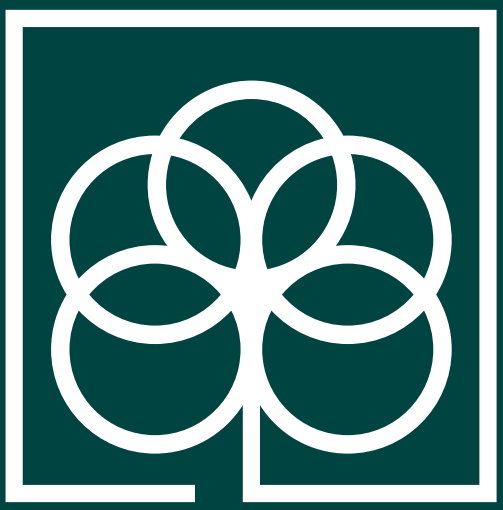

New Park Court

Criminal Briefing

Leeds

16 Park Place
Leeds
LS1 2SJ

DX: 26401
Leeds Park Square
T: +44 (0)113 243 3277
E: clerks@newparkcourt.co.uk

Newcastle

3-7 Broadchare
Newcastle
NE1 3DQ

T: +44 (0)191 232 1980
E: clerks@newparkcourt.co.uk

New Park Court

CHALLENGING THE ADMISSIBILITY OF EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS

ROBERT SMITH KC

1.0 Introduction

1.1 When the Law Commission's Report[1] in relation to the admissibility of expert evidence in criminal proceedings was published by Parliament in March 2011, it made reference to an aspect of real concern which the Commission had raised in its Consultation Paper on the subject. The Commission considered that the attitude of the criminal courts, including Judges as well as Counsel, had been one of *'laissez-faire'* in the context of the admissibility of expert evidence. The point was made by the Commission that expert evidence was not being properly scrutinised for the purposes of identifying whether it was reliable enough to be admitted in evidence or to ensure that it complied with the application of the common law principles determining admissibility, and that this was particularly so with scientific (including medical) expert evidence. The Commission made the point that sufficient attention was not being paid to the principles defined by the common law as preconditions to admissibility and that Judges were equally responsible for permitting expert evidence to be adduced without proper scrutiny, leaving any challenge to be dealt with during the trial process and before the jury.

[1] Law Commission Report No 325

The Commission also recommended that there should be a statutory test for the admissibility of expert evidence. Their principal recommendation was that in order to be admissible, expert evidence needed to be 'sufficiently reliable' to be admitted. This concept is wide in its application since it also embraces issues of impartiality arising from the requirement for an expert to be independent and objective in terms of the content of any report and the expressions of opinion offered. As we shall see, the requirement for an expert to be independent and impartial in discharging his or her duty to the Court, rather than to the instructing party, is one of the governing principles for determining sufficient reliability and. therefore admissibility. This was laid down with clarity in the often cited ruling of Cresswell J in *The Ikarian Reefer*.[2]

1.2 The Government subsequently made a decision not to accept the Commission's recommendation to introduce legislation to this effect. There were no doubt good reasons for this, not least of which was that the common law in fact already defined the principles of admissibility and there was no real requirement for legislation. The problem was the obscurity of some of the principles in terms of understanding current legal practice and the failure of Judges to engage with the issue in appropriate cases. Subsequently, the current Criminal Practice Direction issued by the Lord Chief Justice approved the application in practice of the Law Commission's recommendations and now actively encourages Judges to apply the Commission's recommendations in cases where such evidence comes under scrutiny. The Practice Direction makes clear that the common law remains the definitive source for determining admissibility. Thus, where it might appear that an expert's report does not meet the criteria for admissibility, whether in whole or in part, practitioners should study the Law Commission's Report in the context of the Criminal Practice Direction and Part 19 of the Rules and invite Judges to engage with the question of admissibility. The Report is both extensive and detailed, but it is a particularly informative one, supported in its recommendations and conclusions by the current rules governing procedure.

1.3 Practitioners therefore need to be alive to these important points in considering admissibility. Quite simply, expert evidence of opinion, whether received in our hands with the potential to be deployed on behalf of our clients, or as material relied upon by an opposing

[2] [1993] 2 Lloyd's Rep 68

party, needs to be examined carefully in the course of the pre trial process in order to ensure that it meets the criteria for admission in evidence. Fortunately, most experts now know what is required of them in the preparation of expert reports in criminal proceedings, but a small and significant number of reports do not meet the standard required, either wholly or in part. Deficiencies must therefore be identified at the earliest opportunity and must be ventilated at a pre trial hearing at the earliest opportunity.

1.4 This article is therefore intended to be a summary guide for practitioners on the question of how they should analyse and consider the issue of admissibility and it makes reference to the key materials that they will need for this purpose.

