

Computer Generated Evidence and the Role of an Expert in Court Proceedings

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Common law
position

1

Section 69 of
Police and Criminal
Evidence Act
(1984) (PACE)

2

Law Commission
Report and the
repeal of
Section 69

3

Way forward

4

Different type of
experts - expert
witness and expert
advisor

5



At the Beginning

Common Law Position

Common law position

“In the absence of evidence to the contrary, the courts will presume that mechanical instruments were in order at the material time.

Where a party sought to rely on the presumption, it would not need to lead evidence that the computer was working properly on the occasion in question unless there was evidence that it may not have been...”



Police and Criminal Evidence Act 1984, PACE

Section 69 of PACE 1984, until its repeal, provided that:

(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown:

a. that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;

b. that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and

c. that any relevant conditions specified in rules of court under subsection (2) below are satisfied.

(2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required.



Reasons 1 and 3 were based on a misinterpretation of a paper by Professor Colin Tapper

- Reason 1: Section 69 failed to address the major causes of inaccuracy in computer evidence
- Reason 2: Advances in computer technology made it increasingly difficult to comply with section 69
- Reason 3: Recipients of computer evidence who wished to rely on it were in no position to satisfy the court about the operation of the computer
- Reason 4: It was illogical to apply section 69 when evidence was produced directly from a computer but not when experts relied on computers.
- Reason 5: At the time of the publication of the Report there problems arising from the interpretation of section 69.

1997 Law Commission Report

Evidence in Criminal Proceedings: Hearsay and Related Topics



Section 69 of PACE
was repealed
(without replacement).

Common law position
applies again.

Youth Justice and Criminal Evidence Act

1999



2 stage process as recommend by Paul Marshal and others in their paper: “Recommendations for the probity of computer evidence”, 18 Digital Evidence and Electronic Signature Law Review (2021) 18–26, at 23–25,

<https://journals.sas.ac.uk/deeslr/article/view/5240>

Stage 1: the parties should perform a reasonable and proportionate search for documents that would assist the court in assessing the reliability of evidence, specifically:

- records of known errors and bugs in the system, their effect, and the actions taken in response
- description of information security and other relevant standards and processes followed
- reports of audits performed on the system and how it is managed,
- evidence showing that reports of errors are managed properly and that changes to the system are properly controlled
- evidence confirming that the search for documents was performed adequately, and was done so by a person with appropriate authority and knowledge
- assurance that reasonable steps have been taken to establish that the evidence presented has not been tampered with.

Way Forward

Stage 1

Stage 2: a more detailed examination of evidence should be performed if the disclosed information as part of Stage 1:

- shows that the system may not have been adequately managed
- shows that the number of bugs is sufficiently high to question the reliability of the system
- identifies specific errors that provide grounds for questioning evidence.



Way Forward

Stage 2



Different Type of Experts

Expert Witness v Expert Advisor

Expert Witness

- Person who has been instructed to give or prepare expert evidence for the purpose of proceedings.
- Expert evidence is evidence as to matters of a technical or scientific nature.
- Expert evidence based on opinion rather than fact.
- Assumption is expert's evidence will be given in the form of a written report.
- Parties to seek permission for expert evidence to be given verbally.
- Primary duty is to help the court.
- Duty overrides any duty that experts may have to those instructing or paying them.



Different Type of Experts

Expert Witness v Expert Advisor

Expert Advisor

- Independent expert.
- Expert advisors advises a party on specialist or technical matters within their expertise at any stage of a problem, dispute or claim.
- May support with evaluating and formulating the case, preparing witness statements and other matters.



Possible to transition (risk is independence being undermined).

Need to remember duty as an Expert Witness.

Expert Advisor to Expert Witness

Opine on not only the matters supporting the instructing party's case, but also matters that might undermine it or support the opponent's case.

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Q & A



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