Inns of Court College of Advocacy (ICCA) – Written evidence (FRS0089)

This is the response of the Inns of Court College of Advocacy (ICCA) to the Committee’s call for evidence in support of its above inquiry. In particular the ICCA wishes to inform the Committee of its functions in relation to advocacy training, which are relevant to the second main theme of the Inquiry namely, “The understanding and use of forensic evidence in the criminal justice system. The inquiry will look at the level of understanding within the criminal justice system and explore routes available to improve understanding by the judiciary, legal teams and juries, thus ensuring that forensic evidence, including digital evidence, is used effectively and robustly throughout the process”.

Our evidence will focus on the Committee’s Questions 4, 5 and 6. The subject-matter of these questions lies squarely within the ICCA’s field of activities. The general tenor of our evidence is that, while training in the handling of expert forensic evidence in the courts, and improvements in practice and procedure, continue at a pace, further work is needed on both fronts to ensure that decision-making in criminal cases involving the use of such evidence is fair and accurate.

The ICCA

The ICCA was established by the Council of the Inns of Court (COIC) in 2016. The Committee will know that all barristers must belong to and be called to the Bar by one of the four Inns of Court (Lincoln’s Inn, Gray’s Inn, the Inner Temple and the Middle Temple). The Inns play an important role in the education and training of Bar students and practising barristers. COIC is a corporate entity which promotes the common interests of all four Inns. The ICCA, and its predecessor the Advocacy Training Council (ATC), is a semi-autonomous department of COIC whose mission is to raise and maintain high standards in the practice and ethics of advocacy in courts and tribunals. It performs this function by carrying out research into the many different facets of courtroom advocacy, delivering training to practitioners, and publishing relevant materials. Its constitution and the full scope of its activities can be found on https://www.icca.ac.uk/.

The ICCA’s training is not delivered exclusively to members of the Bar of England and Wales. Many of its activities include solicitor advocates, and it has a flourishing international training programme.

The ICCA’s Expert Evidence Working Group

The ICCA has established a Working Group on expert witnesses and the handling of expert evidence (the Working Group). Its current chairman is Michael Kent QC. It is the successor to an ATC working group chaired by Derek Wood QC (now the Chairman of the Governors of the ICCA). The remit of the Working Group is to keep under consideration how procedures for the handling by advocates of expert witnesses in and out of court can be improved and ensuring that materials for advocacy training in this field are effective and realistic.
The Working Group includes eminent criminal law practitioners from the Bar as well as Professor David Ormerod QC, the Law Commissioner for criminal law who was responsible for the Law Commission Report “Expert Evidence in Criminal Proceedings in England and Wales” 2011 (Law Comm no. 325). Professor Ruth Morgan, who is a Specialist Advisor to your Committee, is also a member of the Working Group.

**Our programme of work**

The programme of work which the Working Group is undertaking was initially triggered by the work of the Law Commission, and in particular concerns expressed by consultees including judges in responses to its Consultation Paper No 190.\(^1\) It was noted that advocates in the criminal courts were not being equipped to deal effectively with scientific expert evidence, and that, when cross-examining, advocates tended not to probe, test or challenge the underlying basis of an expert’s opinion evidence but instead adopted the simpler approach of trying to undermine the expert’s credibility. Attention was drawn by the Law Commission to substantial miscarriages of justice which had occurred as a result of the court’s apparently accepting flawed expert evidence.

The Working Group is accordingly focussing on techniques for challenging experts as to the basis, reliability and relevance of their opinions. The need for scrutiny arises as much in relation to the expert instructed on the advocate’s own side as to the expert of an opposing party. Ultimately the aim is to improve the reliability of all the expert evidence which the court receives.

Expert evidence, including scientific and technical evidence, is presented in every type of legal case. The Working Group’s role is not therefore confined to training in relation to the preparation, presentation and challenge of expert evidence in the criminal courts, which is the focus of the Committee’s Inquiry. It also covers the interaction with experts in civil and family cases, and in statutory tribunals as well as in courts. Many of the problems and solutions surrounding the deployment of expert opinion evidence are generic to all branches of the work of the courts and tribunals; and useful lessons can be learned by comparing and contrasting the practice and procedure for handling expert evidence in different types of case. We refer to this point below.

**The ICCA’S published Guidance**

In 2017 the ICCA published generic guidelines to advocates ("Guidance on the Preparation, Admission and Examination of Expert Evidence") which has a direct bearing on the Committee’s Question 6. The Working Group is currently engaged on a revised and expanded edition of this publication. The ICCA will be pleased to supply the Committee with copies on request.

