Factsheet 60: Experts in Criminal Proceedings

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This factsheet takes a general look at the criminal justice system.

- For details of Part 19: Expert Evidence and the associated Practice Direction, the rules that apply to all experts working within the criminal justice system, see Factsheet 55.
- To learn more about appearing in court, see Factsheet 56.
- Factsheet 61 deals in detail with disclosure of evidence in criminal proceedings.
- For all the rules and regulations relating to payment of your fees and disbursements in criminal cases, see Factsheets 9, 10 and 11.

The legal system in England and Wales can be divided into:

- the **criminal** justice system – involving cases where the State takes action to determine whether a party has committed a crime
- the **civil** justice system – in which a party takes action against another, usually with the aim of achieving financial compensation.

Which court will hear the case and which procedures will be followed will depend on a number of factors, including the nature of the charge and the consequences of a guilty verdict.

At most court hearings, two or more parties come before the court to request a ruling. Each party is usually represented by a lawyer who argues the case. At a hearing, the court needs to:

- **find out what happened**, i.e. establish the facts
- if necessary, **call for expert opinion** to inform the court's decision
- before making a ruling, **determine applicable law**
- **make a ruling**.

Criminal process

The bulk of criminal cases are brought against a defendant (an individual or a company) by the State's prosecuting authority – the Crown Prosecution Service (CPS). The State funds the investigation and prosecution of all criminal cases. Citizens may also bring private prosecutions which they must fund themselves.

A criminal case begins with an investigation by:

- the police
- the Her Majesty's Revenue and Customs (HMRC)
- the Serious Fraud Office
- a local authority
- the Department for Business, Energy and Industrial Strategy (BEIS), or
- the Attorney General.

The prosecuting authority will work in the early stages of a case to gather evidence so that an assessment can be made as to the likelihood of a successful prosecution.

Following the investigative phase, if it is believed that a crime has been committed, then one of two courses will be followed.

1. If it is unnecessary to arrest the offender, a summons/requisition will be served advising that it is believed that they have committed a criminal offence.

2. If the defendant is to be arrested, then the police will detain, interview and charge him.

Whichever course is followed, the prosecuting authority will take the criminal proceedings forward to trial.

There are three types of offence in criminal proceedings:

- **summary** – less serious, heard in the magistrates' court
- **either way** – heard in either the magistrates' or the crown court, the magistrates deciding at a Mode of Trial hearing
- **indictable** – most serious, heard in the crown court.

Whichever category the case falls into, the magistrates' court or youth court will be the first port of call. The relevant court will deal itself with all summary and some either way cases, but it will commit all indictable and other either way cases to the crown court.

If a defendant pleads guilty, a full trial does not go ahead; the court meets only to decide on sentencing. If a defendant pleads not guilty, a full trial proceeds. If found guilty, sentencing usually takes place at a later date.

Courts

All criminal cases start out life in the magistrates' or youth court, and more than 90% are dealt with fully there. The magistrates or a district judge need to decide:

- **whether there is a case to answer**
- whether the defendant should be **held in custody** to await trial
- whether the defendant should be **offered bail** and released, subject to him returning to court on a given date
- whether the defendant is **eligible for legal aid**
- **the trial court** – magistrates' or youth (summary trial) or crown (trial on indictment) court.

Magistrates' court/youth court: summary trials

Criminal trials completed in a magistrates' or youth court are called summary trials. They are heard by magistrates (usually three lay magistrates sit on the bench) or a district judge (who is a qualified lawyer with a least 7 years' experience). They consider the less serious crimes, e.g. speeding offences, shoplifting, minor theft, minor assault, etc. The court needs to:

- decide whether the defendant is guilty or not guilty

and, if guilty:

- decide whether to adjourn to obtain a pre-sentence report from the Probation Service

- pass sentence, or send the guilty party to the crown court (which has more severe sentencing powers).

The magistrates are not lawyers and have volunteered their time to sit as Justices of the Peace. They are assisted by a magistrates' clerk, who is legally qualified and advises them with matters of law.

It can be quickly seen that timetabling in the magistrates' or youth court is near impossible. The uncertain nature of the unfolding case – whether it will be a quick 15-minute 'no case to answer' session, a more lengthy full trial or something in between – means that participants can be left waiting for hours while preceding cases are handled.

Crown Court: trials on indictment

The remaining criminal trials are heard in the crown court. This court considers the more serious offences, including murder, rape, robbery, fraud, dangerous driving, serious assault and drug offences.

The crown court also hears:

- appeals from the magistrates' court and
- cases transferred from the magistrates' court for sentencing.

Crown court trials are presided over by a judge and empanel a jury. The judge may be a high court judge, a circuit judge or a recorder. The role of the judge is to:

- control the proceedings
- direct the jury on the law
- direct the jury as to the weight to be attached to the evidence of each witness
- pass sentence if the defendant is convicted.

The role of the jury is to:

- listen carefully to the evidence
- decide whether the defendant is guilty or not guilty.

