EXPERT EVIDENCE: RELIABILITY AND RELEVANCE
Iain A J McKie

The 'Fingerprint Inquiry Scotland', which reported in December 2011, completely vindicated Shirley McKie in her fight against experts who wrongly identified a fingerprint as hers in 1997. Since then her father Iain McKie has campaigned for better expert evidence in our courts. Part of his campaign is a paper entitled 'Expert Evidence: Reliability and Relevance' in which he argues that that forensic and other expert evidence is not always being effectively processed in our courts. This brings with it the danger of miscarriages of justice.

The full paper can be accessed at:

http://www.shirleymckie.com/documents/ExpertEvidencefinaldraft15812.pdf

Summary of Paper

This paper seeks to answer the question.

'How well is the law meeting the challenges posed by scientific evidence?

While the main focus of the paper's research is Scotland based it is claimed that the findings have relevance across the UK and even further afield.

The author hopes the thoughts, criticisms and recommendations in the paper will act as a stimulus for some long overdue debate within the relevant Justice Systems in respect of the forensic sciences and the evidence they generate. The paper does not profess to provide the last word but will hopefully be a catalyst for further debate and change.

This will require a coming together of all those who have an interest in the reliability and relevance of expert evidence presented in our courts who it is argued are all too often not up to the task and have shied away from facing these admittedly complex issues.

What all legal systems have been facing over past decades is a rapid growth of scientific, technical, psychological, emotional, biological and other expertise to a point where it has become difficult if not impossible for these systems to consistently adduce what is legitimate and admissible expertise and what is not.

The internet has opened us up to a continuous stream of challenges to flawed expert evidence. Although this defective testimony represents a small minority of the total being presented in our courts tragically it can lead to miscarriages of justice with the innocent being deemed guilty and the guilty remaining undetected and unpunished. The financial costs are enormous. The costs in human terms are incalculable.

As a backdrop to the discussions the paper highlights 4 major reports aimed at improving the quality and reliability of forensic expert evidence across the world.

1. American Academy of Sciences Report: Strengthening Forensic Science in the United States: A Path Forward. 2009

2. The Law Commission Report: 'Expert Evidence in Criminal Proceedings in England and Wales'. 2011

3. The 'Fingerprint Inquiry Scotland' Report. 2011

4. Scottish Universities Insight Institute Paper: 'Scots Law of Evidence: Fit for purpose in the digital and global age'. 2011.

Of particular interest to this paper are the recommendations and reservations contained in these reports in respect of judges acting as 'gatekeepers' of expert evidence on the 'Daubert' model found in the USA.

The broad thrust of all the referenced papers is that change in the way we collect, assess, prepare, present and adjudicate on expert evidence is long overdue. While many of the change principles enunciated have been accepted there has been a general reluctance to implement the resultant recommendations. What these papers confirm is that in jurisdictions across the world miscarriages of justice are a real and present danger given the systemic failures of the law and science to decide how forensic and expert evidence is to be handled.

Taken together all the reports analysed and the mass of research material now available mounts a powerful challenge to the way expert evidence is handled in our justice systems and highlights the gulf between the theoretical rules and procedures surrounding the gathering and presentation of forensic evidence and the practical realities involved.

The author argues that over the past decade there has been a failure by prosecution authorities to adequately monitor the experts it uses, a failure by defence lawyers to engage its own experts or offer an informed and coherent challenge to the prosecution ones and a failure by the judiciary to acknowledge the poverty of the current approach. There is in short a judicial acceptance of expert evidence that appears at times to amount to a belief in infallibility.

The paper goes on to examine some of the providers of Forensic Services and those who purport to regulate their experts and to highlight some of the serious issues raised by the closure of the 'Forensic Science Service' (FSS) in England and Wales. These include potential failures in oversight and accreditation and an anticipated reduction in research facilities.

The importance of the appointment of Andrew Rennison as 'Forensic Science Regulator' in 2008 is highlighted. Concern is expressed that while he is expressing an overall confidence, that over time and with sufficient resources, his quality goals can be achieved the Regulator is in danger of being isolated and overworked as the government and others within the justice system, while happy to accord his ideas token public support, often do little to assist in their implementation.

The author alleges that once accreditation is achieved there is often little effective monitoring to ensure that failures to comply with the various codes and standards are reported, recorded and acted on. In the case of so-called independent experts, most of

whom have no route to accreditation, there appears to be little or no scrutiny in respect of the quality of evidence they are producing.

