

REGULATING THE EVIDENTIARY USE OF AI IN CRIMINAL PROCEEDINGS IN THE UK

Rudi Fortson KC

25 Bedford Row, London

Visiting Professor of Law, QMUL

Visiting Professor of Law, University of Liverpool

www.rudifortson4law.co.uk/

www.qmul.ac.uk/law/people/visiting-and-honorary-staff/items/fortson.html

www.liverpool.ac.uk/law/honorary-staff/rudi-fortson/

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PLANNING FOR AI DEVELOPMENTS IN CRIMINAL PROCEEDINGS

- **No legal framework in E&W that is specific to evidentiary AI in criminal proceedings.**
- **Existing legal rules (statutory and case-law) are likely to be sufficient to address *most* problems that arise in practice.**
- **Rules of court practice and procedure are also likely to be sufficient.**
- **Judicial and/or legislative clarification may be required in relation to certain issues – for example:**
 - **The English ‘hearsay rule’.**
 - **Section 129(1), CJA 2003: “Representations other than by a person”.**
 - **The presumption that “a mechanical device has been properly set or calibrated” (s.129, CJA 2003).**

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AN OUTLINE OF EXISTING CATEGORIES OF RULES OF EVIDENCE IN E&W

English criminal trials are based primarily on the **orality of evidence**, but documentary evidence and real evidence (eg. CCTV) are routinely adduced in evidence.

1. **Real evidence**: i.e., evidence that may be examined by the trier of fact – material objects; demeanour of witnesses giving live evidence, intonation of voice on an audio recording.
2. **Direct evidence**: e.g., what a witness saw; CCTV; audio.
3. **Circumstantial**: ‘pieces of the jig-saw’.
4. **Hearsay evidence**: largely governed by the CJA 2003 and case-law.
 - a) **Opinion evidence / forensic analysis** – an exception to the hearsay rule.
 - b) **Confessions** – an exception to the hearsay rule.
5. **Bad character evidence**: largely governed by the CJA 2003 and case-law.
6. **Documentary evidence**.

[1, 2, 3 and 6 are not defined legal expressions, but somewhat loose academic labels.]

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KEY GENERAL PRINCIPLES

- Evidence is generally admissible if it is **RELEVANT** to an issue in the case.
- Evidence, that is *prima facie* relevant, may be subject to:
 - an exclusionary rule – e.g. an involuntary confession improperly obtained.
 - Excluded under a ‘discretionary’ power (e.g. ss.78, 82(3), PACE 1984).
- There is **NO** general rule that evidence obtained improperly (even illegally) is presumed to be inadmissible: *R v Khan* [1997] A.C. 558.
- The ‘fairness of the proceedings’ includes the prosecution / victims – as well as the accused.
- Evidence that is **inherently** or **demonstrably** unreliable is inadmissible in criminal proceedings [**but who shoulders the burden of demonstrating that fact?**]
- Issues of admissibility may be heard (by a judge) pre-trial / during a trial.

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HEARSAY EVIDENCE

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114 Admissibility of hearsay evidence

- (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
- any provision of this Chapter or any other statutory provision makes it admissible,
 - any rule of law preserved by section 118 makes it admissible,
 - all parties to the proceedings agree to it being admissible, or
 - the court is satisfied that it is in the interests of justice for it to be admissible.

115 Statements and matters stated

- (2) A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.
- (3) A matter stated is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been—
- to cause another person to believe the matter, [*Knight [2007] EWCA Crim 3027*] or
 - to cause another person to act or a machine to operate on the basis that the matter is as stated.

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- Accordingly (noting s.115 CJA 2003) a statement will only be “hearsay” if
 - 1) The matter stated is relied on for its truth.
 - 2) The purpose (or one of the purposes) of the person making the statement is to cause another person to believe the matter stated.
- Thus, a diary – the contents of which were intended, by the diarist, to be private – will not attract the hearsay rule by virtue of (2).
- A machine does not have a mind of the kind envisaged by s.115(2).
- A machine is not a “person” and thus it does not generate statements / “representations” (see s.129, CJA 2003) for the purpose of causing another person to believe the matter stated.
- Hearsay statements must pass through a statutory ‘gateway’ or meet an exception to the general rule that hearsay is inadmissible.

