# Expert evidence in court–developments and changes in the UK position

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The paper focuses on recent UK-based developments concerning the production of expert evidence for presentation in criminal trials.

It begins by providing historical background to the UK situation and contrasting it with that in other jurisdictions, mainly the USA.

In the USA there has been a tendency to control the methods of analysis by which expert evidence is produced. The degree of control was perhaps weakest in the earlier Federal Rules of Evidence (Rule 702, 1975) and in the standard set down in the (1923) Appeal Court ruling Frye -v- United States (1923), which simply stipulated that the procedure 'must be sufficiently established to have gained general acceptance in the particular field in which it belongs'. More recently, criteria for admissibility have been tightened, principally via the Appeal Court cases Daubert -v- Merrell Dow Pharmaceuticals, (1993) and Kuhmo Tire Co -v- Carmichael (1999). Whilst revisions to the Federal Rules of Evidence in the wake of these rulings have been relatively weak, the Daubert requirement that the expert should be able to provide a known and acceptably low error rate for his/her method has prevailed. In many cases this has resulted in the exclusion of much that might have passed – and in much of the rest of the world continues to pass – as expert evidence. Arguably, it would render inadmissible all forensic speaker comparison evidence, save perhaps that which is produced by (semi) automatic systems.

In the UK, neither the state nor the higher courts have shown much appetite historically for the control of forensic scientific methods. Rather, the tendency has been very much towards the validation of experts as opposed to procedures (R -v- Silverlock (1894)). Even then, the criteria applied have been weak and ill-defined. Once the expert is accepted as qualified, s/he is accorded a great deal of autonomy and discretion over analytic procedures. In respect of forensic speaker comparison evidence specifically, the position was affirmed in the Appeal Court ruling R -v- Robb (1990), where the court ruled that whether or not an expert used any acoustic testing was entirely at his/her own decision, and re-iterated in respect of the same issue in the more recent Appeal R -v- Flynn and St John (2008). Indeed, the only analytic issues over which the higher courts have seen fit to pass down general principles and prohibitions concern the use of statistics and interpretive frameworks in representing the strength of evidence (cf. R -v- Doheny and Adams (1996); R -v- T (2010)).

More recently, however, the UK has seen a movement towards the US model of regulating methods. This move has come from two government related bodies rather than from the superior courts. The first is from the Law Commission, a body set up to review law and legal practices and to advise the government on statutory provisions in this respect. The recent report from this body, Expert Evidence in Criminal Proceedings (2011), contains a draft Bill of Statute for government consideration and enactment. Criteria for admissibility of expert evidence are laid out in a form similar to those found in the current US Federal Rules of Evidence. However, crucially missing is the known error rate clause found in Daubert.

The second move towards regulation is from the office of the government appointed Forensic Science Regulator. Each forensic science sub-discipline is being invited to form a group that will set out criteria for, inter alia, case handling, analytic procedures and testing in accordance with European standards. Linked to this, the UK-based Forensic Science Society is currently developing and implementing test and accreditation procedures for forensic scientists from different fields. The ultimate aim is universal accreditation.

The presentation considers what these new developments might mean for practicing forensic speech scientists in the UK, and also for those, including IAFPA members, based outside the UK who become involved in UK casework on an occasional basis. Consideration is given to whether IAFPA may have a role to play in respect of the developments.

## References:


R –v– Silverlock [1894] 2 Q.B. 766
Frye -v- United States (293 F. 1013 (D.C. Cir 1923))
R –v– Robb [1991] 93 Cr App R 161
Daubert –v– Merrell Dow Pharmaceuticals Inc. (509 US 579 (1993))
R -v- Doheny & Adams ([1996] EWCA Crim 728)
Kuhmo Tire Co. -v- Carmichael (526 US 137 (1999))
R –v– O'Doherty [2002] NICB 3173
R -v- Flynn & Anor [2008] All ER (D) 30 (May)
R –v- T [2010] All ER (D) 240 (October)
The Law Commission. (2011). Expert Evidence In Criminal Proceeding In England And Wales. (LAW COM No 325) London: The Stationery Office