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## **Expert Evidence in Criminal Proceedings: Current challenges and opportunities.**

**Keywords:** Expert evidence, reliability, Part 19 Criminal Procedure Rules; Criminal Practice Direction 19A

*This paper is based upon an Old Bailey Lecture that was given to the Criminal Bar Association on Tuesday March 1 2016.*

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### **Abstract:**

In its 2011 report “Expert Evidence in Criminal Proceedings in England and Wales” (Law Com No.325), the Law Commission recommended that the admissibility of expert evidence in criminal proceedings should be governed by a new statutory regime comprising a new statutory reliability test in combination with codification and refinement of existing common law principles relating to “assistance”, “expertise” and “impartiality”. The Government declined to enact the Law Commission’s draft Bill due to a lack of certainty as to whether the additional costs incurred would be offset by savings. Instead the Government invited the Criminal Procedure Rule Committee (CrimPRC) to consider amendments to the Criminal Procedure Rules (CrimPR) to introduce, as far as possible, the spirit of the Law Commission’s recommendations. The consequent amendments to CrimPR Part 33 (now CrimPR Part 19) in combination with the making of the new Practice Direction CrimPD 33A (now CrimPD 19A) by the Lord Chief Justice, resulted in what he described in his 2014 Criminal Bar Association Kalisher Lecture as “a novel way of implementing an excellent Report”. This paper considers the possible evolution of the common law in light of these amendments, the challenges associated with adopting such a novel approach to reform and the potential opportunities for the improvement of expert evidence in criminal proceedings that the changes were intended to create.

### Introduction

In 2009 the Law Commission published its consultation paper “The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales”.<sup>1</sup> This consultation, to which Northumbria Centre for Evidence and Criminal Justice Studies responded, had been catalysed by a report of the House of

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<sup>1</sup> Law Commission Consultation Paper No 190 (2009).

Commons' Science and Technology Committee, published in 2005.<sup>2</sup> The Law Commission "shared the Committee's concern that expert opinion evidence was being admitted in criminal proceedings too readily, with insufficient scrutiny".<sup>3</sup> In its resultant 2011 report "Expert Evidence in Criminal Proceedings in England and Wales", the Law Commission recommended that the admissibility of expert evidence in criminal proceedings should be governed by a new statutory regime comprising a new statutory reliability test in combination with codification and refinement of existing common law principles relating to "assistance", "expertise" and "impartiality".<sup>4</sup> Other recommendations related to pre-trial disclosure, court appointed experts and amendments to the Criminal Procedure Rules (CrimPR).<sup>5</sup> The Law Commission recognised, however, that these proposed developments would not in themselves remedy the problems they had identified in relation to expert evidence. Consequently it emphasised the importance of other parallel changes, such as appropriate regulatory schemes to ensure minimum standards, a more critical approach on the part of the judiciary and appropriate training for judges and lawyers.<sup>6</sup>

The Government declined to enact the Law Commission's draft Bill because, whilst the Law Commission's impact assessment recognised that implementation of its recommendations would result in the added expense of holding additional pre-trial hearings<sup>7</sup>, there was a lack of certainty as to whether the additional costs incurred would be offset by savings (via, for example, fewer or shorter trials, reduction in expert's fees and fewer appeals).<sup>8</sup> Whilst the result of the Government's decision was to leave in place the common law principles that govern the admissibility of expert evidence in criminal proceedings, the Government invited the Criminal Procedure Rule Committee (CrimPRC) to consider amendments to the CrimPR which it believed "could increase the likelihood of the trial judge and the opposing party, where appropriate, challenging expert evidence" and "would go some way towards reducing the risk of unsafe convictions as a result of unchallenged inappropriate or unreliable expert evidence".<sup>9</sup> The consequent amendments to CrimPR Part 33 (now CrimPR Part 19) in combination with the making of the new Practice Direction CrimPD 33A (now CrimPD 19A) by the Lord Chief Justice, resulted in what he described in the 2014 Criminal Bar

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<sup>2</sup> Forensic Science on Trial, Seventh Report (2004–2005) HC 96-1.

<sup>3</sup> Law Commission, Expert Evidence in Criminal Proceedings in England and Wales, LAW COM No 325 at [1.2].

<sup>4</sup> *ibid.* at [1.37-1.38].

<sup>5</sup> *ibid.* at [1.41].

<sup>6</sup> *ibid.* at [1.42-1.43].

<sup>7</sup> *ibid.* at 165.

<sup>8</sup> Ministry of Justice (2013) The Government's response to the Law Commission Report: Expert evidence in criminal proceedings in England and Wales (Law Com No 325) at [3]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260369/govt-resp-experts-evidence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260369/govt-resp-experts-evidence.pdf) (accessed 30/01/2016).

<sup>9</sup> *ibid.* at [4-5].

Association Kalisher Lecture as “a novel way of implementing an excellent Report”.<sup>10</sup> The Lord Chief Justice believed that these changes in combination with developments at common law and the work of the Advocacy Training Council (now the Inns of Court College of Advocacy (ICCA)) to develop relevant guidance and training for advocates meant that the bulk of the Law Commission’s recommendations had been implemented.<sup>11</sup>

The purpose of this paper is to examine the principles that currently govern the admissibility of expert evidence in criminal proceedings, the provisions of CrimPR Part 19 and CrimPD 19A and the Law Commissions’ recommendations in order to identify key areas in relation to which additional clarification by the appellate courts, by amendments to CrimPD 19A and/or to CrimPR Part 19 itself would be desirable. The paper is divided into six main sections.

The first section considers the common law test that governs the admissibility of expert evidence in criminal proceedings and whether that test now effectively includes a reliability limb, acknowledges that admissibility challenges should not become automatic and recognises that, when admissibility is to be challenged, appropriate pre-trial case management processes should take place. The second section emphasises the importance of such case management in ensuring that the jury’s attention is focussed upon the relevant issues. The third section recognises that even where the evidence of an expert witness is relevant to an issue in the proceedings it is only admissible if it provides information that is likely to be outside the court’s knowledge and experience and that this rule can also limit the nature of the evidence that an expert witness who has been called should be permitted to give. The fourth section demonstrates that expert witness competence may be of relevance not only when determining whether a witness should be permitted to give expert evidence but also when determining the nature of that evidence which an expert witness should be permitted to give and identifies provisions of the CrimPR that are of significance in the context of expert witness competence or credibility. The fifth section concerns the extent to which the common law reliability test on which the guidance in the new CrimPD 19A is based may be informed not only by the guidance provided in the new Practice Direction itself but also by information provided in compliance with relevant provisions of the CrimPR and, potentially, by additional guidance that may be derived from the Law Commission’s recommendations. The final section accepts that impartiality does not form a condition precedent to the admissibility of expert evidence at common law, identifies provisions of the CrimPR which concern the expert’s duty to the court,

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<sup>10</sup> Lord Thomas CJ (Baron Thomas of Cwmgiedd) (2014) The future of forensic science in criminal trials: 2014 Criminal Bar Association Kalisher Lecture at [17]. Available at: <http://www.judiciary.gov.uk/wp-content/uploads/2014/10/kalisher-lecture-expert-evidence-oct-14.pdf> (accessed 30/01/2016).

<sup>11</sup> *ibid.*

considers possible pathways via which admissibility challenges based on expert witness bias could potentially be founded and acknowledges that the most viable means of challenging expert witness impartiality may well remain that of conducting a well-formulated cross-examination strategy.

This paper is based upon an Old Bailey Lecture that was given to the Criminal Bar Association on Tuesday March 1 2016.

What are the components of the common law admissibility test and when is the court required to determine the admissibility of expert evidence?

CrimPD 19A recognises that the common law principles that govern the admissibility of expert opinion evidence in the criminal context are that the evidence must be “relevant to a matter in issue in the proceedings”, that it must be “needed to provide the court with information likely to be outside the court’s own knowledge and experience” and that the witness who is to be called to give the expert evidence must be “competent to give that opinion”.<sup>12</sup> Additionally, the Practice Direction<sup>13</sup> extracts from the judgment of the Court of Appeal in *R v Dlugosz*<sup>14</sup> the proposition that “in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury”.<sup>15</sup> The extent to which reliability forms part of the criteria for the admissibility of expert evidence will be examined in detail below.

Reliability – the development of a common law reliability test?

