

The competence of experts in criminal proceedings

Lack of compliance and oversight: the need for caution and eternal vigilance

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There are many cautionary tales about expert evidence, but the most visceral is the wrongful conviction of Sally Clark for the tragic death of her two infant children. Many will still recall that the life of this city solicitor was destroyed by a prosecution in 1999 that relied on the now discredited and flawed statistical conclusions of an expert known as Roy Meadows.

As a result of his evidence, a mother spent three years in a prison where she was assaulted and targeted by other inmates as a convicted child killer. The Court of Appeal's eventual overturning of her conviction (it had rejected her first appeal) did not repair the damage. Broken by a prison sentence for crimes that she did not commit, Sally Clark died of alcohol poisoning some four years after her release. It is an important reminder that the criminal justice system must guard against the admission of dangerously inaccurate or substandard expert evidence.

Superficially, much has changed in the 20 years since Sally Clark's conviction with extensive statutory safeguards, official guidance and procedural rules having been brought into existence. The reason that the change is superficial is because the guidance, procedural rules and safeguards are routinely ignored due to a culture of non-compliance in the criminal courts that is

fostered by a lack of funding to the police and the CPS. An example of the continuing problems with expert evidence was provided on 30 May 2019, when a multimillion pound fraud trial collapsed at Southwark Crown Court. It collapsed because the prosecution's expert on the carbon credit market, a Mr Andrew Ager, was found to be entirely unqualified for the role. Mr Ager stated he had given evidence in a 22 previous trials, where defendants had been convicted and imprisoned, before his inadequacies were revealed, which should be a cause for considerable anxiety.

It follows that whatever the wider issues of compliance, the competent practitioner must be familiar with the framework for expert evidence. Familiarity with the procedural guidance is the only reliable way to detect and remedy deficiencies in the evidence of a proposed expert.

THE ACPO GUIDANCE AND PART 19 OF THE CRIMINAL PROCEDURE RULES 2015

The *Guidance Booklet for Experts* was published by the Crown Prosecution Service and the Association of Chief Police Officers in May 2010 ('the ACPO Guidance') and endorsed by the then Director of Public Prosecutions Keir Starmer QC. It remains an important and useful document, which all experts should be required to read before receiving their instructions. The Guidance neatly emphasises the



About the author

Narita Bahra QC is instructed to defend in heavyweight crime and business crime cases, including a number of the high-profile cases in which disclosure failings by the prosecuting authorities have been unmasked, such as *R v Sulley*. In 2018, four of these cases became the subject of review by the House of Commons Committee.

expert’s duty to retain, record and reveal. It also explains, in stark terms, the serious consequences of failing to comply with those obligations.

The principles of retain, record and reveal are summarised in the ACPO Guidance as follows:

- (a) **Duty to retain** – a duty to retain everything, including physical, written and electronically captured material, until otherwise instructed.
- (b) **Duty to record** – a duty to commence making records from the time of instruction and to continue to make records for the entire period in which the expert is involved. Section 4.2.2 of the ACPO Guidance makes it clear that, at a minimum, what must be recorded is the collection and movement of items; the examination of materials; and oral and other communications in respect of the investigation.
- (c) **Duty to reveal** – a duty to make the prosecution team aware of all that the expert has recorded and all of the material in the expert’s possession in respect of the investigation.

In October 2015, the most recent Criminal Procedure Rules (‘CrimPR’) were introduced. The procedural rules in respect of expert evidence can now be found at CrimPR Part 19 and it is essential that they are read in conjunction with the Practice Direction at CPD V Evidence 19A to C. It should be noted that the most recent amendment to the CrimPR was on 1 April 2019, when an obligation was imposed, via the insertion of para 19A.7 of the Practice Direction, on a party introducing expert evidence to ascertain and disclose information that has the potential to undermine the reliability or credibility of their expert evidence. The guidance makes it clear that the type of information contemplated includes, amongst other things, previous adverse judicial comment and a lack of accreditation.

