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The Language of Forensic Experts: A Commentary on the Sally Clark Case  
[1999-2002]

لغة خبراء الأدلة الجنائية: تعليق على قضية سالي كلارك 1999-2002

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Abstract

According to the judge, jury and the public in the UK, Sally Clark murdered her two sons. The prosecution forensic expert had submitted his evidence using complex medical and scientific language that misled the jury. The defence expert failed to challenge him. A few years later, Mrs. Clark was proven innocent, as there was undisclosed evidence and the language of the prosecution forensic expert misled the jury. This paper raises some issues according to the Sally Clark case. It includes some discussions about the expert's role in the adversarial system and also compares it with the inquisitorial system. It is an approach towards understanding whether the expert should stand in the witness box or not. This paper answers whether the decision in the Sally Clark would have taken a different direction, if it was dealt under the inquisitorial justice system or other experts' systems. Although this case has helped to re-open many other cases, it has not encouraged the English criminal justice system to make any changes with the expert system (especially in complex forensic cases). It also affected experts who now think that testifying in court is a risk. This paper presents a new approach that, if considered, can protect the justice system from any miscarriages, the experts themselves from being blamed and the public who look at both as killers.

المستخلص

حسب ما اعتقد القاضي وهيئة المحلفين والجمهور في المملكة المتحدة، فإن سالي كلارك قتلت ابنيها. وقدم الخبير الجنائي في النيابة أدلة بلغة معقدة من الناحية الطبية والعلمية، أدت إلى تضليل هيئة المحلفين وأخفق خبير الدفاع في تحدي الخبير. بعد بضع سنوات، تم اكتشاف أن السيدة كلارك بريئة، فقد كان هناك أدلة غير معلن عنها كما أن لغة الخبير الجنائي في النيابة ضللت هيئة المحلفين. تثير هذه الورقة بعض القضايا وفقاً لقضية سالي كلارك. وتتضمن بعض المناقشات حول دور الخبير في نظام الخصوم وأيضاً مقارنته بنظام التحقيق. كما أنها مقارنة لفهم ما إذا كان ينبغي على الخبير الوقوف في صندوق الشهود أم لا. وتقدم هذه الورقة إجابات عما إذا كان القرار المتخذ بحق سالي كلارك كان سيأخذ اتجاهًا مختلفًا، إذا ما تم التعامل معه بموجب نظام العدالة التحقيقي أو أنظمة الخبراء الأخرى. على الرغم من أن هذه الحالة قد ساعدت على إعادة فتح العديد من الحالات الأخرى، إلا أنها لم تشجع نظام العدالة الجنائية الإنجليزي على إجراء أي تغييرات على نظام الخبراء (خاصة في القضايا الجنائية المعقدة). كما أثرت على الخبراء الذين يعتقدون الآن أن قبول وجودهم داخل قاعة المحكمة هو خطوة للمخاطرة. وتقدم هذه الورقة مقاربة جديدة إذا ما تم النظر فيها، يمكن أن تحمي النظام القضائي من أي حالات سقوط، كما أنها تحمي الخبراء أنفسهم من أن يتم إلقاء اللوم عليهم، وكذلك تفاعل الجمهور الذي ينظر إليهم على أنهم قتلة على حد سواء.

**Keywords:** Forensic Science, Forensic Evidence, Sally Clark, Criminal Justice, Experts, Language.

الكلمات المفتاحية: علوم الأدلة الجنائية، أدلة الإثبات الجنائي، سالي كلارك، العدالة الجنائية، الخبراء، اللغة.



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## 1. Introduction

Giving evidence in court can be a worrying duty for any person. Every word is monitored, analysed and tested by highly qualified people in a very sensitive context, which can lead a person to freedom or to the end of their future in a cell. This duty is more difficult for those who give opinion evidence or expert evidence. Any person can stand in the witness box to testify about what she/he has heard, seen or said; however, the expert comes to give a forensic or complex opinion with a great responsibility to present it using appropriate language. The purpose of this opinion is to help the court assess the weight of any scientific or technical evidence.

Under the adversarial criminal justice system, such as in the case of Sally Clark [1], the expert provides a statement of their opinion to the Crown Prosecution Service (CPS). Copies are given to both the prosecution and defence counsel. Often, the language of the expert evidence in the statement confuses or misdirects the court, and the prosecution usually takes advantage of this, especially when the case involves medical or forensic opinion. Thus, the interpretation of the expert's language in the statement must be undertaken by a competent qualified expert, because it can lead to an open interpretation that causes an unfair trial. Sally Clark lost her life because of either the failure of the criminal justice system or the system of expert testimony or even potentially as a result of both systems.