At common law the reliability (or otherwise) of evidence tendered by an expert witness has historically been treated as a matter for the jury with a consequent reduction in the weight apportioned to “unreliable” expert evidence.<sup>16</sup> Such an approach was justified on the basis that juries should not be denied “...the advantages to be gained from new techniques and new advances in science”<sup>17</sup>. Although the common law did not preclude reliability as a criterion for the admission of expert evidence the threshold set was a low one. The Court of Appeal in *R v Luttrell*<sup>18</sup> identified “...that so long as a field is sufficiently well-established to pass the *ordinary tests of relevance and reliability*, then no enhanced test of admissibility should be applied...”.<sup>19</sup> Indeed in *R v Reed*<sup>20</sup> the

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<sup>12</sup> CrimPD 33A.1.

<sup>13</sup> CrimPD 33A.4.

<sup>14</sup> [2013] 1 Cr. App. R. 32

<sup>15</sup> *ibid.* per Sir John Thomas P at [11].

<sup>16</sup> See for example: *R v Robb* (1991) 93 Cr.App.R. 161 , 165; *R v Dallagher* [2003] 1 Cr.App.R. 195, para.23.; *R v Luttrell* [2004] 2 Cr. App. R. 31

<sup>17</sup> *R v Clarke* [1995] 2 Cr. App. R. 425, 430

<sup>18</sup> Above n.16

<sup>19</sup> *ibid.* at 37 (*italics added*)

Court of Appeal confirmed the absence of an enhanced reliability test and endorsed the approach taken in previous cases.<sup>21</sup>

This “*laissez faire*” approach to the admission of expert opinion evidence was criticised by the Law Commission which favoured the creation of a “more stringent reliability test”.<sup>22</sup> Clause 1(2) of the Law Commission’s draft Bill<sup>23</sup> proposed the creation of an admissibility criterion based on whether the expert opinion evidence was “sufficiently reliable”, to be determined with reference to a number of factors contained in Clause 4 of the Bill. Although the provisions in the draft Bill were never enacted it is noteworthy that the concept of “sufficient reliability” is one that the Court of Appeal had previously considered in the context of expert opinion evidence on a number of occasions.<sup>24</sup> Again in *R v Reed*<sup>25</sup> the court identified that:

“If the reliability of the scientific basis for the evidence is challenged, the court will consider whether there is a sufficiently reliable scientific basis for that evidence to be admitted, but, if satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted, then it will leave the opposing views to be tested in the trial.”<sup>26</sup>

The Lord Chief Justice in his 2014 Kalisher Lecture to the Criminal Bar Association opined that, notwithstanding the failure to enact a statutory admissibility test, the common law had already evolved to incorporate “sufficient reliability” as a requirement for the admission of expert evidence.<sup>27</sup> This principle developed out of what the Lord Chief Justice described as “a series of cases largely arising out of the use of Low Template DNA [which] established the requirement that the court can only admit expert evidence if it is reliable”.<sup>28</sup> This position has been expressly incorporated into CrimPD 19A by the inclusion of the reference to *R v Dlugosz*<sup>29</sup> as authority for the proposition that expert opinion evidence must have a “sufficiently reliable scientific basis”.<sup>30</sup>

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<sup>20</sup> [2010] 1 Cr. App. R. 23

<sup>21</sup> See for example; *R v Clarke*, above n.17; *R v Luttrell*, above n.16

<sup>22</sup> Law Com No. 325 at [3.3 -3.5]

<sup>23</sup> Above n.3 at p.146

<sup>24</sup> See for example *R v Dallagher* n.16; *R v Reed* n.20; *R v Ahmed* [2011] EWCA Crim 184

<sup>25</sup> Above n.20

<sup>26</sup> *ibid.* at [111]

<sup>27</sup> Baron Thomas of Cwmgiedd, above, n.10 at [19]

<sup>28</sup> Baron Thomas of Cwmgiedd, above, n.10 at [19]. As regards the relevant series of cases, see *R v Reed* n.20, *R v Broughton* [2010] EWCA Crim 549, *R v Weller* [2010] EWCA Crim 1085, *R v C* [2010] EWCA Crim 2578 and *R v Dlugosz* n.14 (all DNA cases) and see, also, *R v Atkins* [2010] 1 Cr App R 8 (facial mapping) and *R v T* [2011] 1 Cr App R 9 (footwear marks).

<sup>29</sup> Above n.14

<sup>30</sup> CrimPD 19A.4

Unfortunately, CrimPD 19A does not make clear whether it was drafted upon the basis that the principle stated in *Dlugosz*<sup>31</sup> now effectively forms a discrete fourth limb of the common law admissibility test or whether the guidance which CrimPD 19A provides for the courts when they are required to determine the reliability of expert opinion evidence is guidance that they are intended to take into account when determining whether the traditional three limbs of the common law admissibility test have been satisfied. Tony Ward takes the latter view, suggesting that “[e]xpert evidence...is admissible if it is 'sufficiently reliable' to satisfy these three tests” but commenting that “[t]he Practice Direction does not tell us which of the three tests is to be applied or how they are to be interpreted”.<sup>32</sup> Indeed, Ward regards it as questionable whether the series of cases that the Lord Chief Justice referred to in his lecture developed the law as significantly as the Lord Chief Justice asserted.<sup>33</sup>

It is suggested that examination of the jurisprudence of the Court of Appeal in combination with the fact that the Law Commission had envisaged that the guidance now embodied in CrimPD 19A would operate alongside a distinct reliability limb and the Lord Chief Justice’s view expressed in his lecture that the common law now encompasses a requirement that expert opinion evidence can only be admitted if it is reliable, suggests that the Court of Appeal is likely in future to treat sufficiency of reliability as a discrete admissibility condition to which the guidance in CrimPD 19A is applicable. Indeed, as prefaced above, the case law would appear to demonstrate that the Court of Appeal had begun to develop and apply a distinct common law reliability test several years before CrimPD 19A came into force. For example, in *R v Reed*<sup>34</sup>, the Court of Appeal, stating that “expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury”, held that an expert witness could not give “admissible evidence that expressed an opinion that the appellants were handling...knives when they broke” because “there was no reliable scientific basis for her to be able to express a view on the use the appellants made of the knives as opposed to the circumstances of transfer of their DNA”.<sup>35</sup> In *R v Broughton*<sup>36</sup>, the Court of Appeal considered that the test that the judge had applied, namely, “whether there appeared to be a risk that the evidence might be unreliable so that it would potentially mislead the jury rather than help them” was “too low” but, having applied “a higher test

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<sup>31</sup> Above n.14

<sup>32</sup> Ward, T. “A new and more rigorous approach” to Expert Evidence in England and Wales (2015) *International Journal of Evidence and Proof*, 19(4), 228-245, at 235.

<sup>33</sup> *ibid.* at 234

<sup>34</sup> Above n.20

<sup>35</sup> *ibid.* at [102]

<sup>36</sup> [2010] EWCA Crim 549

than that applied by the judge”<sup>37</sup>, held that the Low Template DNA evidence that the case concerned was sufficiently reliable to be admissible in evidence. In *R v T*<sup>38</sup>, the Court of Appeal, applying the principles stated in *Reed*, held in the context of footwear mark evidence that “there [was] not a sufficiently reliable basis for an expert to be able to express an opinion based on the use of a mathematical formula”<sup>39</sup>. And, in *R v Dlugosz*<sup>40</sup>, the Court of Appeal, applying *R v Reed*<sup>41</sup> and *R v T*<sup>42</sup>, held that in the context of DNA evidence, “the fact that there is no reliable statistical basis does not mean that a court cannot admit an evaluative opinion, provided there is some other sufficiently reliable basis for its admission”<sup>43</sup>, but also made clear that, [i]f the admissibility is challenged, the judge must...scrutinise the experience of the expert and the features of the profile so as to be satisfied as to the reliability of the basis on which the evaluative opinion is being given”.<sup>44</sup>

It is therefore submitted that the requirement that expert opinion evidence must have a “sufficiently reliable scientific basis” (and presumably a “sufficiently reliable basis” for non-scientific expert opinion evidence) now constitutes a distinct admissibility criteria. Much then must turn on the interpretation of the “ordinary” test of reliability, how this test is affected by the incorporation of a “sufficient reliability” criterion and how rigorously this requirement is applied in practice. In the absence of appellate court jurisprudence on this matter since the introduction of the amended Part 19 CrimPR and CrimPD 19A it remains a moot point as to what extent this development will affect the approach of the courts. It is however further submitted that these changes provide a clear opportunity for more rigorous challenge of expert opinion evidence on the basis of (insufficient) reliability and for exclusion of evidence which cannot demonstrably meet the required standard.