2.0 The Authorities and the Rules

2.1 The starting point is, of course, The Criminal Procedure Rules – Part 19. This Part needs to be read with the Combined Criminal Practice Directions, CPD V 19A and CPD V 19 B. CrimPR 19.3 (3) (c) lays down very clear criteria in relation to the content of an expert's report. The Criminal Practice Direction spells it out even more clearly. The Court's statutory power to exclude expert evidence which does not meet the criteria is section 81 of the Police and Criminal Evidence Act 1968 and there are separate provisions within the Criminal Procedure and Investigations Act which are referred to in the Criminal Practice Direction.

2.2 Underpinning these procedural rules are a number of important authorities which will need to be deployed in the course of applications to exclude expert evidence. The first of these for active consideration is:

2.3 *Kennedy v Cordia Services (LLP)* [2016] 1 W.L.R.597, a judgment of the Supreme Court on appeal from the Court of Session. While the judgment relates to an Appeal in civil proceedings from the Inner House of the Court of Session, the principles are applicable in criminal proceedings in England and Wales and it should be noted that the treatment of the case law in *Kennedy* is wide ranging in terms of its reference to decisions in jurisdictions other than Scotland, including England, Australia and the United States. At paragraph 38 onwards the judgment deals with the matters to be addressed in the use of expert evidence, and a number of English authorities are cited in the judgment. The judgment also contains the important

observation (at paragraph 34) that *"There is a degree of commonality of approach between jurisdictions which adopt similar methods of fact finding ....."*

2.4 A number of important principles can be distilled from the judgment in *Kennedy*. These reflect the prevailing case law and the practice requirements incorporated within the Criminal Procedure Rules and the Practice Direction. The starting point is the approval by The Supreme Court of the principles for the admission of expert evidence[3] which were defined in the South Australian Case of *R v Bonython* (1984) 38 SASR 45:

"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[4] 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."

2.5 The Supreme Court identified four considerations which apply to the admissibility of expert evidence, as follows:

(i) "44……*There are in our view four considerations which govern the admissibility of skilled evidence: (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence. All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent."*

(ii) An expert must explain the basis of his or her opinion. A statement by way of mere assertion is "worthless."

"48. An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "bare ipse dixit" carries little weight, as the Lord

[3] Paragraph 43
[4] Note the word 'reliable.'

President (Cooper) famously stated in Davie v Magistrates of Edinburgh 1953 SC 34 , 40. If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH 1976 (3) SA 352 , 371:

"an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."

As Lord Prosser pithily stated in Dingley v Chief Constable, Strathclyde Police 1998 SC 548 , 604: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

(iii) An expert must demonstrate to the Court that he or she has relevant knowledge or experience to give opinion evidence. Where an expert establishes such knowledge or experience he or she can draw on the general body knowledge and understanding of the relevant expertise.[5]

(iv) If a party proffers an expert report which on its face does not comply with the recognised duties of a skilled witness to be independent and impartial, the court may exclude the evidence as inadmissible.[6]

2.6 The importance of the requirement of independence and impartiality must not be overlooked. It is clear that an expert's report must be balanced and objective in its content, informing the court of material which conflicts with the opinion being presented and, if a controversial hypothesis is being introduced there is a heavy burden on the expert to explain his or her methodology and whether a correct and established scientific basis has been applied in reaching the conclusions relied upon. Practitioners are referred to the decision in *Re: AB: Child Abuse Expert Witness* [1995] 1 FLR 181:

"...the expert who advances such a hypothesis owes a very heavy duty to explain to the court that what he is advancing is a hypothesis, that it is controversial (if it is) and to place

[5] Paragraph 50.
[6] Paragraphs 51 to 53.

before the court all the material which contradicts the hypothesis. Secondly, he must make all his material available to the other experts in the case."

2.7 The Supreme Court's judgment is supplemented in this jurisdiction by a number of authorities (referred to herein) and the provisions of Part 19 of the Criminal Procedure Rules 2020[7] and, in particular, Rules 19.3 (3) (3) (c) and 19.4, together with the Criminal Practice Directions CPD V Evidence 19A: Expert Evidence and 19B.[8]

2.8 Crim PR 19.3 (3) (c) includes the important requirement to serve with the report any information and material which falls under the following head:

(i) *"Notice of anything of which the party serving it is aware which might reasonably be thought capable of undermining the reliability of the expert's opinion, or detracting from the credibility or impartiality of the expert."*

2.9 The Criminal Practice Direction CPD V 'Evidence 19A' includes the following:

(i) *"The common law, therefore, remains the source of the criteria by reference to which the court must assess the admissibility and weight of such evidence; and rule 19.4…lists those matters with which an expert's report must deal, so that the court can conduct an adequate such assessment"* [19A.3].

(ii) *"Therefore factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include* [19A.5]……..:

(d) *the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance in peer reviewed publications), and the views of those others on that material.*

(e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise.

---

[7] Blackstone's Criminal Practice 2023 Supplement 1 page 378 / Archbold 2023 Supplement 1 - §B-338
[8] Blackstone's Criminal Practice 2023 Supplement 1 page 382 / Archbold 2023 Supplement 3 – page 441 - 443 / §B-348

(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained.

