Guidance on the preparation, admission and examination of expert evidence

The Inns of Court College of Advocacy has published guidance on the preparation, admission and examination of expert evidence. The guidance aims to identify and promote the basis of good practice that is commonly accepted across the profession and supplements specific guidance the Inns of Court College of Advocacy published with the Royal Statistical Society in 2017 on statistics and probability for advocates. It deals only with the pre-trial stages of selection, preparation, conference and disclosure.

For the full text of the guidance, visit https://www.icca.ac.uk/images/download/expert-evidence/Expert-Guidance-final-copy-with-cover-2019.pdf.

Comment

In a 2011 report, the Law Commission criticised the common law, laissez-faire approach to the admission of expert evidence in criminal cases, which had resulted in a number of miscarriages of justice (*Expert Evidence in Criminal Proceedings,* Law Com No. 325). The "ordinary tests of relevance and reliability" were applicable to expert evidence (*Dallagher* [2002] EWCA Crim 2312; *Luttrell* [2004] EWCA Crim 1344; *Reed* [2009] EWCA Crim 2698) and there was no enhanced reliability test, such as that deployed in the majority of US states (*Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993)). The default position was that expert evidence should be admitted, as it was assumed that concerns about reliability could be adequately addressed through cross examination or by the adduction of opposing expert evidence. The Commission was highly critical of this approach, recommending that expert evidence should only be admitted if it is "sufficiently reliable". The Commission's proposals included criteria for judges to consider when determining evidentiary reliability, and these were subsequently incorporated into Criminal Practice Direction 33A (now CrimPD 19A).

CrimPD 19A encourages the court to "actively enquire" into the reliability of expert opinion, with reference to "substantially similar factors to those the Law Commission recommended" (CrimPD 19A.4). The factors set out in CrimPD 19A.5 include the validity of the expert's methods. In addition, CPD 19A.6 provides that a court "should be astute to identify potential flaws in [an expert's] opinion which detract from its reliability", such as "being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing)."

However, the Law Commission had stressed that any changes to rules and procedures governing expert evidence would need to be accompanied by "appropriate training on how to determine evidentiary reliability, particularly in relation to evidence of a scientific nature" for "all judges and lawyers involved in criminal proceedings" (Law Com No. 325, 1.43).

In 2014, Sir Brian Leveson P announced that the Advocacy Training Council (ATC) was "in the course of preparing a 'tool kit' for advocates to use… itself based upon the recommendations in the Law Commission Report" (2014 EWCA Crim 14, at [43]). Leveson P predicted that this document, together with the changes to the Practice Direction, would

result in a “new and more rigorous approach on the part of the courts to the handling of expert evidence” (at [44]).

This week the ATC’s successor, the Inns of Court College of Advocacy, published new “guidance” on expert evidence. It is unclear whether this is supposed to be the “tool kit” referred to by Leveson P. Certainly it does not adhere to the format of the vulnerable witness toolkits, with which criminal lawyers will be familiar. Produced by The Advocate’s Gateway, the vulnerable witness toolkits are research evidence-based and contain both good practice guidance and exemplars. In contrast, the expert evidence “guidance” is descriptive and generic. It seeks to encompass civil and family, as well as criminal, proceedings and its aims and scope are unclear. Although it is entitled “Guidance on the preparation, admission and examination of expert evidence”, only cursory mention is made of cross-examination. In direct conflict with its title, both the Foreword and the conclusion state that it only covers pre-trial stages. The subtitle of the document, “Promoting reliability in expert evidence”, also belies its contents, which say very little about this critically important topic. The evidentiary reliability factors set out in CrimPD 19A have been copied and pasted into the guidance (though without reference to their source), but there is no attempt to explain how they might be used to promote reliability. There is no discussion of validity, which seems surprising given the current state of knowledge about the importance of establishing both foundational validity (the method is, in principle, reliable) and validity as applied (the method has been reliably applied in practice). A recent report from the USA (*Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods,* President’s Council of Advisors on Science and Technology, 2016) highlighted the lack of evidence to support the foundational validity of many feature-comparison methods, which are frequently encountered in criminal cases.

The issue of reliability is especially important given the rise in the use of streamlined forensic reports (SFR), which the guidance entirely omits to mention. The SFR scheme was introduced in 2012 and involves the early preparation of a short report (the SFR1) setting out the key conclusion(s), which the prosecution proposes to adduce by way of an admission. If the SFR1 is not agreed the Defence must identify the “real issues” and a statement from the expert (the SFR2) will be requested. A major difficulty with SFR 1 documents, in particular, is that their stated conclusions have the potential to be misleading; streamlined reports do not address the factors in the CrimPD so as to enable advocates to identify any limitations of the opinion being expressed.

There is little to suggest that CrimPD 19A is currently being used to exclude unreliable expert evidence in practice and the new guidance is unlikely to encourage such challenges. There have been few appeal court cases mentioning CrimPD 19A and none have engaged with it in any meaningful way. Research suggests that criminal practitioners are either unaware of the reliability factors, or at best are unsure how to utilise them (see Davies and Piasecki, ‘No More Laissez Faire?’ (2016) 80 J. Crim. L. 327). Against this background, a “toolkit” of the sort envisaged by Leveson P would have been welcome. The new guidance does not serve this function.