Accepting that a distinct reliability test to which the guidance in CrimPD 19A relates now effectively exists at common law, it is then important to note that the Law Commission had not intended its proposals to result in reliability investigations every time expert opinion evidence was tendered by a party to criminal proceedings. Rather, its intention was that the reliability limb of its admissibility test would only come into play if, either, a party raised the issue of reliability and it appeared to the court that the evidence might not be sufficiently reliable to be admissible or, exceptionally, the court of its own motion raised the issue as a condition of admissibility. Whilst the Law Commission’s

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<sup>37</sup> *ibid.*

<sup>38</sup> Above n.28

<sup>39</sup> *ibid.* at [86]

<sup>40</sup> n.14

<sup>41</sup> n.20

<sup>42</sup> n.28

<sup>43</sup> n.14 at [9]

<sup>44</sup> *ibid.* at [24]



recommendations were not enacted, it is suggested that the Law Commission's intended approach is, essentially, in line with the existing jurisprudence concerning the approach that the court should take prior to requiring a party to criminal proceedings to prove the admissibility of expert evidence. Thus, the Court of Appeal has indicated that "unless the admissibility is challenged, the judge will admit [the] evidence...However, if objection to the admissibility is made, then it is for the party proffering the evidence to prove its admissibility"<sup>45</sup>. Prior to such a challenge being made, experts' reports complying with the requirements imposed by CrimPR 19.4 should have been served by the parties, the parties should have analysed them, brought any disagreement to the attention of the court (at the Plea and Case Management Hearing if the reports have been served by the time when it takes place) and the court, in the exercise of its powers under CrimPR 19.6, should have directed the experts to discuss the expert issues and prepare a reasoned statement indicating the areas of agreement and disagreement.<sup>46</sup>

### Relevance

As with evidence in general, in order to be admissible expert evidence must be relevant to an issue in the proceedings, which means that it must be "logically probative or disprobative of some matter that requires proof"<sup>47</sup>. Effective pre-trial case management is crucial in enabling the court to identify the issues in relation to which expert evidence is relevant and should assist the court to apply the various limbs of the common law admissibility test to such evidence.<sup>48</sup> Where expert evidence is admitted, effective case management should ensure that experts are not permitted to wander into "unnecessary, complicated and confusing detail", that evidence in chief, cross-examination, re-examination, submissions and speeches to the jury focus upon the relevant issues and that the judge's summing up identifies for the jury the expert evidence which is probative or disprobative of those issues.<sup>49</sup> A key provision of the CrimPR in this regard is the power in CrimPR 19.6 to direct pre-hearing discussions of expert evidence, which was referred to above.

### Information likely to be outside the court's knowledge and experience.

The fact that expert evidence is relevant to an issue in the proceedings does not in itself render such evidence admissible, relevance being "a condition precedent to admissibility".<sup>50</sup> Rather, expert

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<sup>45</sup> Per Thomas LJ in *Reed v Reed*, above, n.20 at [113]

<sup>46</sup> See Thomas LJ in *Reed v Reed*, above, n.20 at [131-132], Thomas LJ in *R v C* [2010] EWCA Crim 2578 at [38-41] and Moses LJ in *R v Henderson* [2010] 2 Cr App R 24 at [209-212].

<sup>47</sup> Lord Simon of Glaisdale in *DPP v Kilbourne* [1973] AC 723 at 756, applied in the context of expert evidence by the Court of Appeal in *R v Luttrell* [2004] 2 Cr App R 3 per Rose LJ at [33].

<sup>48</sup> See Moses LJ in *R v Henderson*, above n.46 at [205-206].

<sup>49</sup> *ibid.* at [205] and [214-215].

<sup>50</sup> Lawton LJ in *R v Turner* [1975] QB 834 at 841

evidence is only admissible if it provides the court with “information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary”<sup>51</sup>. The Law Commission, which referred to this limb of the common law admissibility test as the “assistance” requirement, believed that it ensured that “expert evidence is admitted only when it has sufficient probative value, in the sense that the evidence is likely to help the court resolve a disputed issue” but that all that was required in order for expert evidence to be “necessary” in this “limited sense was “that it has to provide helpful information which is likely to be outside a judge or jury’s knowledge and experience.”<sup>52</sup>

The Law Commission’s draft Bill required that in order for expert evidence to be admissible “the court is satisfied that it would provide information which is likely to be outside a judge or jury’s experience and knowledge, and which would give them help they need in arriving at their conclusions”<sup>53</sup>. Whilst recommending codification of all limbs of the common law admissibility test, the Law Commission (accepting that its practical application could occasionally be problematic) believed that the assistance limb was fundamentally sound and, following consultation, believed that no change to the test was required.<sup>54</sup> Moreover, nothing either in the recent revisions to the CrimPR or in the new Practice Direction relates to the operation of the assistance limb of the admissibility test.

The operation of this limb of the common law admissibility test does not only have the potential to exclude expert evidence in its entirety but also has the potential to limit the evidence which an expert witness should be permitted to give. Thus, where expert evidence is admitted, the expert should not be permitted to give evidence which does not inform the jury of scientific or medical experience of which it is unaware but merely amounts to common sense comment on the factual evidence, and such comment should not be included in an expert’s report, as this usurps the function of the jury.<sup>55</sup> Indeed, in *R v H*<sup>56</sup> the judge properly declined to admit the expert evidence of a retired psychiatrist and psychotherapist, much of whose evidence “amounted to no more than a comment on the complainant’s credibility and reliability”, because “the way in which [the expert] had formulated her opinion required the judge to untangle what was of assistance to the jury and

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<sup>51</sup> *ibid.*

<sup>52</sup> Law Commission, above n. 3 at [2.3-2.5], [2.17].

<sup>53</sup> *ibid.* at 146 (see cl.1(1)(a) of the Law Commission’s draft Bill).

<sup>54</sup> *ibid.* at [3.126] and [4.6]

<sup>55</sup> See *R v H* [2014] EWCA Crim 1555 per Leveson P at [26], [42] and [44].

<sup>56</sup> *ibid.*

what was confusing and inadmissible comment”<sup>57</sup>. Moreover, the Privy Council, recognising the dangers of experts expressing opinions as “unalterable truths” on matters that are central to the jury’s decision, recently suggested that, as a general rule, experts should only be asked to state opinions on ultimate issues in circumstances in which this would provide substantial assistance to the tribunal of fact<sup>58</sup>.

### Competence to give expert evidence

In order for a witness to be competent to give expert evidence, “the witness...must be peritus; he must be skilled”<sup>59</sup> in the relevant field of expertise, though the common law does not require that the witness “must have become peritus in the way of his business or in any definite way”.<sup>60</sup> In its draft Bill, the Law Commission provided that “a person may be qualified to give expert evidence by virtue of study, training, experience or any other appropriate means”<sup>61</sup>. The Law Commission believed that what it termed the “relevant expertise” limb of the common law admissibility test was fundamentally sound and following consultation, whilst it recommended codification, believed that no change to the test was required.<sup>62</sup>

An example of an area in which issues of competence may commonly be encountered in practice is provided by expert evidence given by current or former police officers/police employees. It has long been recognised that, “there is no question of a police officer being prevented from giving evidence as an expert if the subject in which he is giving evidence as an expert is a subject in which he has expert knowledge, and if it is restricted and directed to the issues in the case.”<sup>63</sup> It is important, however, that where a police officer is to be called to give expert evidence, “the ordinary threshold requirements for expertise are established [and] the ordinary rules as to the giving of expert evidence are observed”<sup>64</sup>. For example, in *R v Hodges*<sup>65</sup>, a police officer was properly permitted to give evidence as to the usual method of supplying heroin, the purchase price of heroin and that the amount of heroin found on the accused on arrest was more than he would have required for personal use. The officer, who had previously worked undercover but was now a drugs liaison officer, had over 16 years’ experience as a drugs officer, currently saw all forensic science service drugs reports that came into his police Division and his expertise in relation to the matters which his

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<sup>57</sup> *ibid.* at [40]

<sup>58</sup> *Pora v The Queen* [2016] 1 Cr. App. R. 3

<sup>59</sup> *R v Silverlock* [1894] 2 QB 766, 771

<sup>60</sup> *ibid.*

<sup>61</sup> Law Commission, above, n.3 at 146 (see cl.2(1) of the Law Commission’s draft Bill).

<sup>62</sup> *ibid.* at [3.126] and [4.6]

<sup>63</sup> *R v Oakley* (1980) 70 Cr App R 7 per Lord Widgery CJ at 9.

<sup>64</sup> *Myers v R* [2015] UKPC 40 per Lord Hughes at [57].

