This article discusses the principles governing the use of expert evidence in English criminal trials, with particular reference to evidence on the interpretation of video recordings and photographs. Drawing in part on debates in the USA, it argues that English law is inconsistent in its response to the question of how far juries need to be protected from being unduly influenced by experts.

Key Words: Expert witnesses; legal rules; video identification; trusting the jury

Introduction

My title risks offending the readers of this journal who either appear as expert witnesses themselves or rely on their services; but the classification of liars attributed to the Victorian judge Lord Bramwell captures the tone of much of the mounting criticism of expert witnesses both in the USA and, to a lesser extent, in Britain. American experts are, it is said, regularly compared to ‘whores’ by the very lawyers who depend on their services; while in this country no less a lawyer than Lord Woolf, the most senior civil judge, has borrowed a common American phrase in referring to a perception of experts in medical negligence cases as ‘hired guns’. The proposed extension of ‘no win, no fee’ arrangements in English civil litigation may result in pressure for experts as well as lawyers to accept payment on this basis, thus increasing the tension between their two roles as servants of the court on the one hand and members of the litigation ‘team’ on the other. Both in Britain and North America (as well as Australia and New Zealand) particular concern has been expressed about the ability of juries to resolve conflicts of scientific evidence on which millions of dollars (in American civil trials) or the life or liberty of criminal defendants, may depend.

This article aims to provide both an explanation and a critique of the legal rules which currently govern the admission of expert evidence in the criminal courts of England and Wales. It does so by examining a series of cases involving the evidence of the one kind of witness that supposedly never lies — the camera (particularly the video or security camera). In the digital age, photographs, if not cameras, most certainly can lie, but the question in these cases is whether the photograph or video recording needs an expert interpreter to make its meaning clear. Apart from their practical importance, these cases provide a telling illustration of the ambivalence of judges towards both experts and juries, and their different attitudes towards different kinds of expertise. I shall first outline the relevant general principles of the law of criminal evidence and then explain the development of the law in the cases on video evidence, before subjecting these cases to critical discussion. I am by no means an expert in security matters and my purpose is neither to criticise nor defend this particular kind of expertise, but merely to show why, from a legal perspective, it raises interesting problems.
Principles of evidence

In a jury trial, it is for the judge to decide whether evidence is admissible (ie whether the jury should hear it) and for the jury to decide what weight to give it. In the USA, a great volume of case law and academic debate has grown up around standards of admissibility by which, it is hoped, juries can be shielded from so-called ‘junk science’ without being deprived of the benefit of important new techniques. By contrast, English criminal courts have taken the view that experts’ qualifications or lack of them, and compliance or otherwise with accepted scientific techniques, are matters for the jury to take into account in deciding what weight to give their evidence.

The leading case on this point is *R. v. Robb*, where a specialist in phonetics, Dr Baldwin, compared tape recordings of a kidnapper making ransom demands with a recording on video of what was undoubtedly the defendant’s voice. His evidence that the recordings were all of the same voice was based on his impression of the pitch, accent, etc of the words, unsupported by any acoustical measurement. Under cross-examination, Dr Baldwin conceded that:

> The great weight of informed opinion, including the world leaders in the field, [was] that auditory techniques unless verified by acoustic analysis were an unreliable basis of speaker identification ... There were only a handful of others ... who shared Dr Baldwin’s opinion. He had published no material which would allow his methods to be tested or his results checked. He had conducted no experiments or tests on the accuracy of his own conclusions.

This is exactly the kind of evidence which the American tests of admissibility are designed to exclude. It could be excluded either under the test laid down in *Frye v. United States*, because it was not generally accepted by the relevant scientific community, or under the ‘reliability’ test laid down by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* (which has superseded *Frye* in the Federal courts and some states) because the technique had not been tested, published or subjected to peer review, nor was its error rate established (whether an American court would, in reality, apply either of these tests strictly to prosecution forensic evidence is a very different question).

In *Robb*, however, the Court of Appeal rejected the argument that the trial judge should have excluded the evidence. Lord Justice Bingham (as he was then) restated the conventional view that expert evidence is an exception to the general rule that witnesses may only give evidence of fact, not opinion; and that in deciding what was expert evidence the ‘essential questions’ were firstly ‘whether study and experience will give a witness’s opinion an authority which the opinion of one not so qualified will lack’, and secondly whether the individual witness had adequate skill and knowledge. Although Dr Baldwin represented a minority view in his discipline he was not ‘a quack, a charlatan or an enthusiastic amateur’ and it could fairly be left to the jury to decide what weight, if any, to give to his opinion.

The Court of Appeal in *Robb* also reiterated the traditional view that the witness must not ‘usurp’ the function of the jury as the final arbiter of fact. Two rules which the courts have developed in an effort to preserve the sovereignty of the jury have formed the basis for many of the objections to evidence about videotapes. The ‘ultimate issue rule’ holds that the expert must not testify as to the very question which the jury has to decide, eg that the defendant is insane or that Robb was the kidnapper. In practice, this rule has been commonly flouted for at least a century (especially by psychiatrists), and reliance on it ‘now seems to be little more than the last strategy of a desperate advocate’. A more important and controversial restriction is the ‘common knowledge rule’, which was formulated as follows by Lord Justice Lawton...