

From: MAHER G
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To: SLC info
Subject: 9th Programme of Law Reform

I would like to suggest the following topic for inclusion in the Commission's Ninth Programme of Law Reform: expert evidence in criminal trials

Until recently the Scots law of evidence was very undeveloped on whether the subject-matter of an expert witness's evidence was sufficiently reliable to allow its admission before a jury or judge as fact-finder in a criminal trial. This was in marked contrast to many other jurisdictions (including the USA, Canada, Australia and England) where the courts and legislatures had grappled with this issue. As a result of 3 significant recent cases (Liehne v HM Advocate 2011 SCCR 419; Hainey v HM Advocate 2013 SLT 525; and Young v HM Advocate 2014 SLT 21) the Scottish courts have now shown an awareness of the range of issues which this topic involves, in particular the so-called gatekeeper function which judges are to play.

In Young (paragraph 54) the Court identified various matters to be considered in carrying out this function but did not state the provenance of these criteria, which were probably based on the influential US Supreme Court decision of Daubert v Merrell Dow Pharmaceuticals Inc 509 US 579 (1993) or the Law Commission Report on Expert Evidence in Criminal Proceedings in England and Wales (Law Com No 325; 2011). The Daubert case has given rise to extensive judicial and academic commentary; and the Law Commission report contains a detailed discussion of the issues and 20 recommendations for reform.

In my view this topic is of major significance in Scottish criminal practice but as the law is unclear and undeveloped, it should be considered by the Scottish Law Commission.

Best wishes

Professor Gerry Maher

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