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Principal gateways:
noting s.114(1)(a)-(d)

s. 116 Cases where a witness is unavailable.....
s. 117 Business and other documents.....
s. 118 Preservation of certain common law categories of admissibility.

117 Business and other documents

(1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if—

(a) oral evidence given in the proceedings would be admissible as evidence of that matter,

(b) and.... [s.117(2)]....

(a) the document or the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office,

(b) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and

(c) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in paragraph (a) received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.

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S.117(1)(c) / s.117(5)

IF the statement was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation THEN

- (a) any of the five conditions mentioned in section 116(2) [*maker of the statement is unavailable*] is satisfied: the relevant person is (i) dead; (ii) unfit to be a witness because of his bodily or mental condition; (iii) outside the UK and it is not reasonably practicable to secure his attendance; (iv) cannot be found although such steps as it is reasonably practicable to take to find him have been taken; (v) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings either at all or in connection with the subject matter of the statement,.... OR
- (b) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances).

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117(6) / 117(7)

A statement is not admissible under this section if the court is satisfied that the statement's reliability as evidence for the purpose for which it is tendered is doubtful in view of

- (a) its contents,
- (b) the source of the information contained in it,
- (c) the way in which or the circumstances in which the information was supplied or received, or
- (d) the way in which or the circumstances in which the document concerned was created or received.

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Hearsay admitted in the “Interests of justice” – s.114(1)(d), s.114(2)

(2) In deciding whether a [hearsay] statement.....should be admitted under [s.114(1)(d)] the court must have regard to the following factors (and to any others it considers relevant) —

- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
- (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
- (d) the circumstances in which the statement was made;
- (e) how reliable the maker of the statement appears to be;
- (f) how reliable the evidence of the making of the statement appears to be;
- (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
- (h) the amount of difficulty involved in challenging the statement;
- (i) the extent to which that difficulty would be likely to prejudice the party facing it.

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KINDS OF MACHINE-GENERATED INFORMATION

1. Output from a machine that operates as a calculator or tool – e.g. intoximeter; weighing scale.
2. Output from a machine which processes information that was inputted directly (e.g., whether X attended work on a given day; till roll).
3. Information produced by a machine that reproduces, in another format, a statement made by a person.
4. Information produced by a machine that processes and then analyses information supplied by a person (e.g. chat-bots).
5. Wholly automated representations of fact produced by a machine which has the capacity for self-learning (e.g. analyses a person’s financial history and lifestyle).

[Note: Seng and Mason “*Artificial Intelligence and Evidence*” (2021) 33 SAclJ 241]

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Section 129 CJA 2003 - Representations other than by a person

(1) Where a **representation of any fact**—

*“Evidence in Criminal Proceedings: Hearsay and Related Topics”:
Law Com. 245; 19 June 1997*

(a) is **made otherwise than by a person**, but

(b) depends for its accuracy on **information supplied (directly or indirectly) by a person**, the representation is not admissible in criminal proceedings as evidence of the fact unless it is proved that the information was accurate.

(2) Subsection (1) does not affect the operation of the presumption that a mechanical device has been properly set or calibrated.

- The courts have not fully clarified the relationship between s.129 and rules relating to “hearsay”.
- However, s.129 appears to relate to the internal workings of a machine and it is not engaged whenever a hearsay statement is sought to be relied on. *R v Wood* (1983).
- Academic commentary: R. Pattenden, “*Machinespeak: section 129 of the Criminal Justice Act 2003*” [2010] CLR 623

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PROPOSITIONS

1. If the machine merely reproduces hearsay in machine format – the hearsay rules apply, but not s.129 (e.g., **word processor; excel spreadsheet; OCR output**).
2. If the machine produces a combination of (i) a matter stated (e.g. **the name of a suspect**) and (ii) a calculation (**presence of a drug**), then the former is subject to the hearsay rules, but the latter is subject to s.129: *Castle v Cross* [1984]
3. Representations of fact produced by the internal operation of a machine may constitute “real evidence”, are are not hearsay but may attract s.129 (e.g., **tachographs, ANPR data, weighing scale information, radar tracking data, breathalyser and drug outputs**). [*Sapporo Maru v Statue of Liberty* [1968] 1 WLR 739]
4. Section 129 requires information to be supplied by a “person” – directly or indirectly. Indirect might include scanning a QR code, or using NFC.
5. **HOWEVER** – s.129 not designed for machines employing “machine-learning”.