<sup>65</sup> [2003] 2 Cr. App. R. 15

evidence concerned had been derived from training videos, from a drugs investigation course, from observations he had carried out, from speaking to prisoners, informants, colleagues and buyers and sellers of drugs and from police items recovered via drugs seizures. In contrast, an example of circumstances in which the opinion evidence given by a police witness fell outside the ambit of the witness's established expertise is provided by in *R (on the application of Wright) v the Crown Prosecution Service*<sup>66</sup>. In *Wright*, a case concerning whether mushrooms which the accused admitted he had picked in October were "magic mushrooms"<sup>67</sup>, the Administrative Court held that CV Forster (a grade lower than police officer) should not have been permitted to give evidence identifying the mushrooms as magic mushrooms. The evidence had been based on Mr Foster's physical examination of the mushrooms but there was no evidence indicating how he had distinguished them from the few other varieties of mushroom which he said looked like magic mushrooms, there was no "provenance" for his evidence that the growing season for magic mushrooms was July to August/September and there was no evidence that he possessed "any background" entitling him to testify that in consequence of global warming the growing season could extend into October.

Once the court is satisfied that a witness is competent to give expert evidence in the relevant field, the weight of the witness' evidence "is entirely a question for the jury, who will attach more or less weight to it according as they believe the witness to be peritus"<sup>68</sup>. For example, the fact that a recently retired former police officer called by the prosecution to give expert evidence relating to a police operated speed detection laser device had received recent training in the use of such devices and had used them in the recent past did not mean that a former police officer called by the defence who had retired eight years earlier, had not had the same training (because the training was not available to defence experts) and had not used such devices since he retired was not an expert witness. The latter witness had conducted continuing research into the device and did have experience of similar devices. The Divisional Court held that these matters went to the comparative weight of the expert evidence, not to the competence of the latter witness to give expert evidence<sup>69</sup>.

The operation of the "relevant expertise" limb of the common law admissibility test does not only have the potential to exclude expert evidence but also has the potential to limit the evidence which an expert witness should be permitted to give. Thus, where expert evidence is admitted, the expert

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<sup>66</sup> [2015] EWHC 628 (Admin)

<sup>67</sup> Specifically Psilocybin mushrooms, a type of wild mushroom which, when consumed, produce hallucinogenic effects. Psilocybin mushrooms are prohibited in the United Kingdom and listed as a "Class A" drug under the Misuse of Drugs Act 1971,

<sup>68</sup> Above n.59 at 771

<sup>69</sup> *R (On the application of Doughty) v Ely Magistrates' Court* [2008] EWHC 522 (Admin)

should still not be permitted to give evidence which falls outside the witness' field of expertise. For example, in *R v Clarke*<sup>70</sup>, the Court of Appeal accepted that the judge had been entitled to rule that an expert in osteoarticular pathology who had never conducted a post mortem where murder was suspected did not possess the expertise to give an opinion on cause of death in a murder trial. The judge had not permitted the expert to stray outside of his field of expertise, though had properly permitted the expert to give evidence concerning matters within his field of expertise, such as how long before the victim's death the fractures to the victim's ribs had occurred. Conversely, the expert in *Wright*<sup>71</sup> should not have strayed from the area of valuation of drugs to those of identification of mushrooms as magic mushrooms, the duration of the magic mushroom growing season and the consequences of global warming thereupon.

CrimPR Part 19 contains several provisions which are of relevance in relation to expert witness competence, the expert's field of expertise and the credibility of expert witnesses. Some of these provisions were introduced or amended in 2014, subsequent to the Government's response to the Law Commission's recommendations.

CrimPR 19.4(a) requires experts, in their reports, to provide details of "qualifications, relevant experience and accreditation". This will clearly provide information of assistance when the court is determining whether the witness is competent to give expert evidence.

CrimPR 19.2, which concerns the expert's duty to the court, contains several provisions which specifically relate to an expert's field of expertise. It provides that an expert's duty to the court includes, amongst other matters, an obligation to give an opinion which falls "within the expert's area or areas of expertise", an obligation, both in an expert's report and when testifying, "to define the expert's area or areas of expertise" and an obligation, when testifying, "to draw the court's attention to any question to which the answer would be outside the expert's area or areas of expertise"<sup>72</sup>.

Finally, CrimPR 19.3(c) requires an expert who wishes to introduce an expert's evidence other than as an admitted fact to "serve with the report notice of anything of which the party serving it is aware which might reasonably be thought capable of detracting substantially from the credibility of that expert". It is suggested that examples of matters which a party should disclose in order to comply with this requirement are provided by those matters that prosecution experts are required to disclose to the prosecution when they complete the Expert Witnesses Self-Certificate contained in

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<sup>70</sup> [2013] EWCA Crim 162

<sup>71</sup> Above n.66

<sup>72</sup> See, respectively, CrimPR 19.2(1)(a)(ii), 19.2(3)(a) and 19.2(3)(b).

Appendix C to the Crown Prosecution Service’s Guidance Booklet for Experts.<sup>73</sup> The relevant matters include previous convictions, cautions and penalty notices, criminal or civil proceedings pending against the expert, adverse findings made by judges, magistrates or coroners concerning the expert’s professional competence or credibility, adverse findings by professional or regulatory bodies, pending proceedings, referrals or investigations by such bodies and any other information which may adversely affect the expert’s professional competence and credibility. Perhaps a useful amendment either to CrimPR 19.3(c) or to CrimPD 19A which might assist parties when determining what matters should be disclosed under this requirement would be the addition of examples of matters which might be relevant to credibility along the lines of those that prosecution experts are required to disclose.

*Determining reliability in the context of CrimPD 19A*

As was indicated above, CrimPD 19A.4 extracts from the judgment of the Court of Appeal in *R v Dlugosz*<sup>74</sup> the proposition that “in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury”.<sup>75</sup> The Practice Direction then recognises that “nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility” and encourages the courts to “actively enquire into such factors”.<sup>76</sup> CrimPD 19A.5 (reproducing what the Law Commission referred to as its “lower-order factors”<sup>77</sup>) then indicates that the factors that the court may consider when determining reliability (and especially that of “expert scientific opinion”) include,

- (a) the extent and quality of the data on which the expert’s opinion is based, and the validity of the methods by which they were obtained;
- (b) if the expert’s opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
- (c) if the expert’s opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the

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<sup>73</sup> Guidance Booklet for Experts. Disclosure: Experts' Evidence, Case Management and Unused Material May 2010 [http://www.cps.gov.uk/legal/d\\_to\\_g/disclosure\\_manual/annex\\_k\\_disclosure\\_manual/](http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/annex_k_disclosure_manual/) <last accessed 10/09/2016>.

<sup>74</sup> Above n.14

<sup>75</sup> Sir John Thomas P, above n.14 at [11].

<sup>76</sup> CrimPD 19A.4.

<sup>77</sup> Law Commission, above n.3 at 5.10 and 157 (see Part 1 of Schedule 1 to the Law Commission’s draft Bill).

degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

(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;

(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

(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; and

(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.

The Law Commission intended that on a case by case basis the judge would select those factors that were appropriate in relation to the type of expert opinion evidence before the court, could take into account other factors that were not specifically listed and would not take into account factors that were not applicable.<sup>78</sup> Perhaps CrimPD 19A should make clear that this is how the guidance it provides which is drawn from the Law Commission's lower-order factors should be deployed.

So far as factor (h), above is concerned, a footnote in the Law Commission's Report makes clear that "[t]his factor should not in any way be understood as a presumption against the admission of expert opinion evidence based on new or nascent developments in science and technology" but that an expert whose opinion is based on such developments "should explain why an opinion founded on it is sound".<sup>79</sup> Indeed as identified above, prior to the introduction of CrimPD 19A, the Court of Appeal had emphasised on a number of occasions that the criminal courts should not be denied the advantages that such new developments can provide.<sup>80</sup> Whilst the courts should in future adopt "a

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<sup>78</sup> Ibid. at [3.49-3.52].

<sup>79</sup> Ibid. at p.67, footnote 35.

<sup>80</sup> See Steyn LJ in *R v Clarke* n.17, Thomas LJ in *R v Reed*, above n.20 at [111] and Moses LJ in *R v Henderson*, above n.46 at [206].

more rigorous approach”<sup>81</sup> when considering, in the light of the new Practice Direction, whether expert evidence is sufficiently reliable to be admitted in criminal proceedings, it is hoped that they will continue to recognise the potential advantages of new scientific and technological developments. The danger if the balance swings too far from the previous “laissez faire” approach to the admission of expert opinion evidence that the Law Commission intended to replace with its new admissibility test<sup>82</sup> to a new approach of rigid enforcement of the common law reliability test is that,

“a significant proportion of currently admissible techniques and expert opinions--that have presumably assisted in procuring convictions--would be inadmissible [and] some techniques that might eventually prove to be reliable will face delay before criminal courts accept them [which could] leave more serious offenders in our communities.”<sup>83</sup>

It is suggested that an amendment to CrimPD 19A could usefully make clear that the guidance it contains is not intended to prevent the courts from admitting expert evidence based on new science or new technology provided that the court has undertaken a sufficiently rigorous examination of its reliability.