It is of course axiomatic that the duty of any expert is to assist the court or tribunal by giving impartial and unbiased evidence, uninfluenced by the interests of the party who is presenting that expert as a witness. Within this overriding constraint the Guidance lays strong emphasis on the need for advocates to acquire a thorough understanding of the prospective evidence of their own expert

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before trial. Without careful pre-trial preparation flaws in the evidence of the advocate’s own expert may go undetected; and the advocate will not be properly equipped to challenge the evidence given on the other side.

**The use of statistical evidence**

Many expert witnesses, whether they are trained statisticians or not, regularly use statistics of various kinds in the presentation of their evidence. In the criminal courts statistics are routinely used, for example, in the analysis of DNA, blood samples and other bodily specimens, fibres, and medical injuries and outcomes. As the Law Commission has pointed out, some of the most notorious miscarriages of justice in the criminal courts have occurred as a result, specifically, of the misuse of statistics.

In 2017, in order to promote proper training in the use of statistics, and in the detection of misuse, the ICCA and the Royal Statistical Society jointly published a substantial booklet “Statistics and Probability for Advocates: Understanding the use of Statistical Evidence in Courts and Tribunals.” The ICCA will be pleased to provide the Committee with copies of this booklet on request. It contains many examples of the correct and incorrect use of statistics in criminal as well as civil cases, and it contains suggested training exercises.

**Training events**

The ICCA has developed a programme of training events for advocates specifically in the deployment of expert evidence. Two were held in London in 2017, and further events are to be held in London, Manchester and Bristol. Training takes the form of the conduct of a mock trial, based on realistic scenarios. Qualified experts attend to take the role of expert witness. Advocates confer with their expert before calling them as a witness and cross-examining the expert on the other side. These events have included the use of scientific evidence in criminal cases. The ICCA will be pleased to welcome members of the Committee if they wish to attend and observe these events.

**Improving training for the future**

The Working Group continues to develop training exercises for the Inns’ and regional Circuits’ programmes for New Practitioners (i.e. barristers within 3 years of their call to the Bar). It is also developing further expert witness exercises for the advanced training of established advocates. It is hoped that members of the Expert Witness Institute, who already volunteer for mock trials and other advocacy training exercises, will assist in reviewing these practical exercises and associated materials to ensure that they reflect problems encountered in practice and are thus relevant, from an expert witness’s perspective. It is planned to include agreed arrangements for the provision of experts for training conferences and, perhaps, the preparation of glossaries to provide assistance to advocates on the correct meaning and application of commonly occurring technical terms within the various disciplines represented by the Institute.

It is also planned to produce training DVDs to include introductory material explaining and illustrating basic principles of instructing and examining an expert witness.
Other special problems in the presentation of expert evidence

The Working Group is also exploring other specialised problems of general application of which advocates must be aware. A current and highly topical example, with which the Committee will be familiar, is the issue of unconscious bias in forensic experts. In embarking on this difficult and complex topic the Working Group is assisted by a senior researcher in cognitive neuroscience.

Practice and procedure in the admission of expert evidence

Critical to the effective presentation of expert evidence in the criminal courts is the practice and procedure under which it scrutinised and agreed by the court to be heard at trial: see Criminal Procedure Rules October 2015, amended April 2018, Part 19 and the associated Practice Direction Division V. It is derived from the recommendations of the Law Commission and follows in many respects the practice and procedure in the civil courts. In summary, parties who wish to rely on such evidence must follow a detailed step-by-step process: (1) permission from the court must be obtained before expert evidence can be called; (2) experts must exchange initial reports, and file them with the court; (3) opposing experts must then meet, and identify areas on which they agree and disagree; (4) areas of agreement and disagreement must be recorded in a joint document; (5) at an appropriate stage the experts may be entitled to file supplemental reports in reply. A timetable will be laid down by the court for taking these steps. The civil rules and practice direction are reinforced by Guidance for the Instruction of Experts in Civil Claims, issued by the Civil Justice Council. The active participation of the advocate in these various stages is critical both to test the strength of the evidence and to ensure that the advocate understands it.

The ICCA is not however aware of any formal review of the practical effectiveness of the Rules since they were introduced in 2015, or of the extent to which they are rigorously enforced in all cases. We suggest that the Committee commissions such a review.

Submitted by:
James Wakefield, Dean of the ICCA
Derek Wood CBE QC, Chair of Governors
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2 Civil Procedure Rules Part 35 and Practice Direction 35.