This commentary paper finds importance in clarifying whose mistake it was, why it was made and the solution to preventing this in the future. This case happened many years ago, and hundreds of authors, judges and experts have provided their opinions and critical arguments on the case. Sally Clark has been considered as one of the most controversial cases in modern criminal history [2]. However, the criminal justice system has not taken any steps to

effect any change.. This raises questions about the influence of these arguments on the justice system.

Providing a commentary on a case that occurred many years ago in an attempt to reveal its flaws can be a great challenge. Nevertheless, reexamining this case is a step to effecting change in the system of expert testimony. It will also provide further insight into the role of experts and the level of blame they carry when a miscarriage of justice occurs, as in Sally Clark's case. This case occurred under the English adversarial justice system. It is important to consider the inquisitorial system and compare it with the adversarial system to reach the best system that protects both justice and the expert witnesses.

## 2. Sally Clark Case and the Overwhelming Statistics

In 1999, Sally Clark was convicted of the murder of her two sons, and she was sentenced to life imprisonment. Mrs. Clark was a solicitor and a woman of a good character. On the 29th September 1996, she had her first child, Christopher, who died shortly after when he was 11 weeks old. The death was certified by Dr. Williams as being a result of natural causes, which were resuscitation attempts. On 29th November 1997, she had her second child, Harry, who died when he was 8 weeks old. In 1998, Sally was arrested on suspicion of Harry's murder, and the crown prosecution decided that the two babies did not die from natural causes. The crown court stated that according to Dr. Williams' findings, there were physical injuries such as cyanosed bruises. They concluded that her first son had died as a result of being smothered, and that her second child had been shaken to death. In the trial, the prosecution added that both cases cannot be considered as sudden infant death syndrome (SIDS) because of the injuries which were found on the children's bodies and the similarities in both cases.



The forensic evidence at the trial was complicated and confusing to deal with. The prosecution expert, Professor Meadow, identified some issues that were interpreted as causes of unnatural deaths. However, the prosecution relied on Professor Meadow's statistics: he stated that the probabilities of two SIDS deaths in one family, matching the profile of Sally Clark, were 1 in 73 Million. Meadow was not a statistician and at that time the Royal Statistical Society and many other statisticians expressed concern about Meadow's statistics saying they were not accurate [3].

In 2002, in the appeal courts, there was clear evidence provided by a new expert who knew about Sally's case through the media. He was Dr. David Drucker, a microbiologist and expert in the field of cot deaths. Dr. Drucker concluded that Harry had died as a result of infection. Mrs. Clark was then declared innocent.

The system of expert testimony in the UK prevented Sally Clark from providing a statistical expert to defend her against the statistics presented by the prosecution pathologist. She could not afford to bring an expert witness and it was not easy to find the undisclosed evidence which was hidden by the prosecution pathologist. Sally was not the only case that the criminal justice system faced [4]. Professor Meadow, who provided an expert opinion in Sally's case, was a specialist and experienced in his area of child abuse and in criminal trials. In ABC of child protection [5], Meadow stated that: "One sudden infant death is a tragedy, two is suspicious and three is murder until proved otherwise". It is acceptable that some mothers kill their children, but Meadow's law or rule or use of language risks incriminating all mothers who have suffered multiple cot death.

### 3. The Role of the Expert

Historically, the purpose of calling an expert has been as an "auxiliary" [6]. In both adversarial and inquisitorial

legal systems such as in the UK and France, the expert is seen theoretically as an assistant to the party who calls him. However, in the English adversarial system, there is no neutral expert system. Thus, a party, especially the defence, is searching for a competent expert, who "chooses an objective procedure to apply to a set of facts and then works through the facts using the process chosen" [7].

Most studies which compared between the adversarial and inquisitorial legal systems do not highlight the importance of the expert's role in relation to the current criminal justice system. They only deal with the rules and procedures of the expert who gives an opinion. These studies also criticise bias as an initial difficulty in the present expert adversarial system and recommend having a neutral expert called by the court. However, they face significant criticism [8], because they denote their opinion on the problems of the present system, rather than explaining clearly how the neutral expert system could function. Others [9] discussed that the problem lies in organising the expert system in the UK. Sommer [10] discussed the difficulties and benefits of having meetings between experts, insisting on the danger that the jury never has a clear explanation and no accurate knowledge of the advanced science involved. Allen [11] explained the role of the expert according to the facts that the expert bases his opinion on. He proposed that there are primary facts and expert's facts. The former are the facts that are peculiar to a case. In this context, the defence may call an expert to dispute the prosecution expert's facts, which can be provided in a particular knowledge or language. In the Sally Clark case, the defence expert was asked to re-examine the opinion of the prosecution expert. The later expert provided an opinion that was derived from his own facts such as experimental data, statistics and reports.