As well as reproducing the Law Commission’s lower-order factors, CrimPD 19A<sup>84</sup> also indicates that when the court is considering the reliability of expert opinion evidence (and especially that of scientific opinion) it “should be astute to identify potential flaws in such opinion which detract from its reliability”.<sup>85</sup> CrimPD 19A.6 then reproduces the Law Commission’s “higher-order examples” of expert evidence which is insufficiently reliable to be admitted<sup>86</sup>, namely,

- (a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;
- (b) being based on an unjustifiable assumption;
- (c) being based on flawed data;

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<sup>81</sup> See Leveson P in *R v H*, above n.55 at [44] where his Lordship indicated that when the new Practice Direction was in force “a new and more rigorous approach on the part of advocates and the courts to the handling of expert evidence must be adopted”.

<sup>82</sup> Above, n.3 at [1.8], [1.17], [1.21], [2.16], [3.3-3.4] and [6.10] and see, also, Moses LJ in *R v Henderson*, above n.46 at [206].

<sup>83</sup> Edmond, G. “Is reliability sufficient? The Law Commission and expert evidence in international and interdisciplinary perspective (Part 1)” [2012] *IJEP* 16 1 (30) at 64.

<sup>84</sup> CrimPR 19A.6.

<sup>85</sup> *ibid.*

<sup>86</sup> Law Commission, above, n.3 at [5.9], [5.36] and 148 (see cl.4(2) of the Law Commission’s draft Bill.



- (d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or
- (e) relying on an inference or conclusion which has not been properly reached.

The Law Commission believed that the combination of its higher-order examples and lower-order factors would both “direct the trial judge to matters which have a bearing on the question of evidentiary reliability in a particular case [and] explain what the reliability test means for the type of expert evidence being proffered for admission”.<sup>87</sup> The reliability limb of the Law Commission’s proposed admissibility test in cl.1(2) of its draft Bill would have provided that “expert opinion evidence is admissible in criminal proceedings only if it is sufficiently reliable to be admitted”.<sup>88</sup> In determining whether this was so the Law Commission envisaged that its lower-order factors would be read in conjunction not only with the abovementioned reliability limb and its higher-order examples but also in conjunction with the “core test” in cl. 4(1).<sup>89</sup> This core test would have provided that “[e]xpert opinion evidence is sufficiently reliable to be admitted if—(a) the opinion is soundly based, and (b) the strength of the opinion is warranted having regard to the grounds on which it is based”.<sup>90</sup> The core test is not referred to by CrimPD 19A. It is suggested that adding the core test to the matters stated in CrimPD 19A to which the court is entitled to refer when applying the common law reliability test would enhance the utility of the Practice Direction. However, even though the core test is not reproduced in the Practice Direction, there is presumably no reason why a court could not treat the Law Commission’s core test as additional guidance to assist it when considering whether expert opinion has a sound basis the strength of which is warranted with regards to the grounds which form its basis in order to assist it when applying the common law reliability test.

Another omission from CrimPD 19A when compared to the Law Commission’s draft Bill is a specific indication that apart from the lower-order factors that are reproduced in CrimPD 19A.5 the court should also consider “anything else which appears to the court to be relevant”.<sup>91</sup> It is assumed that whilst CrimPD 19A does not specifically make this clear, this does in fact reflect the ethos underlying the new Practice Direction.

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<sup>87</sup> *ibid.* at [5.11].

<sup>88</sup> *ibid.* at p.146.

<sup>89</sup> *ibid.* at [5.36].

<sup>90</sup> *ibid.* at [9.11] and 148.

<sup>91</sup> *ibid.* at 148 (see cl.4(3) of the Law Commission’s draft Bill).

Whilst the common law test is stated in *Dlugosz*<sup>92</sup> in terms of there being a sufficiently reliable “scientific” basis to justify the admission of the relevant evidence, the Law Commission had intended its proposed reliability test to be applicable both to scientific and to non-scientific (experience based) expert opinion evidence.<sup>93</sup> The Law Commission recognised, however, that whilst it might occasionally be necessary to apply its reliability test to non-scientific evidence it would often be unnecessary to do so and that in many cases the only issue with such evidence would be whether the witness possessed the requisite skill.<sup>94</sup> The Practice Direction seems to implicitly recognise that the guidance that it provides extends beyond the realm of scientific evidence but is primarily relevant to scientific evidence where it states that, “factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include...”.<sup>95</sup> An amendment to CrimPD 19A making it clear that the guidance it reproduces is intended to be generic might make sense.

So far as scientific (including medical) evidence is concerned, the Law Commission envisaged that in order to satisfy its reliability test,

“...any inference drawn by the expert must be expressed with no greater degree of precision or certainty than can be justified by the material supporting it. The onus will be on the party proffering the evidence, and the party’s experts, to refer to properly conducted empirical research (testing and observing) which substantiates the hypothesis and does not undermine it. The court will then consider whether the opinion evidence the expert wishes to provide (including its strength) is sufficiently reliable to be admitted, bearing in mind the extent and quality of the research, the margins of uncertainty in the findings, the extent of the data relied on, any “known unknowns” and, in particular, whether there is a plausible, alternative explanation for the findings.”<sup>96</sup>

The Law Commission accepted, however, that whilst

“...the underlying evidence supporting the hypothesis and the chain of reasoning underpinning the opinion would always need to be scientifically valid...the required extent to which there has been scientific research and the required extent of the corroborative data

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<sup>92</sup> Above n.14

<sup>93</sup> Law Commission, above, n.3 at [3.40-3.64].

<sup>94</sup> *ibid.* at [5.71-5.72].

<sup>95</sup> CrimPD 19A.5.

<sup>96</sup> Law Commission, above, n.3 at [5.66].

supporting a hypothesis will depend on the nature and strength of the opinion and the extent to which it is qualified.”<sup>97</sup>

With regard to non-scientific evidence, the Law Commission, taking the example of lip-reading evidence, indicated that in the occasional circumstances in which it would be necessary to apply the reliability test (as opposed to the relevant expertise test) to such evidence, it would be necessary “to show that the lip-reader’s methodology, or the way the expert applied his or her skill for the instant case, provides sufficient evidence of reliability to justify his or her opinion evidence being placed before the jury”.<sup>98</sup> The Law Commission accepted that,

“Factors such as line-of-sight, facial hair, regional accents and lighting may have a bearing on the reliability of a lip-reader’s interpretation. If the angle of observation and the lighting were poor, and the fundamental issue is whether the observed person said just one or a few key words, then the lip-reader’s evidence could be insufficiently reliable to be admitted in a given case.”<sup>99</sup>

The Law Commission intended that the assistance, relevant expertise and impartiality limbs of its admissibility test would apply to all expert evidence whereas the reliability limb would only apply to expert opinion evidence.<sup>100</sup> It recognised that *R v Meads*<sup>101</sup> provided authority for the proposition that the common law admissibility criteria only apply to expert opinion evidence and not to expert evidence of fact but also that the existing case law almost exclusively relates to expert opinion evidence. The Law Commission contrasted, the situation where a police officer was called to give factual evidence (such as evidence of paraphernalia that drug-dealers commonly use) from that in which a police officer was called to give expert opinion evidence (such as whether the quantity of drugs found in the accused’s possession exceeded that required for personal consumption).<sup>102</sup> In the former situation, the Law Commission’s reliability test would not have been applicable and the issue so far as the admissibility of the expert’s factual evidence was concerned would simply have been whether the police officer “was qualified to provide expert evidence, with reference to information such as the number of recent cases involving drugs he or she has worked on, the nature and extent

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<sup>97</sup> *ibid.* at [5.70].

<sup>98</sup> *ibid.* at [5.74].

<sup>99</sup> *ibid.* at [5.73].

<sup>100</sup> *ibid.* at [2.19-2.23].

<sup>101</sup> [1996] Criminal Law Review 519.