HOW TO APPROACH THE ANALYSIS OF EXPERT EVIDENCE

For any practitioner reviewing expert evidence, the starting point has to be familiarisation with Part 19 of the CrimPR and the relevant Practice Direction at 19A to C. It is also worth taking time to reflect on the overriding principles of expert evidence as rehearsed by Gage LJ in *R v Lorraine Harris* [2005] EWCA Crim 1980 at [271] and the Court of Appeal’s recent commentary in *R v Alex Julian Pabon* [2018] EWCA Crim 420.

The first step upon receipt of an expert’s report should be to check if the expert has complied with the relevant formalities, as set out in the CrimPR. If, for example, the expert has failed to sign a declaration of understanding in respect of their duties to the court (as per CPD V Evidence 19B), it will be a strong indication that they have neither familiarised themselves with the relevant



R v Sulley, the carbon credit and diamond fraud case which collapsed at Southwark Crown Court at the end of May 2019, resulted in exposing the prosecution’s carbon credits market expert witness and significant disclosure failings. The case attracted substantial media coverage.



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guidance or been sufficiently diligent in respect of their duties.

The second step should be to carry out an internet search in respect of the expert, as a surprising amount of material can be obtained from search engines such as Google. It is equally important to enter the expert’s name into Westlaw or LexisNexis to check if there has been any previous judicial commentary regarding their evidence in other proceedings. Pausing here, while the amendment of 1 April 2019 requires disclosure of information that is likely to undermine the reliability or credibility of their expert’s evidence, it cannot be taken for granted that the party seeking to introduce the evidence will be aware of the amendment or have asked the relevant questions of their expert. The responsible advocate would be well advised to make their own enquiries

Thirdly and, most importantly, is the question of the expert’s methodology and the existence of independent statistical or empirical data which is capable of being independently reviewed. It is a matter of logic that if no independent review is possible, the evidence cannot be adequately tested and there will be a viable argument against its admissibility.

Fourthly, at the conclusion of the initial analysis the following items, as a minimum, should be requested in further disclosure:

- Confirmation that the expert has provided an Expert’s Self-Certificate, which is a requirement in every case where an expert is instructed by the prosecution (see the ACPO Guidance at 6).
- Confirmation from the prosecution that they have received an Expert’s Index of unused material and that the schedule has been disclosed.

Additional disclosure requests relating to expert evidence will inevitably be case specific and dependent on the type of expert evidence that is being provided. If a defence expert had been instructed, they should be consulted about further areas of testing or analysis which could assist in peer review or contrary opinion before any disclosure request is finalised.

Finally, it is essential that any defence expert is directed to CrimPR 19, the relevant Practice Direction and the ACPO Guidance if their reputation and reliability is to be maintained.

The debacle with Mr Ager highlights that in 2019 the guidance and procedural rules, which were specifically designed to prevent the type of miscarriage of justice that occurred in Sally Clark’s case in 1999, are being routinely ignored.

RULES AND GUIDANCE ARE POINTLESS WITHOUT SANCTION

As the case of Sally Clark demonstrates, the use of unreliable expert evidence can have devastating consequences for the fairness of the trial process. Disappointingly, the debacle with Mr Ager highlights that in 2019 the guidance and procedural rules, which were specifically designed to prevent the type of miscarriage of justice that occurred in Sally Clark's case in 1999, are being routinely ignored. It is likely there will be many other examples in the coming years and urgent steps must be taken to address this problem.

CrimPr 19, and particularly the Practice Direction, is a well drafted and thorough safeguard. It bears many similarities to the content of Part 35 of the Civil Procedure Rules (CPR). Where they differ is that a failure to comply with CPR 35 may result in a case being struck out or an adverse costs award. It is the sanctions that act as a driver for compliance, as they do within the operation of the CPR generally. In the criminal courts, where individual liberty is often at stake, the rules are infrequently referenced and sanctions are almost non-existent.

The difference between the civil and criminal regimes is entirely attributable to the difference in funding during the trial process and it would be foolish to think that there is going to be a substantial



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Perhaps the most visceral of the many cautionary tales about expert evidence is the wrongful conviction of Sally Clark who died four years after her release (pictured outside court in 2003).

injection of funds into the operation of the criminal justice system anytime soon. In that context, one simple and cost effective solution might be to insist that all parties confirm, in the pre-trial checklist, that they have read CrimPR 19 and have referred their instructed expert to the relevant guidance. ●