

On 20 March 2013, Lady Clark of Calton, Chairman of the Scottish Law Commission, addressed a conference organised by the Forensic Science Society which dealt with developments and challenges in relation to expert evidence and the law, in a speech entitled "**Expert evidence: viewed from the bench**". The speakers included Kenny MacAskill MSP (Cabinet Secretary for Justice), Professor Fiona Raitt (University of Dundee), Professor Christophe Champod (University of Lausanne), Gerard Sinclair (Chief Executive, Scottish Criminal Cases Review Commission), Dr David Parratt (Director of Training, The Faculty of Advocates), Sheriff Tom Welsh QC (Director of Judicial Institute), Frank Mulholland QC (Lord Advocate), Professor Sue Black (University of Dundee), Professor Niamh Nic Daeid (University of Strathclyde) and Andrew Rennison (Forensic Science Regulator).

Lady Clark, under reference to the various authorities cited below, considered in some detail the position in England and Wales, where the problems with the use of expert evidence were deemed to be sufficiently significant to warrant a call for reform from the House of Commons Science and Technology Committee. The primary reason prompting the Committee's call for reform related to the lack of a clear and cogent test to determine the reliability of expert evidence, a complaint that has also been raised by academics and members of the judiciary in England. There were also a number of examples identified in England where dubious expert evidence had caused miscarriages of justice which resulted in demand for reform to introduce more stringent rules. The Committee considered that the common law approach was *laissez faire* to an inappropriate extent, in that so-called expert evidence was not subject to sufficient scrutiny in terms of reliability before allowing it to be heard in court.

Consideration was given by the Committee to the approach developed in the United States, referred to as the *Daubert* test. This sets out various criteria to be fulfilled before proposed expert evidence can be admitted as evidence in court. Although the utility of this "gatekeeping" test itself is a contentious matter, the Committee argued that, in principle, it would be beneficial to have a formula building upon the *Daubert* test that could provide objective criteria to ascertain whether the evidence in question constitutes a reliable expert opinion. The Committee concluded that the test for admissibility of expert evidence was inadequate and required reconsideration.

Having accepted the referral from the Committee and having considered the issues, the Law Commission of England and Wales made a number of recommendations. They recommended that a special statutory test be formulated to determine the admissibility of expert opinion evidence. They proposed developing a potential framework for that test, including the common law requirements of assistance, expertise, and impartiality. It was also suggested that an additional test relating to the reliability of expert evidence in a given case should be incorporated into the wider consideration of admissibility. They recommended that this should be codified in primary legislation. The rules would include a provision stating that the reliability part of the test should only be applied in situations where the evidence may not be sufficiently reliable to be admitted. Furthermore, the burden of proof in terms of the reliability of a piece of expert evidence should lie with the party seeking to rely on said evidence. Some further consequential amendments to the rules relating to pre-trial disclosure and court appointed expert were also recommended, as well as some alterations to the Criminal Procedure Rules 2010.

Further recommendations included that a set of guidelines should be produced to aid judges in implementing these new provisions, and that all judges and lawyers dealing with criminal cases should have to undertake training on dealing with expert opinion.

Lady Clark contrasted this with the position in Scotland where there had been no widespread demand for reform in this area of law. Expert evidence was not raised as a problematic area in need of reform in the Commission's last round of consultation prior to the finalisation of its Eighth Programme of Law Reform. Further, the Commission has not been asked to consider

any reference relating to expert evidence from Scottish Ministers. Expert evidence has received attention in Scotland in the form of the *Shirley McKie* case which did lead to an inquiry. The ensuing report, which runs to hundreds of pages, made detailed recommendations in relation to various aspects of fingerprint evidence, but it is important to note that this inquiry remains embedded in its specialist area. The report did not seek to address the wider issues which might arise in relation to expert evidence in court proceedings in Scotland. Lady Clark noted that the absence of widespread and reasoned demand for reform may suggest that there is no particular problem in Scotland in relation to expert evidence. She argued, however, that such a conclusion might be difficult to justify.

Lady Clark highlighted that law and practice in relation to expert evidence is different in Scotland compared with England and Wales. She therefore advocated caution in making reference to the conclusions of the Law Commission report in England and Wales when considering the Scottish position. She made reference to problems encountered by judges and sheriffs in dealing with expert evidence when they are acting as decision-maker. She explained that these problems become more complex when the decision-maker is not a skilled professional but a group of citizens, chosen at random, sitting as a jury in criminal or civil cases. She discussed the power of the judge to withhold a case from a civil jury trial where special cause exists as to why this should be done, for example in cases where the evidence is deemed too complex for the case to be tried by jury. She noted that no such power exists in criminal cases.