<sup>102</sup> Law Commission, above n.3, at [5.81-5.82].

of his or her involvement, the courses and seminars attended and so on".<sup>103</sup> In the latter situation the Law Commission's reliability limb would potentially have been applicable and if it had been applied it would have been necessary both to show that the police officer was "qualified to provide an expert opinion on such matters" and to show that the police officer's "opinion was based on sound empirical research and that the strength of the opinion was warranted by the data relied on and the inferences legitimately to be drawn from the data".<sup>104</sup>

For present purposes, the crucial question is to what extent the three limbs of the common law admissibility test and/or the common law reliability test would be applicable in the context of the Law Commission's two police officer scenarios. CrimPD 19A refers to three common law limbs in terms of the admissibility of "expert opinion evidence" and to the guidance it adopted from the Law Commission's draft Bill in terms of "expert opinion" and "expert scientific opinion".<sup>105</sup> This would suggest that, in line with the decision of the Court of Appeal in *Meads*<sup>106</sup>, the three limbs of the common law admissibility test and the common law reliability test would be inapplicable to the Law Commission's former scenario but would apply to the latter. The decision in *Meads*<sup>107</sup> (which concerned factual evidence of tests performed by handwriting experts into whether police officers could have written handwritten notes in the time in which they had allegedly been written) has, however, been subject to criticism, including criticism by the Law Commission itself.<sup>108</sup> Whilst *Meads*<sup>109</sup> has been applied by the Divisional Court<sup>110</sup>, it is suggested that the better approach to admissibility at common law would be that, at the very least, the three traditional limbs of the common law admissibility test should be applicable to evidence such as that encountered in the former of the Law Commission's two police officer scenarios. It may be that this is a matter that the Court of Appeal should revisit. If expert evidence of fact was treated as falling within the ambit of the common law admissibility test but not within that of the new common law reliability test, the sole live issue in the former of the Law Commission's scenarios would be whether the police witness was competent to give such evidence whereas in the latter scenario reliability would also, potentially, become a live issue.

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<sup>103</sup> *ibid.* at [5.81].

<sup>104</sup> *ibid.* at [5.82].

<sup>105</sup> CrimPD 19A.1, 19A.5. and 19A.6.

<sup>106</sup> Above n.101

<sup>107</sup> *ibid.*

<sup>108</sup> See Tony Ward 'English Law's Epistemology of Expert Testimony' (2006) 33 *JL & Soc'y* 572 at 583-584 and see Law Commission, above n.3 at [2.21], referring to Phipson on Evidence, Sweet and Maxwell, London, 17th ed, 2010, at [33-19].

<sup>109</sup> Above n.101

<sup>110</sup> See *Blair-Ford v CRS Adventures Ltd* [2012] EWHC 1886 (QB).

The requirements of CrimPR 19.4 concerning the content of experts' reports require the provision of information some of which should be of value when the court is required to determine the reliability of expert evidence. For example, the report must provide details of the literature etc relied upon by the expert, set out the substance of the facts on which the expert's opinion is based, clarify which facts fall within the expert's personal knowledge, identify those who carried out tests and experiments etc (detailing the qualifications etc of such persons), summarise the range of opinion in the area (if there is such a range) providing reasons for the opinion formed by the expert and if the opinion is a qualified opinion, state that this is so.<sup>111</sup> The requirement imposed by CrimPR 19.4 which most obviously concerns the reliability of expert evidence is that imposed by an amendment to the CrimPR made by the CrimPRC following a request made by the Government in its response to the Law Commission's Report<sup>112</sup>, namely, that an expert's report must "include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence".<sup>113</sup> The Crown Prosecution Service Guidance on Expert Evidence suggests that when an expert is considering what to include in a report in order to comply with this new requirement the expert should have regard to the guidance provided by the Practice Direction.<sup>114</sup> It is suggested that guidance to this effect could usefully be added either to CrimPR 19.4 itself or to CrimPD 19A.

The Law Commission did not believe that its proposed evidentiary reliability test would have provided "a panacea".<sup>115</sup> It believed, however, that the problems that been encountered in the United States of America<sup>116</sup> in relation to the application of the *Daubert*<sup>117</sup> reliability test, which is now codified in Federal Rule of Evidence 702<sup>118</sup>, would not be replicated if its recommended reliability test was implemented in England and Wales. This it believed was so because the courts would have had the benefit of the guidance provided by its higher-order examples and lower-order

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<sup>111</sup> See, respectively, CrimPR 19.4 (b)-(g).

<sup>112</sup> A Guide to the Criminal Procedure Rules 2014 (s.i. 2014/1610) at 4. Available at: [https://www.google.co.uk/webhp?sourceid=chrome-instant&rlz=1C1RNLH\\_enGB514GB517&ion=1&espv=2&ie=UTF-8#q=A+Guide+to+the+Criminal+Procedure+Rules+2014+\(s.i.+2014%2F1610\)](https://www.google.co.uk/webhp?sourceid=chrome-instant&rlz=1C1RNLH_enGB514GB517&ion=1&espv=2&ie=UTF-8#q=A+Guide+to+the+Criminal+Procedure+Rules+2014+(s.i.+2014%2F1610)) (accessed 17/02/2016).

<sup>113</sup> CrimPD 19.4(h).

<sup>114</sup> Crown Prosecution Service: Guidance on Expert Evidence, 1<sup>st</sup> ed, 2014 at 18. Available at [http://www.cps.gov.uk/legal/assets/uploads/files/expert\\_evidence\\_first\\_edition\\_2014.pdf](http://www.cps.gov.uk/legal/assets/uploads/files/expert_evidence_first_edition_2014.pdf) (accessed 17/02/2016).

<sup>115</sup> Law Commission, above, n.3 at [1.42].

<sup>116</sup> In relation these problems see Edmond, above n.83 at 42-50 and see Law Commission above n.3 at 5.91.

<sup>117</sup> *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>118</sup> In its current form, Rule 702 provides that: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case".

factors, judges would have received practical training, the reliability test would have been policed by the Court of Appeal, judges would (under its recommendations) have been entitled to call on additional expertise in complex cases and its recommended amendments to the CrimPR would have ensured that all relevant material was available to the judge.<sup>119</sup> In particular, the Law Commission emphasised “the importance of training, both for lawyers and the judiciary, and the need for a more proactive, enquiring approach to expert opinion evidence in criminal proceedings”.<sup>120</sup> Edmond suggests, however, that the Law Commission “overstated” the differences between its proposals and the positions in the United States of America because the *Daubert*<sup>121</sup> test includes criteria to assist the court in assessing reliability, lawyers and judges in the United States of America also receive education and training, the Court of Appeal might not quash a conviction and order a retrial if the case against the accused is compelling even if the expert evidence ought not to have been admitted and the courts in the United States rarely exercise their powers to appoint expert witnesses to assist them.<sup>122</sup> Edmond also suggests, with reference to the difficulty of dealing with “varying degrees of technical and methodological sophistication (and illiteracy) [which] limit the ability to comprehend and adapt”, that “[i]t is far from obvious that training, even training based around conventional legal values, will facilitate the kinds of changes that appear to be required”.<sup>123</sup> In practice, the recommendation that the court should possess the power to appoint an expert to assist it in complex cases<sup>124</sup> has not been implemented, the extent, quality and efficacy of the training provided for judges and lawyers remains to be seen and at the time of writing, it remains to be seen what the approach of the Court of Appeal to the application of the reliability of the common law reliability test in the context of the guidance now provided by CrimPD 19A will be.

### Impartiality

Under the Law Commission’s recommended admissibility test, if it appeared to the court that there was a significant risk that an expert would not or had not complied with the expert’s duty to the court to give objective and unbiased evidence, the expert’s evidence would not have been admissible unless the court was satisfied that its admission was in the interests of justice, though the fact that the expert had an association, such as an employment relationship, which might have made a reasonable observer think that the expert might not so comply would not in itself have

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<sup>119</sup> Law Commission, above n.3 at [5.110-5.114].

<sup>120</sup> *Ibid.* at [5.115].

<sup>121</sup> Above n.117

<sup>122</sup> Edmond, above n.83 at 49-50.

<sup>123</sup> *ibid.* at 63.

