for the prosecution nor for the defence, but it is witness of the Court"³⁰. Hence, the court should consider the appointment of an expert to ensure impartiality. The second question is regarding the decision in case of conflicting expert evidence. In such cases, usually, in all systems, the court has the discretion to prefer the evidence which seems best. The third question raised is if the experts should submit any report in writing to the lawyers before appearing as a witness and, if, such reports should be made available to the court as well as the other party.³¹

Comparison of Expert Witness Law In India, U.S. And England:**Scope of 'Expert Testimony':**

Based on the comparison of the provisions regarding expert witness in the U.S., England and Indian laws, it is clear that both the US and the England are broad and far more wide. They include any matter for expert opinion, unlike India. There is no specific subject that has been provided for the experts to testify. The Judiciary is given the discretion (subject to certain restrictions) in choosing the areas. They have also widened the scope of the expression science or

²⁹ *Kalua v. State of Uttar Pradesh*, 1958 AIR 180.

³⁰ See *supra* note 27.

³¹ *ibid.*

art by including trade or skill.³² This broad term includes anyone starting from the surveyor to farmers, or even blacksmiths. But under Section 45 of the Indian Evidence Act, the term 'trade' is not mentioned anywhere. The legislative intent may have been to expand the words "Science" or "art" and widen its scope. But that paves way to ambiguity.

In *Basudeo Gir v. State*³³, the question laid before the court was if the footprint evidence, which was the sole evidence in the case, could be made admissible under Section 45 of the Indian Evidence Act. The court gave a liberal interpretation to Section 45 and held that its ambit was wide enough to include the evidence given by the footprint expert. But again, the problem is that any new subject must be brought under the terms 'science' or 'art'.

Exclusionary Rules:

The general rule as already mentioned is that the expert witness is deemed necessary only if the particular subject is beyond the scope of a prudent man. If it is within the common knowledge of a person, then in such cases, expert opinion is not regarded. This is the position in India which is quite similar to the position in other countries. The fundamental rule is to not consider expert evidence if it does not help the Judges in interpreting the facts.

In England, courts have been reluctant to admit any expert opinion regarding human behaviour, reactions and emotions. This is because of the view that previous experience is sufficient to understand any issue relating to human behaviour.

In United States, in *James Victor Salem v. United States Lines Company*³⁴, it was pointed out that expert evidence can be excluded and deemed unnecessary by the Trial Judge if the facts and issues of the case can be properly explained to the Jury and the facts are of common understanding and if the Jury is able to decide based on it.

But this rule has been criticised, especially, for disregarding expert opinion in human behaviour and psychology. Hence, the rule has been slightly relaxed in the England which was seen in *R v. Robinson*³⁵

³² Federal Rules of Evidence. Rule 702 States of the United States say that, "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 there in the form of an opinion or otherwise".

³³ AIR 1959 Pat 534.

³⁴ 8 L.Ed. 2d 313 (1962).

³⁵ [1994] 3 All ER 346.

Ultimate Issue Rule:

The role of expert in any case is to provide the evidence to the Judge. But he cannot try and supersede the Judge. He cannot execute any judicial function. Hence, a witness shouldn't disturb or modify the ultimate issues in a case. This is called the ultimate issue rule. It is applicable to expert as well as lay witness. In India, the Judges were hesitant to surrender their own opinion to that of the experts. This was also discussed in *State v. Pali Ram*³⁶. The position is same in England. In the US., expert opinion relating to ultimate issues are admissible in certain cases.³⁷

Privilege against Self- Incrimination:

This means that a person cannot be asked to incriminate himself. The privilege to not incriminate self is given to individuals. The fifth amendment³⁸ of the U.S. constitution states no person shall be forced to be a witness against himself. By judicial Interpretation, the above provision has been given a broad connotation. This privilege has been extended to civil and criminal proceedings.

In England, except in a few cases, no witness can be compelled to answer any question or to produce any document the tendency of which is to expose the witness (or the spouse of the witness), to any criminal charge, penalty or forfeiture.³⁹

In India, the question raised was if a person is asked to give his specimen handwriting or signature, or impressions of his finger, palm or foot to the investigating officer under Section 73 of the Evidence Act, then does it mean he is being forced to be a witness against himself under Article 20(3) of the Constitution? The court in *State of Bombay v. Kathi Kalu Oghad*⁴⁰ considered these questions and held that asking a person to give his specimen handwriting or signature, or impressions of his finger, palm or foot to the investigating officer does not violate Article 20(3) of the Constitution. Though they come under the meaning of evidence in the broader sense, they are not violative because these specimens cannot change or alter its intrinsic character by concealment of its true nature. They are also not in the nature of 'personal testimony' and hence is not violative of Article 20(3).

³⁶ AIR 1979 S.C. 14.

³⁷ Steve Huyghe and Adrian Chan, *The Evolution of Expert Witness Law under U.K. and U.S. Jurisdiction*, JAMS Global Construction Solutions, 2014, p. 7.

³⁸ "No person shall be compelled in any Criminal Case, to be a Witness against Himself."

³⁹ Andrew Choo, *The Privilege Against Self-Incrimination and Criminal Justice*, A&C Black, 2014, p. 13.

⁴⁰ AIR 1961 S.C. 1808.

Conclusion & Suggestions:

Firstly, the problem with expert opinion is that it is merely an advisory opinion. It is only corroborative and not a conclusive piece of evidence. The Evidence Act does not envisage any guidelines as to who can be termed as an expert? It merely mentions subject-matters in which opinion can be sought by the court of law. The definition of expert opinion is also missing. It has also not been mentioned in the Evidence Act on how the court of law will try to ensure that the opinion of the expert is not partial or that expert is not enthusiastic to prove the case of the prosecution.

Secondly, the law on expert opinion in India is not a comprehensive one. This is why the expert opinion is considered a weak evidence. No proper stress has been laid on the professional qualification. Experience and skill has only been given predominance. The legislature must take efforts to bring in guidelines to ensure that the expert's opinion can be relied on by the Court of law while deciding cases. This clearly proves the hypothesis.

Thirdly, there should be some amendment regarding the procedure of production of expert witness as mentioned earlier. Consideration should be given on if the expert is to be appointed by the Court or by the party to the suit.

Fourthly, in India, the expert witness is not given any protection and is harassed in most cases. Steps must be taken to ensure that they are given protection. There is an urgent need to evolve an independent witness protection measures. This would largely focus on the witness, his contribution and his role in the trial. His security and his family's must be given paramount importance. His identity must be protected, this is to ensure that his life is not affected by those people whose liberty depends completely on his remaining silent and not speaking in the court of law.

Fifthly, scientific test must be given more weightage than eye-witness as there are lot of possibilities for the eye-witness to have been exaggerating facts and providing a distorted version of the real incident.

Lastly, the role of expert witnesses in India is limited. It is not wide enough to be applied in all cases. Experts are appointed only after the other means of procuring evidence has been exhausted by the general investigation team and the Judge. So this causes is a delay in the case proceedings. Also, with the increasing efficiency in which the crimes are being committed

nowadays, there is an imminent need to develop the forensics technology of the country by taking the advice of experts.

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