In conclusion, Lady Clark acknowledged that there were many interesting issues raised by the speakers in the conference. She emphasised the importance of checks and balances in an adversarial system. She concluded that one of the best safeguards against the difficulties posed by expert evidence is well trained, experienced counsel and advocate depute who have a clear idea of the evidence and what they are trying to achieve in presenting the evidence to the court. That requires preparation time, skill and training. The judge has to make sense of the evidence where the judge is the decision-maker and in jury cases the judge has to assist the jury. This can be a challenging task, and is made more difficult if the evidence is presented in an incomprehensible or confusing way. The role of the expert is to assist the decision-maker whether that decision-maker be a judge or a jury. The role of counsel and the advocate depute is to understand the evidence and how it fits into the case, to facilitate the presentation of that evidence and, where appropriate, to challenge and test that evidence. When this is done with skill, everyone's task becomes a great deal easier, and, most importantly, justice is more likely to be served.

Expert Evidence and the law: developments and challenges
20th March 2013

Expert evidence: viewed from the bench
Lady Clark of Calton, Chairman, Scottish Law Commission

References

General Principles

- *Davie v Magistrates of Edinburgh* 1953 SC 34
- *R v Turner* [1975] QB 834
- *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68
- *McTear v Imperial Tobacco Ltd No 1* [2005] CSOH 69

Emerging Expertise

- Fingerprints
Hamilton v HM Advocate 1934 JC 1
- DNA
R v Pitchfork (Colin) [2009] EWCA Crim 963.
See, in Scotland, *Welsh v HM Advocate* 1992 SLT 193
- Teethmarks / Bite marks
Hay v H.M. Advocate 1968 JC. 40

Inquiry in Scotland

- *HM Advocate v McKie* (1999, unreported)
- *McKie v Strathclyde Joint Police Board* 2004 SLT 982
- *McKie v Scottish Ministers* [2006] CSOH 54
- The Fingerprint Inquiry Scotland
- The Rt Hon Sir Anthony Campbell, "The Fingerprint Inquiry Report: Volume 1" 14th December 2011

England and Wales

- House of Commons' Science and Technology Committee, "Forensic Science on Trial", Seventh Report (2004–2005) HC 96-1 (25th July 2005)
- The Law Commission, "The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales" Consultation Paper No 190
- The Law Commission, "Expert Evidence in Criminal Proceedings in England and Wales" Law Com No 325

Dubious expert evidence:

- *Dallagher* [2002] EWCA Crim 1903, [2005] 1 Cr App R 12 (ear print evidence)
- *Clark* [2003] EWCA Crim 1020, (expert lacking the relevant expertise in statistics offering views on the likelihood of naturally occurring cot deaths)
- *Harris and others* [2005] EWCA Crim 1980 (hypothesis relied upon by prosecution in relation to injuries suffered by a child did not have strong empirical research behind it)

Recommendations for change:

- The Law Commission, "Expert Evidence in Criminal Proceedings in England and Wales" Law Com No 325 at Part 9

America

- *Daubert v Merrell Dow Pharmaceuticals* 509 US 579.

Different approaches in England and Scotland

- *Amy Whitehead's Legal Representative v Graeme John Douglas and Anr* [2006] CSOH 178 *per* Lord Carloway at paras 16-18
- *BSA International SA v Irvine Outer House* 2009 SLT. 1180 *per* Lord Glennie at paras 16-19
- *McTear v Imperial Tobacco Ltd* No 1 [2005] CSOH 69 *per* Lord Nimmo Smith at paras 5.1 – 5.19

Assessing expert evidence

- *Liehne v HM Advocate* 2011 SCCR 419
- *Scottish Children's Reporter Administration (in the case AC) Kilmarnock*, Kilmarnock Sheriff Court, 20th December 2010 (Case Reference: B620/09)

Civil Jury Trials

- *Gibson v McAndrew Wormald & Co Ltd* 1998 SLT 562 (issues allowed – no special cause shown)
- *Fyfe v Barnet and Morton Ltd* 1965 SLT (Notes) 52