In fact, both legal systems confirm the importance of the role of the expert. Even so, this importance does not



take a legislative or legal form.

Accordingly, the role of Professor Meadow in Sally Clark's case was very valuable, and the case cannot be recognized by the court without an expert opinion. The purpose of this forensic opinion is not to decide the issue of the court, but to ensure that "the necessary scientific criteria" [12] is available and concluded to the court. These criteria should include all aspects that are related to the scientific or forensic part of the case that are available for cross-examination, and which should involve a particular degree of discretion from the expert. This means that an expert who provides his opinion makes his decision grounded on his scientific judgment and discretion, which are essential elements in giving a satisfactory scientific or forensic judgment. Professor Meadow, in Sally Clark's case, stated his scientific judgement or law grounded on his scientific and forensic analysis. The question arises whether he provided to the courts a relevant law or judgment using sufficient forensic and scientific language.

#### 4. Meadow's Language

"No one can tell you the (truth) like an expert" (Quran, Fater 14).

According to this verse and to many other authors opinions, the expert in both adversarial or inquisitorial Legal systems has two roles: first to be an expert who is qualified to give expert knowledge or expertise, and secondly to tell the truth of a complex forensic issue which is outside of the court's expertise. 'No one' in the above verse reflects the importance of the expert's role in giving their forensic expertise and truthful opinion [13]. Experts' roles are different than other witnesses who come to the court to give testimony about what they had heard, seen or knew. Experts are also viewed in the light of different expectations and theories [14], that require their testimony to be delivered in forensic or scientific language. This language,

if well delivered and organised, can help the criminal justice system to avoid miscarriage of justice and to reach fair trial. Ladd pointed out that "an ordinary witness...is using his opinion as a composite expression of his observations otherwise difficult to state, whereas the expert is expressing his scientific knowledge through his opinion" [41].

Considering an expert as a witness in any legal system reduces the value of the expert, especially in forensic fields, as it cannot be understood by anyone other than an expert acknowledging that the complexity often occurs between experts in the same field [15].

In fact, it is very difficult for the judge or jury to decide the case without experts' assistance if it involves forensic or scientific issues. For example, if a case includes document evidence that is not in English, the question here is whether the court can decide the case without an interpreter or translator. It is the same case with the forensic experts in the medical field for example. They have special role and scientific language which must be presented clearly and effectively to help the court reaching a fair decision [16]. Their testimony is delivered in medical or forensic language that helps the court to assess the admissibility of the evidence. This language includes knowledge, opinion and evidence, which are essential elements to be provided sufficiently. For the first element, which is knowledge, it is something that a person acquires by actual experimentations and the awareness of facts, truths and information gained through special means. For opinion, it has a personal aspect because it is like a personal, reasonable and logical judgment that is based on assessment of any sets of facts. Thus, it is different from knowledge. Finally, evidence, which is undisputed information. The use of evidence may result in a dispute as to what it seeks to prove. These three elements confirm the privilege of the experts in the court provide their opinion in a sufficient and relevant language. Considering experts as witnesses reduces



the value of their role and can influence their legal and scientific responsibility [17].

It can be said that in Sally Clark's case, the expert, Mr. Meadow, had all the elements that allowed him to act as a competent expert; however, the issue relates to the insufficient rules of the system of expert testimony. Therefore, the issue will always be considered unresolved. Although Mr. Meadow misled the jury with his insufficient statistical language, he was a very competent expert. In Angela Cannings' case [18], the prosecution expert could not give a definitive theory about the deaths of the infants; therefore, the expert left the court with no answer except concluding the "rarity" of the three babies' deaths. Both cases, Sally and Angela, were similar cases and the court sentenced the two mothers to life imprisonment. However, the difference was that in the Sally Clark case, the prosecution expert presented his statistics with inaccurate statistical language and his own rule or law. In Angela Cannings' case, the expert could not base his opinion on any theory. Both experts provided their opinion depending on their own findings as they were both competent experts. Accordingly, as a result of Sally's acquittal, Angela Cannings had the chance to review her case and was also released after appeal.