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126 Court's general discretion to exclude evidence [s.126, CJA 2003]

(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if—

- (a) the statement was made otherwise than in oral evidence in the proceedings, and
- (b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.

(2) Nothing in this Chapter prejudices—

- (a) any power of a court to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984 (c. 60) (exclusion of unfair evidence), or
- (b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise).

78 Exclusion of unfair evidence.

s.78 PACE 1984

- (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
- (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

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EXPERT EVIDENCE

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Expert evidence is admissible if:

1. It will be of assistance to the court [i.e., it outside the knowledge of most fact-finders].
2. The expert has relevant expertise.
3. The expert is impartial.
4. There is a sufficiently reliable basis for expert evidence to be admitted.

Experts must comply with the *Criminal Procedure Rules* and the *Criminal Practice Directions*. **But, are these sufficient protections for novel AI techniques?**

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- There is no national procedure governing the pre-certification and/or approval of particular evidentiary AI.
- *Forensic Science Regulator Act 2021* created the *Forensic Science Regulator*.
- Aim is to ensure that the CJS has reliable forensic science.
- Regulator to publish a *Code of Practice* re FS activities in E&W (s.2, FSRA 2021).
- The Code (March 2023) sets out:
 - Validation standards for scientific processes
 - Accreditation (of forensic science units rather than individuals)
 - Quality management standards in partnership with the United Kingdom Accreditation Service (UKAS).
- There is NO national registry of AI used by Judicial Authorities, Defence Counsel, and/or by victims or by witnesses in criminal proceeding.

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January 2023 - Centre for Data Ethics and Innovation (CDEI). [disbanded: Sept.23]

“The **ALGORITHMIC TRANSPARENCY RECORDING STANDARD (ATRS)** provides a clear and accessible format and mechanism designed to support public sector bodies **providing information about the algorithmic tools they use in decision-making processes that affect members of the public.** The Standard is designed to be an enabler for more effective and joined-up use of algorithmic tools to support public service delivery.”

“The Algorithmic Transparency Recording Standard is most relevant for algorithmic tools that either: have a significant influence on a decision-making process with direct or indirect public effect, or directly interact with the general public.”

“Examples of tools that could fall within the scope of these criteria are:

- A machine learning algorithm providing members of the public with a score to help a government department determine their eligibility for benefits (impact on decision making and public effect)
- A chatbot on a local authority’s website interacting directly with the public which responds to individual queries and directs members of the public to appropriate content on the website (Direct interaction with the public)”

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BS 10008-1:2020 - Evidential weight and legal admissibility of electronically stored information (ESI) – Specification - 31 May 2020 – [AI STANDARDS HUB - “The UK’s AI Standards Hub (the Hub) seeks to advance trustworthy and responsible AI with a focus on the role of technical standards.” [Oxford Information Labs - AI Standards Hub - Evaluation -3 July 2023]

This British Standard specifies requirements for the implementation and operation of electronic information management systems, including the storage and transfer of electronically stored information (ESI), with an objective of enabling the user to ensure the authenticity and integrity of the ESI is maintained, so that it is trustworthy and is either accepted without dispute or successfully resists challenge. These issues are important where the ESI might be used as evidence – whether for business, compliance, legal or other dispute resolution purposes.

This British Standard covers:

- a. a) the management of the availability of ESI over time;
- b. b) the electronic transfer or communication of ESI; and
- c. c) the linking of electronic identity to particular ESI, including the use of electronic signatures and electronic copyright systems, as well as the verification of electronic identity.



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