When it comes to quality control of our forensic services the gap between theoretical standards and procedures and the reality of their implementation is wide.

The paper looks at the work of the UK's sole national accreditation body, 'The United Kingdom Accreditation Service' (UKAS), and reservations are expressed about its efficacy. It is observed that despite all four of the Scottish Police Services Authority (SPSA) forensic laboratories being accredited to UKAS there has been no 'failure to comply' action taken following the publication of the sweeping criticism and recommendations for change contained in the 2011 'Fingerprint Inquiry Scotland Report'

The paper concludes that accreditation and regulation are of little use without effective monitoring of the implementation of the various codes of practice and without having effective procedures in place for identifying any 'failures to comply'. How efficiently the accredited services are delivered once accreditation has been achieved is of critical importance.

It is argued that while there are internal codes of practice extant in various forensic disciplines standards vary greatly from country to country and often within countries.

Central to the paper is a evaluation of issues central to the effective judicial assessment of expert evidence and it highlights some of the difficulties encountered where judges act as 'gatekeepers' for such evidence. It is argued that in Scotland judges adopt a somewhat 'hands off' approach to such evidence and that this results in a very real danger of 'bad' science being admitted as evidence and 'good' science being deemed as inadmissible.

In an exploration of some of the problems inherent in assuming that judges are qualified to carry out a 'gatekeeper' role in relation to expert evidence the paper highlights the recent Scottish Appeal Court case of William Gage where objective expert testimony by a renowned expert in identification was prevented from being heard as his evidence did not meet *'the test of necessity'.*

It is suggested that this case offers a good example of the judge's decision not taking account of well established thinking and research on memory and identification. It also provides a dramatic example of the dangers of creating judges as 'gatekeepers' of expert evidence. Rather than grasp the nettle and examine the issues surrounding expert evidence raised in this and other papers, the judiciary, often aided and abetted by the prosecution and defence, prefer to fall back on old established principles of our common law, stated cases and judicial experience which quite frankly no longer hold water.

The author believes that whatever is to be the way forward one thing is clear – the status quo is not an option. The frailties inherent in the current structures and procedures for the preparation, presentation and evaluation of forensic evidence make it imperative that we find a better way forward. What the research also makes crystal clear is that in general judges are ill equipped to act as 'gatekeepers' of expert evidence. The challenge is - how are they to be equipped properly for that role?

The paper goes on to argue that the judge's failure to act as effective 'gatekeepers' of expert forensic evidence is only one element in the 'quality' issues surrounding expert evidence. Those institutions within our justice system charged with the duty of ensuring that only the highest quality forensic evidence is presented in our courts are failing in that duty.

Organisations responsible for employing, training, setting standards and accrediting experts have for a number of reasons failed in their goal and have either failed to take coordinated action or have been frustrated in that respect.

In terms of developing, monitoring and maintaining high quality and reliable forensic expert evidence organisations like the Law Society, Faculty of Advocates, the Judicial Studies Committee and those concerned with law reform like the Scottish Law Commission , have an important role to play. All however are to some extent the meat in the sandwich between the suppliers and verifiers of expert evidence like the SPSA and police and the 'gatekeeper' judges. If they do not accept the need for higher standards then the whole system is at risk.

Overall the paper's research has found little or no appetite among Scotland's legal profession to debate or assess the efficacy of expert evidence. An awareness or understanding of the issues thrown up by forensic evidence and challenge they represent appears to be the exception rather than the norm. Failure to effect change only serves to render decision making out of touch, flawed, ultimately redundant and lacking scientific rigour and credibility.

Research for this paper revealed a number of other issues that affect how forensic expert evidence is prepared and utilized.

In Scotland the planned removal of the need for corroboration in criminal prosecutions has the potential to impact on expert evidence. Unfortunately it is not clear what this effect will be.

The paper argues that once the mantle of infallibility is stripped away from expert evidence corroboration becomes a necessity. Given the confused state of the forensic sciences it would be ludicrous to even consider lowering the standard of proof. We cannot lower the safeguards against expert evidence at the very time there are so many questions to be answered about its efficacy and admissibility. It is suggested that the way such evidence is processed in England and Wales might offer some solutions.

The recent Supreme Court decision which ruled that expert witnesses in England and Wales should no longer be immune from prosecution in respect of evidence given in court is highlighted. Lord Hope, one of two Scottish Supreme Court judges, in dissenting, asserted that removing immunity would create, *'an uncertain state of affairs which would potentially undermine witness immunity in general'*.