Professor Meadow was called by the prosecution to give a complex forensic opinion. Although Professor Meadow provided his evidence based on statistics that were created by him, he managed to make his opinion admissible by the court. However, he misled the jury by saying that the probability of cot death is 1: 73 million, because he used language that influenced the jury. What if he had said 1:4? would it have had the same influence on the jury? The language led to the court's satisfaction that the defendant was guilty of murder, but it has opened the door to many questions, the most important of which is about the expert system in the UK. Mr. Meadow was an experienced forensic expert, but the system not only opened the door for

Professor Meadow to mislead the court; it misled the experts themselves, because Mr. Meadow was called to the court by the prosecution and was blamed for being biased to the prosecution rather than acting as a neutral scientific expert. Under the adversarial system, there is one expert who is called by the prosecution to give a scientific evidence, therefore, the term "neutral expertise" can be provided with a doubt especially if the defence cannot afford to have an expert to challenge the prosecution expert [19].

Therefore, two issues can be considered because of the above miscarriage of justice in the Sally Clark case. The first is professor Meadow's language, which was provided according to his forensic and statistical findings. Second, the prosecution pathologist Dr. Williams failed to disclose the document that later resulted in the acquittal of Sally Clark. These issues are related to the system of expert testimony rather than the role of the expert or the failure of the criminal justice system. If the rules and principles of a neutral expert system which are part of the inquisitorial systems had been applied to the Sally Clark case, would she have been sentenced to life imprisonment? Will a competent expert be blamed and criticised? Will the criminal justice system or the court be blamed that they have been influenced by expert opinion or language in a very complex issue?

## 5. Sally Clark's Case under the Inquisitorial Expert System

If the rules and principles of the French or the Egyptian inquisitorial system, for example, had been applied to Sally Clark's case and other similar cases, two related procedures would have occurred. The first is that the court would have conducted a final investigation, controlled by the principle of 'the freedom of the judge to be satisfied' [20]. Thus, the judge has the final decision in assessing any evidence and to base his decision on satisfactory reasons. The second



procedure that would have occurred is that it would be the role of a neutral expert, working in the interests of society, to satisfy the court. The situation in Sally's trial, even if she had not been able to provide her own expert, is that the court's expert would have been sufficient. This is not only because he has been called by the court, but also because the legislature has given the defence the right to call his consultative expert. In addition, qualified and experienced experts should review the court expert's opinion. Therefore, the relevance of the expert's opinion cannot face criticism. Were it not clear, it would be inadmissible and the satisfaction of the procedures in dealing with expert evidence would not produce criticism with the court's decision. Therefore, even if any criticism appears the defence might call his consultative expert. Following the inquisitorial expert's method does not mean that the system will be free from problems, but those problems might be less likely to create miscarriage of justice. Maybe the problem occurs in the organization of the neutral expert system and the rules that control the whole system.

Although the inquisitorial legislature organizes the expert evidence system, the court under the principle of 'the freedom of the judge to be satisfied' has the right to refuse the expert's knowledge or forensic opinion. This principle controls the expert system and it reduces problems of confrontation between the general legal system and other private rules or systems. However, it is not an easy task to balance these legal rules or such a principle with scientific and forensic developments. For example, the rule that 'the judge is the expert of experts' is a result of the principle of 'the freedom of the criminal judge to be satisfied'. This rule has produced some discussion, especially after the developments in scientific evidence [21], because the judge may not be able to decide on these issues.

The discussion on miscarriages of justice has never

stopped in the English adversarial system and has increased massively since Sally Clark case, because society desires development and improvement in criminal justice to obtain justice or fairness to all [22].

Accordingly, experts should bear the responsibility for the miscarriages of justice as a result of giving their opinions in their own forensic language [23]. There has been no clear answer to all the above questions so far, because examining criminal procedures in isolation from the whole expert evidence system is not the right approach. Miscarriages of justice differ according to the rules and procedures of each system [24]. Even so, in the inquisitorial criminal system, it is difficult to discover miscarriages of justice, because there is stability in the system of proof [25]. In addition, there is a 'neutral expert system' which helps to avoid problems in the criminal justice system such as competency, qualifications and bias, although the inquisitorial system has not yet legislated the expert's role to state his unique role [Unclear]. On the other hand, in the English adversarial system [26], the numerous discussions on expert evidence [27] have arisen from a lack of satisfaction with the rules and procedures regarding experts, especially medical and forensic ones. The discussion has extended to the question about how the criminal justice system deals with some pieces of evidence to obtain a fair trial. The duty of the expert to give a reliable opinion, the admissibility issue and miscarriages of justice have been discussed as individual issues. The problem indeed lies within the expert system. An attempt to clarify this matter has been made by comparing the English and French systems. The arguments so far have proved that the parties and the experts do not find the current English system particularly satisfactory [28]. Howard [29] tried to reduce the criticism of expert evidence in the English adversarial system. He conducted an influential comparative discussion about expert evi-