<sup>124</sup> See cl. 9 of the Law Commission’s draft Bill, Law Commission, above n.3 at 152.

demonstrated a significant risk.<sup>125</sup> The Law Commission regarded this provision as codifying an existing limb of the common law admissibility test which it regarded as fundamentally sound, though it accepted that its view was based on civil jurisprudence due to the lack of criminal authorities in this area and that its recommendations might “be slightly different from the common law position for criminal proceedings”.<sup>126</sup> In fact, the criminal authorities in this area provide no authority for the proposition that impartiality forms a limb of the common law admissibility test (and, indeed, CrimPD 19A, when summarising the limbs of the common law admissibility test, does not mention impartiality). Rather, the position in criminal proceedings is that

“[e]xpertise and independence are separate issues [it being] a matter for the jury to determine whether there [is] any conscious or unconscious bias or lack of objectivity that might render [an expert’s] evidence unreliable [this being] a matter going to weight rather than admissibility”.<sup>127</sup>

Whilst impartiality does not amount to a limb of the common law admissibility test, CrimPR Part 19 makes clear, amongst other matters, that the expert’s duty to the court, which overrides the expert’s obligation to the person instructing or paying the expert, includes the duty to give evidence which is “objective and unbiased”.<sup>128</sup> Moreover, CrimPR 19.4(j) provides that an expert’s report must “contain a statement that the expert understands an expert’s duty to the court, and has complied and will continue to comply with that duty”.

The current approach in civil proceedings as regards impartiality is that

[i]t is always a matter for the court to decide whether...connections [between the expert and the litigation or the litigating parties] disqualify the expert from giving evidence or whether, as will often be the case, they go not to the admissibility of the evidence but to the weight to be attached to it.<sup>129</sup>

The key question that the civil court must determine when deciding whether an expert who has some form of interest in the outcome of civil proceedings should be permitted to give expert

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<sup>125</sup> Law Commission, above, n.3 at 147-148 (see cl.1(1)(c) and cl.3 of the Law Commission’s draft Bill).

<sup>126</sup> *ibid.* at [3.126], [4.5] and [4.7].

<sup>127</sup> *R v Stubbs* [2006] EWCA Crim 2312 per Richards LJ at [59] and see, also, *R v Gokal* (CA) 11 March 1999 and *Leo Sawrij Ltd v North Cumbria Magistrates’ Court* [2010] 1 Cr App R 22.

<sup>128</sup> See CrimPR 19.2(1)(a),(2).

<sup>129</sup> *Rowley v Dunlop* [2014] EWHC 1995 (Ch) per Richards J at [20].

evidence in those proceedings is “whether...he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty”.<sup>130</sup> Whilst the Law Commission regarded civil jurisprudence as providing authority for the existence of a common law admissibility limb based on impartiality<sup>131</sup>, it does not seem to have recognised that the admissibility of expert evidence in civil proceedings is governed not by the common law but by statute<sup>132</sup> and, more significantly, it does not appear to have taken into account the fact that, under the Civil Procedure Rules (CPR), the civil courts possess powers both to restrict expert evidence<sup>133</sup> and to exclude evidence that would otherwise be admissible<sup>134</sup> that their criminal counterparts do not possess.

Whilst impartiality does not form a distinct limb of the common law admissibility test and the case management powers conferred on the criminal courts by CrimPR Part 19 are less extensive than those conferred on their civil counterparts by CPR Part 35, there do appear to be at least two possible routes via which a criminal court could potentially exclude expert evidence solely or partially in consequence of bias on the part of an expert witness. First, there seems to be no reason why a criminal court in the exercise of its exclusionary discretion under s.78 of the Police and Criminal Evidence Act would not be entitled to exclude expert evidence tendered by the prosecution which was so tainted by bias that a civil court would have excluded it on the basis that admitting the evidence would have such an adverse on the fairness of the proceedings that it ought not to be admitted. Indeed, the decision of the Court of Appeal in *R v Luttrell*<sup>135</sup> (whilst not concerning impartiality) made clear that the court is entitled to exclude expert evidence tendered by the prosecution in order to secure the fairness of the proceedings. Similarly, in *R v Dlugosz* (again admittedly not in the context of impartiality) the Court of Appeal made clear that if there is a danger that a jury might “attach a false or misleading impression” to expert evidence, “then, even though admissible, the court should decline to admit it under its powers under s.78 of PACE”.<sup>136</sup>

The s.78 option would not be available to the judge where the tainted evidence was tendered by the defence because s.78 only applies to prosecution evidence. Consequently, arguments aimed at excluding defence expert evidence on the basis of bias would have to be targeted via one or more of the limbs of the common law admissibility test and/or the common law reliability test. Unless the

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<sup>130</sup> *Armchair Passenger Transport Ltd v Helical Barr plc* [2003] EWHC 367 (QB) per Nelson J at [29].

<sup>131</sup> Law Commission, above n.3 at [4.7].

<sup>132</sup> By s.3 of the Civil Evidence Act 1972.

<sup>133</sup> See CPR 35.4.

<sup>134</sup> See CPR 32.1.

<sup>135</sup> Rose LJ in *R v Luttrell*, above n.16 at [28], [34] and [38].

<sup>136</sup> Thomas P, above, n.14 at [27].



evidence was so tainted by bias as to have no probative value it would presumably be difficult to justify its exclusion on the basis of irrelevance. Similarly, if the evidence possessed more than minimal probative value it would be difficult to assert purely on the basis of bias either that it was incapable of providing the jury with some assistance in resolving issues outside of its knowledge and experience or that its maker did not possess sufficient skill in the relevant field of expertise to be competent to give expert evidence. Thus, it may be that the most viable approach would be to assert (in circumstances where this was so) that in consequence of bias there was not a sufficiently reliable scientific basis for expert opinion evidence to be admitted (an argument which, of course, could equally be applied to expert evidence tendered by the prosecution).

So far as the US *Daubert*<sup>137</sup> reliability test, codified in Federal Rule of Evidence 702, is concerned, David Bernstein suggested that the “implicit rationale for the reliability test is to preserve the perceived advantages of the adversarial system while mitigating the harms to the courts' truth-seeking function by the inevitable and strong biases that accompany adversarial expert testimony”.<sup>138</sup> Bernstein believes, however, that the *Daubert* test “far from fully succeeds in efficiently achieving this goal” and believes that Rule 702 and the “*Daubert* trilogy”<sup>139</sup> took a “wrong turn” by “insisting that judges attempt to discern the underlying reliability of proffered expert testimony in a given case” rather than focussing “on whether the testimony reflects unbiased, nonpartisan opinion within the expert witness's legitimate field of expertise”.<sup>140</sup>

In its final Report, the Law Commission deliberately avoided including factors relating to expertise or impartiality in the reliability limb of its admissibility test in order to avoid judges being required to apply distinct tests which overlapped.<sup>141</sup> In its original Consultation Paper, however, the Law Commission had included in its lists of guidelines relating to scientific and experience based expert opinion evidence the factor “whether there is evidence to suggest that the expert witness has failed to act in accordance with his or her overriding duty of impartiality”.<sup>142</sup> Given that the Law Commission’s recommended impartiality limb does not exist at common law, the potential overlap between reliability and impartiality limbs that persuaded the Law Commission not to include an impartiality factor in its lower-order factors is not an issue. Thus there would seem to be no reason

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<sup>137</sup> Above n.117

<sup>138</sup> David E Bernstein, "Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution" (2008) 93 Iowa L. Rev. 451 at 488.

<sup>139</sup> Namely, *Daubert* itself (n.117) plus *Kumho Tire Co Ltd v Carmichael*, 526 U.S. 137 (1999) and *General Electric Co v Joiner*, 522 U.S. 136 (1997).

<sup>140</sup> David E Bernstein, above n.138 at 488-489.

<sup>141</sup> Law Commission, above n.3 at 5.24.

<sup>142</sup> Law Commission, above n.1 at 6.26 and 6.35.

why the criminal courts could not take the impartiality factor from the Law Commission's Consultation Paper into account as guidance when applying the common law reliability test. Indeed, it is arguable that alleged bias could also be relevant to the application of the common law reliability test when the Court is considering, in line with the guidance provided by CrimPD 19A.5, whether an expert took full account of all relevant information, whether an expert's preference from a range of opinion relating to the relevant matter has been properly explained and/or whether an expert's divergence from established practice in the field has been properly explained.<sup>143</sup>

It is not suggested that recourse to the common law reliability test as a means of challenging the impartiality of an expert witness is something that should be attempted regularly. Fundamentally, as *Michell* and *Mandhane* recognised,

courts should not be too quick to find bias on the part of expert witnesses...

[Partisanship] should be discouraged, but [conflict between expert testimony] may reflect a genuine divergence of opinion amongst experts, which is essential to the adversarial process.<sup>144</sup>

Thus, even if the courts become willing to consider arguments based on bias when considering whether expert opinion evidence is sufficiently reliable to be admitted, it may be that they should not be too willing to do so.