(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

(iii) *"To assist in the assessment described above, Crim PR 19.3 (3) (c) requires a party who introduces expert evidence to give notice of anything of which that party is aware which might reasonably be thought capable of undermining the reliability of the expert's opinion, or detracting from the credibility or impartiality of the expert and Crim PR 19.2 (3) (d) requires the expert to disclose to that party any such matter of which the expert is aware. Examples of matters that should be disclosed pursuant to those rules include (this is not a comprehensive list).....(c) adverse judicial comment (d) any case in which an appeal has been allowed by reason of a deficiency in the expert's evidence (d) any adverse finding, disciplinary proceedings or other criticism by a professional, regulatory or registration body or authority.....(k) a history of failure to observe recognized standards in the expert's area of expertise (l) a history of failure to adhere to the standards expected of an expert witness in the criminal justice system"* [19A.7].

(iv) *"....<u>where matters ostensibly within the scope of the disclosure obligation come to the attention of the court without their disclosure by the party who introduces the evidence</u> then that party, and the expert, should expect a searching examination of the circumstances by the court and subject to what emerges, the court may exercise its power under section 81 of the Police and Criminal Evidence Act 1984 or section 20 of the Criminal Procedure and Investigations Act 1996 to exclude the expert evidence"* [19A.9].

2.10 These rules and the Judgment of The Supreme Court should also be read in conjunction with decisions such as *R v Gilfoyle* [2001] 2 Cr App R 5 at §25 (approved in *Kennedy* at §56) in which the Court of Appeal, in excluding the evidence of the proposed expert in that case, made this important observation:

".... his reports identify no criteria by reference to which the court could test the quality of his opinions: there is no data base comparing real and questionable suicides and there is no substantial body of academic writing approving his methodology."

Valuable guidance is also contained in decisions such as *R v Dlugloz* [2013] 1 Cr App R 32 (referred to expressly in the Criminal Practice Direction 19 A).

2.11 Thus, the preparation and marshalling of expert evidence is of the utmost importance in achieving a just resolution. In applying to exclude expert evidence, in whole or in part, the Court needs to be invited to consider focused issues, these authorities (and others), and those aspects of the report upon which resolution of those issues will depend. Compliance with the Criminal Procedure Rules and the Practice Directions is a matter of substance, not form. See *Stephen H v The Queen* [2014] EWCA Crim 1555 at paragraphs 43 and 44] and the observations of the Court of Appeal in *R v Berberi* [2014] EWCA Crim 2961 at paragraphs 16 and 17.

3.0 Conclusions

3.1 Many, if not most, of the expert reports that come into our hands will meet the test for admissibility without difficulty, particularly where they are produced by experts within mainstream medical and scientific opinion. They need to be considered and dealt with in the ordinary way, namely, within the trial process.

3.2 Where expert evidence sits outside mainstream opinion, or presents new or novel theories, or takes issue with accepted medical, scientific or other established doctrine, the evidence needs to be scrutinised with care. It may not meet the requirement of being 'sufficiently reliable' to be admitted for any number of reasons. The principles and guidance referred to above then need to be deployed for the purposes of determining whether the material falls to be excluded as 'not sufficiently reliable.' Submissions relating to admissibility need to address the Rules and the Practice Direction and those principles identified in *Kennedy* which are relevant to any such application. Submissions need to be structured to incorporate (i) the issues in the case; (ii) the relevance of the expert evidence to those issues; (iii) the deficiencies identified; and (iv) the grounds upon which the Court is to be invited to rule that the evidence should not be admitted. The onus lies upon the party seeking to rely upon the evidence to establish that it meets the criteria for admissibility once its admissibility is challenged and the reasons for the challenge identified.

3.3 Practitioners will need to be astute to the importance of considering whether the report in question demonstrates an independent and impartial approach by the expert. If the witness may

not satisfy that requirement, his or her evidence may not meet the criteria for admissibility since it may fail the test for reliability. If a controversial theory is advanced, the report needs to identify the process by which the theory was reached, and whether it meets established scientific criteria. It is important to remember that the challenge to admissibility involves analysis of the methodology and the reasoning which results in the expert's conclusion. A bare statement of opinion by an expert is "worthless." As the judgment in *Kennedy* confirms, a mere statement of opinion without the reasoning is of no value to the Court. The methodology applied therefore needs to be identified together with all material which may impact upon the accuracy of the theory. There should be strict compliance with the Rules and the terms of the required Declaration.

3.4 Finally, the importance of raising and addressing these issues at the earliest stage in the trial process cannot be sufficiently emphasised. The procedural rules are clear. The evidence can be examined and if necessary tested on the issue of reliability before the trial commences, thereby permitting a ruling which will allow the parties to know in advance where they stand and to clear the way for a trial in which issues of admissibility have already been defined.

ROBERT SMITH K.C.

New Park Court Chambers
Leeds and Newcastle upon Tyne