Given the uncertain state of expert evidence that the author believes exists in the UK today he argues that Lord Hope might yet prove to be right and that by removing immunity further uncertainty will be caused. He suspects the removal of expert immunity in England and Wales will lead to closer assessment of expert court performance and more and more claims against experts.

It could also be argued that the removal of immunity is just what is required to shake up a complacent system which is in denial about the serious issues undermining expert evidence in our courts and the potential effect it has on miscarriages of justice. Immunity not only protects the experts but also the system which fails to ensure they are fully effective and efficient.

The paper goes on to examine the debate about the relative benefits of assessing and hearing expert forensic evidence under the inquisitorial as opposed to our adversarial system.

It is argued that the accepted fiction is that the present adversarial system offers equal opportunity to prosecution and defence to bring forward objective expert testimony, have it tested in open court by a judge or jury and that the court is able to differentiate between 'good' and 'bad' science.

The paper points out that for all sorts of reasons ranging from judicial failings to effectively assess expert evidence to the reluctance of the state to fund legal aid this is not an equal struggle. It is also argued that our adversarial system encourages lawyers only to employ experts who will support their argument. This does not appear to be the best way of resolving forensic and other complex issues and ascertaining 'scientific facts.

The last decade is littered with many cases highlighting the deficiencies of an adversarial system where vital test results are withheld, mistakes are made, expert evidence can be confusing and contradictory and where effective quality control is absent. The cynical might observe that in our adversarial system juries are often the uncomprehending witnesses to a confusing game of chance being played out as experts trade 'opinions'. In this situation reliance on judicial guidance might well be misplaced.

As we have seen in any justice system change and reform to one part often impacts on other parts. The removal for the need for corroboration for instance has a ripple effect through the system and brings with it often unforeseen consequences. The author argues that reform of the rules governing expert forensic evidence cannot be isolated from other change and reform of the system. This calls for an overall rather than a partial system review.

In looking forward to solutions the paper identifies three major findings that have emerged.

1. Criticism of the authenticity, accuracy and admissibility of forensic expert evidence is a worldwide phenomenon.
2. Few if any of the recommendations emerging from major enquiries are ever implemented in full the approach being very much one of first aid rather than fundamental change.
3. Scotland's justice system is not good at learning the lessons that it's own and other jurisdictions deliver.

In short the decision makers within our justice system when faced with overwhelming evidence that something is wrong with the way we handle expert evidence either will not or cannot consider the application of that evidence to our system and engage in the required change management. This 'first aid approach' has kept things going but the author argues it is now redundant. All stakeholders within the system need to stop pushing in different directions, often in the cause of self interest and the status quo, and focus on a system of

preparing, delivering and assessing expert evidence which makes everyone involved more proactive, open and accountable. All of us need to start listening to the clear message being delivered from around the world.

The aim of this paper has not been a comprehensive review of all the issues surrounding forensic expert evidence. It is more an attempt to provide food for thought which it is hoped will act as a stimulus for some long overdue debate within the Scottish and UK Justice Systems in respect of the forensic sciences, the evidence they generate and the restrictive culture within which they operate.

It is a collection of informed thoughts and opinions resulting in the main from the author's experiences while fighting for justice for his daughter whose very life was threatened by erroneous forensic evidence.

The inevitable truth is however that the old checks and balances and systems and procedures for evaluating forensic evidence in the UK are no longer effective. All involved require to take a long hard look at themselves. We require to develop a consensus among those who manage our justice system that change is necessary and until we achieve this nothing will happen.

The paper concludes with a quote from Scottish philosopher David Hume which adorns the walls of the main concourse in Glasgow High Court

"….to have a fair and equitable trial, in which innocence runs no risk of being ensnared or surprised…it is all that a reasonable man can wish for, and all perhaps that is attainable to human wisdom."

The author believes that his daughter received a 'fair and equitable trial' because the 'bad science' was rejected and 'good science' accepted. He believes that every accused person is so entitled.

Iain A J McKie
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Notes:

1. The full paper can be obtained by contacting the author at: iain.mckie1@talktalk.net

2. It can also be accessed at:

   http://www.shirleymckie.com/documents/ExpertEvidencefinaldraft15812.pdf

3. Links to all of the paper's internet footnotes are available at:

   http://www.shirleymckie.com/documents/InternetBibliolatest.pdf