Whilst it is possible to speculate that the criminal courts might be persuaded to exclude expert evidence which is tainted by bias either under s.78 or on the basis of unreliability, currently the main option for counsel who wishes to challenge expert evidence in criminal proceedings upon the basis of bias would appear to remain that of developing an appropriate cross-examination strategy. In order to do so it is important to recognise that bias may have a variety of causes. A valuable analysis of the causes of expert witness bias was provided by Deidre Dwyer, who identified three categories, namely, "personal interest, financial interest and intellectual interest".<sup>145</sup> Whilst Dwyer's analysis was directed at the civil context, most of the causes of expert witness bias she identifies are clearly relevant in the context of criminal proceedings. Dwyer subdivided the personal interest category into "personal predisposition" (encompassing moral opinions, personal relationships, common memberships and other professional relationships) and "personal involvement (i.e. the expert

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<sup>143</sup> See, respectively, CrimPD 19.5 (f),(g) and(h).

<sup>144</sup> *Michell*, P; *Madhane*, R. "The Uncertain Duty of the Expert Witness" (2005) 42 *Alta L Rev* 636 at At 649.

<sup>145</sup> Deidre Dwyer, "The causes and manifestations of bias in civil expert evidence" (2007) 26 *CJQ* 425 at 427.

developing sympathy for the instructing party).<sup>146</sup> Dwyer subdivided the financial interest category into “financial predisposition” (encompassing expert as shareholders, experts as employees and developing a future career as an expert) and “financial involvement” (i.e. the fact that the expert is being paid by one of the parties).<sup>147</sup> Finally, the intellectual interest category concerns the potential for bias where an expert’s standing in the expert’s profession may be increased or reduced depending upon the court’s conclusions in relation to a method or theory in relation to which the expert is a leading authority.<sup>148</sup>

With regard to potential cross-examination strategies, David Paciocco’s analysis is helpful<sup>149</sup>. Paciocco, whilst recognising that “[b]ias is notoriously difficult to prove” also believes that “[bias] has its high-risk contexts, practices and symptoms; these can and should be exposed during cross-examination and, where a credible foundation is created, referred to in counsel’s submissions”.<sup>150</sup> Thus, based on Paciocco’s work, a cross-examination strategy might, for example, be aimed at revealing “selection bias” (i.e. that a witness has been selected because the witness’ ideas align with the party’s interests), at questioning whether an expert witness has understood expert’s duty to the court, at exposing personal or professional bias or at exploring litigation influences (i.e. pressures) to which the witness was exposed by the instructing party.<sup>151</sup>

Some of the forms of bias identified by Dwyer and considered by Paciocco might be less obvious either to the expert or to the party instructing the expert than others. It is suggested that a desirable amendment to the provisions of CrimPR Part 19 concerning expert’s duties in criminal proceedings would be elaboration concerning some of the key forms of bias that might be encountered in criminal proceedings which could have the effect of drawing to experts’ attention some of the less obvious forms of which they might not be aware but to which they might be prone. Moreover, it is suggested that a valuable amendment to CrimPD 19A might be to add to the list of lower-order factors which it reproduces from the Law Commission’s Report the impartiality factor that is to be found in the Law Commission’s earlier consultation paper.

## Conclusion

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<sup>146</sup> Ibid. at 427-430.

<sup>147</sup> Ibid. at 430-435.

<sup>148</sup> Ibid. at 434.

<sup>149</sup> Paciocco M, “Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts” (2009) 34 Queen’s LJ 565.

<sup>150</sup> Ibid. at 600.

<sup>151</sup> Ibid. at 600-604.

Following the Government's decision not to implement the Law Commission's recommendations concerning expert evidence in criminal proceedings, the admissibility of expert opinion evidence in criminal proceedings in England and Wales continues to be governed by a three limbed common law admissibility test which does not include an impartiality limb but now, it is suggested, is supplemented by a common law reliability test which has developed via recent jurisprudence of the Court of Appeal. The existence of a reliability test should not, however, be taken to suggest that the criminal courts will be required to conduct investigations into the admissibility of all expert evidence as a matter of routine. It should also be noted that, until the Court of Appeal further considers reliability in the context of the amendments to Part 19 CrimPR and CrimPD 19A, it is difficult to predict to what extent the court will use the opportunity to develop the common law reliability test.

Expert evidence must be relevant and the court, taking appropriate case management steps, should ensure that where expert evidence is admitted the attention of the jury is focussed on the relevant issues. Moreover, such evidence should only be admitted if it provides information that is likely to be outside the court's knowledge and experience and, again, the court should ensure that where an expert witness is called, expert opinion is restricted to issues in relation to which this test is satisfied.

An expert witness must be competent to give expert evidence and where a witness is so competent the court should ensure that the witness is not permitted to give evidence which strays outside the witness' field of expertise. Provisions of CrimPR Part 19 require the provision of information which should assist the court when it is determining the competence of a witness to give expert evidence, when it is evaluating the ambit of an expert's field of expertise and when it is assessing the credibility of an expert witness and Part 19 also contains provisions which emphasise the duty of an expert to give evidence which falls within the ambit of the expert's field of expertise. It is suggested that either the new credibility provision within CrimPR 19 itself or CrimPD 19A might beneficially be amended so as to provide parties with examples of the types of matter that they are required to disclose.

The guidance contained in CrimPD 19A is intended to inform the application of the common law reliability test, as stated in *R v Dlugosz*<sup>152</sup>. The common law reliability test in *Dlugosz* was framed in terms of scientific evidence whereas the Law Commission intended its guidance to apply to both scientific and non-scientific expert evidence. Whilst the Practice Direction appears to recognise that the guidance it produces is applicable to expert evidence of both types, an amendment making clear

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<sup>152</sup> n.14

that the reliability test is generic might be of assistance. Moreover, the Practice Direction appears to accept that both the common law admissibility test which it reproduces and the guidance it imports from the Law Commission's Report are both applicable to expert opinion evidence but do not apply when an expert gives evidence of fact. This appears to be in line with the very limited jurisprudence in relation to the issue but may be a matter that the Court of Appeal could usefully revisit. CrimPD 19A reproduces the Law Commission's "lower-order factors" and "higher-order examples" but fails to reproduce the Law Commission's "core test". It is suggested that amendment of the Practice Direction so as to encompass the core test as additional high level guidance which the courts could take into account when deciding whether expert evidence is sufficiently reliable would enhance the coherence of the Practice Direction and the utility of the guidance that it provides. It is suggested also that CrimPD 19A should be further amended to make clear both that the courts should, on a case by case basis, take into account only those of the Law Commission's lower-order factors that are appropriate in relation to the type of expert opinion evidence which is before them and that as well as the lower-order factors the court should also consider any other factors that are relevant to evaluating the reliability of the expert evidence which is before them. Another potential amendment to the Practice Direction might be one making clear that the guidance it contains is not intended to prevent the courts from admitting expert evidence based on new science or new technology provided that the court has undertaken a sufficiently rigorous examination of its reliability. Several of the provisions of CrimPR Part 19 which concern the content of experts' reports require experts to provide information which the court should find of value when required to evaluate the reliability of their evidence. In particular, experts are now required to provide the information that the court may require in order to apply the common law reliability test. It is suggested that both experts and the parties instructing them would be likely to value guidance concerning what is required in order to comply with that requirement and that such guidance should be made explicit either in CrimPR part 19 itself or in CrimPD 19A. Moreover, whilst the Law Commission emphasised the importance of training for judges and lawyers as regards the application of its proposed reliability test, it remains to be seen both what training will be provided in relation to the application of the common law reliability test in the context of the guidance provided by CrimPD 19A and how successful that training will be.

Finally, whilst impartiality does not appear to amount to a condition precedent to the admissibility of expert evidence in criminal proceedings, it is suggested that there are at least two routes via which a party to criminal proceedings could potentially deploy arguments based on alleged expert witness bias in attempting to persuade the court to exclude such evidence. First, there would seem

to be no obvious reason why the court could not exclude expert evidence tendered by the prosecution in the exercise of its exclusionary discretion under s.78 of the Police and Criminal Evidence Act 1984 in circumstances in which a civil court would exercise its case management powers so as to exclude expert evidence in consequence of expert witness bias. Secondly, given that the common law admissibility test does not possess a discrete impartiality limb, there would seem to be no reason why the court could not take expert witness bias into account when applying the common law reliability test. Accepting, however, that the courts may not be prepared to exclude expert evidence on the basis of either of these two suggested routes, it remains important for counsel to be aware of the various forms that bias can take and, in circumstances in which expert evidence appears to be tainted by bias, to develop an appropriate cross-examination strategy. A final suggestion is that whilst CrimPR Part 19 clearly states the expert's overriding duty to the court, it might be helpful for the rules to provide some examples of the various forms that bias can take in order to draw some of the less obvious forms to the attention both of experts and of the parties instructing them.

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