Appeal courts

The appeal court structure is very complicated and does not usually apply to expert witnesses. Expert evidence will be confined almost exclusively to the magistrates', youth or crown court at the main trial hearing. The higher courts are wholly appellate, which means that they rarely consider new evidence.

The only new expert evidence that may be allowed at a higher court would be evidence that has come to light since the original trial that could not have been admitted at the time. So, for example, if science has progressed rapidly and a new forensic science technique has been developed, the application of which has provided new evidence, then that may be considered. But if a report is now available from a source that could have been consulted before the original trial took place, then it will not be allowed to influence proceedings.

Forms of address

Before attending court it is worth making some effort to find out who will be presiding over the case and their title. There are correct forms of address that should be adopted, and they are detailed below.

The form of address is not court-dependent. So, for example, a High Court Judge should be referred to as Your Lordship/Your Ladyship or My Lord/My Lady regardless of the court setting. If in doubt or to be doubly sure, ask your instructing lawyer or a court usher for confirmation prior to the hearing.

Who	Correct form of address
Magistrate	Sir or Madam or Your Worship
District judge	Sir or Madam
Circuit judge, recorder or assistant recorder	Your Honour
Registrar	Registrar or Sir/Madam
High Court Master	Master (regardless of gender)
High Court Judge	Your Lordship/Your Ladyship or My Lord/My Lady
Lord Justice of Appeal	Your Lordship/Your Ladyship or My Lord/My Lady
Lord Chief Justice (most senior criminal judge in England and Wales)	Your Lordship/Your Ladyship or My Lord/My Lady

Experts should avoid excessive use of these terms. It is probably sufficient to use them once to preface or end responses, and it would be inappropriate and, frankly, laborious to use them in every sentence.

Evidence in criminal trials

There are three categories of evidence in criminal trials:

- **documentary** evidence – including photographs, video and audio recordings, photofits, documents (e.g. letters, memos, e-mails, hospital records), etc.
- **real** evidence – e.g. a firearm, a signature, radar traces, photographs, video and audio recordings
- **witness** evidence – e.g. eyewitnesses, professional witnesses and expert witnesses.

Witness evidence in criminal trials

There are three different types of witness:

- **witness of fact** (eyewitness) – someone who observed or heard something during an incident and can give evidence about what happened, but must not give an opinion, e.g. an eyewitness to a road traffic accident. A statement is given, and an appearance at court is required unless all sides agree that the statement can be read in court.
- **professional witness** – a professional who saw something happen in the course of their everyday job, e.g. police officers and police surgeons. They mainly give factual evidence, but can offer some opinion. A statement is made and, if the statement is not disputed, a court appearance will be unnecessary.
- **expert witness** – a professional called to give expert opinion based on the facts (assumed or observed) of a case. An expert witness will write a report and will be asked to attend court if any party wishes to hear his oral evidence or conduct a cross-examination of his evidence.

Witness summons

A witness can be compelled to attend court if a witness summons (or subpoena) is served. A witness summons will be issued in criminal cases:

- if a witness does not confirm in writing their willingness to attend court to give oral evidence
- if a witness refuses to attend court to give oral evidence

- if a witness's employer refuses to allow time off to attend court.

A summons must be served on the witness in person. It will inform the witness of:

- the location of the court they must attend
- the time and date of the trial.

Failure to obey a witness summons may lead to arrest, imposition of a fine or imprisonment.

See Factsheet 43 for more information on the witness summons.

Disclosure

Disclosure (or discovery) of evidence refers to the act of informing all opposing parties of the evidence held. In criminal litigation, disclosure ensures that parties cannot be ambushed at trial with previously unannounced evidence or witnesses.

See Factsheet 61 for lots more detail.

Burden of proof

In general, the prosecution has to prove the case, showing that there is sufficient evidence to find the defendant guilty. To secure a conviction, the prosecution must both:

- prove beyond reasonable doubt every element of their case
- disprove beyond reasonable doubt the defendant's defence.

In a few instances the burden of proof falls on the defence team, e.g. if the defendant wishes to plead insanity or diminished responsibility. However, in this case the defence team is only required to prove on the balance of probability rather than beyond reasonable doubt.

Criminal trial procedure

In brief, a criminal trial proceeds as follows:

1. Prosecution opening speech
2. Prosecution evidence called
   For each witness…
   Examination-in-chief by prosecution
   Cross-examination by defence
   Re-examination by prosecution (if required)
3. The defence now has the option to submit to the court that there is no case to answer if key elements of the case cannot be proved.
4. Defence opening speech
5. Defence evidence called
   For each witness…
   Examination-in-chief by defence
   Cross-examination by prosecution
   Re-examination by defence (if required)
6. Defence closing speech
7. Prosecution closing speech (optional) in the crown court, but rarely in the magistrates' court.

Note that expert witnesses can sit in court throughout the trial and listen to all the evidence adduced. Witnesses of fact are not permitted in the courtroom unless giving their evidence.

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