dence in the adversarial and the inquisitorial systems. He argued that even though the current English system has its pitfalls, it is more helpful to the justice system not to apply the neutral expert system. Spencer [30] replied directly to Howard's defence of the expert evidence system. Although Howard forwarded important views, they were subject to criticism, because the current expert evidence system in the inquisitorial system does not face strong criticism. The comparison did not lead to any changes in the English criminal justice system. However, some scholars, such as Redmayne [31], Freckelton [32], Usher [33], and Gee [34] provided arguments that justify the need for a comparative study of the role of the expert in the inquisitorial and adversarial systems. This study would lead to a sufficient expert system whether under the adversarial or inquisitorial systems [35].

A variety of concepts or legal cultures should not be considered an obstacle to making considerable changes in the expert evidence system under the English adversarial system. For instance, Lord Woolf made essential change to the expert system in civil law [36]. His attempt led to a valuable change in the civil legal system as he called for appointed experts to deal with civil cases. This attempt was not confronted with apparent criticism; it was an attempt that encouraged increased calls to apply this type of expert in the criminal system. Recently, the problem that has been frustrating experts in the English system is that the term 'miscarriages of justice' is connected to their role in the criminal justice system. As a result of many miscarriages, the government questioned the role of the expert and ordered a review of several cases. This review might help to avoid any further miscarriages of justice originating from this source, but not those originating from other sources. It should be stressed that whether miscarriages of justice have resulted from expert evidence and their role

or any other evidence or system, the accused has not had a fair trial, which is against human rights. Associating the concept of 'fair trial' [37] with the expert system requires a balance between the present rules or procedures and the expert system in both the adversarial and inquisitorial system. Although stating rules and procedures for a fair trial is not an easy task, reviewing the present rules and procedures of the criminal system shows that some of these rules or procedures require changing. Although, in the inquisitorial systems, such as that of France, Italy, Egypt and Libya, the situation is different, but it cannot be said that there is full satisfaction with the expert evidence system, which works to get the interests of the society rather than a particular party in the case. Under the inquisitorial systems, the expert is an employee of the Ministry of Justice and therefore works for society via the judiciary. However, this is not the case in the English criminal system, in which both sides try to find or 'shop' for an expert. The main criticism that created some dissatisfaction of using experts in the inquisitorial system is that these experts work for the Ministry of Justice. Sommer [38] considered the benefits of having meetings between experts before the trial; this is a significant step towards clarifying the scientific or forensic issue to the court and avoiding miscarriages of justice based on one expert's opinion. However, it is only a step but not complete requirement to resolve the disappointment about the current expert system. Although in the adversarial system the defence can ask to examine all the prosecution expert's findings and in the inquisitorial system, there are higher experts who review the court's expert statement; these processes have not helped to reach the satisfaction of the society. The only step which can help the expert system in both legal systems is to apply the neutral expert system, which is already applicable in the inquisitorial system; but this neutral expert system should be a neutral and inde-



pendent body that belongs to the Judiciary. Therefore, this body includes different types of experts in different fields and includes an organized hierarchy of experienced and qualified panel to review all cases and statements before they are submitted to the court, or before the experts appear in the court room. These experts are not witnesses and should not apply the witness rules on them. Experts can be considered only as employees in the judiciary or the Ministry of Justice. Although the inquisitorial system applies the neutral expert system, they are considered as witnesses; but their reports are reviewed by experts of a higher rank. Having organized a neutral expert system that belongs only to the judiciary, avoiding calling them "Expert Witnesses" requires amending the legal rules and stating them only as employees in the judiciary. In addition, a panel of experts or a commission from all the fields in the expert system is very important to avoid statements with insufficient scientific or forensic language. Moreover, some authors argued that the evaluation of scientific evidence by the court can often be misinterpreted [39].

By applying this type of expert system to the Sally Clark case, Professor Meadow would be called by the court from the experts who work for the society. Professor Meadow could provide his opinion evidence, but it would be supervised and reviewed by the experts's panel or commission which involves various types of experts and legal experts who work aside to the scientific or forensic experts in the commission to review the expert's statements. Therefore, using uncertain statistical data or stating the expert's opinion in specific scientific language to influence the court can be certainly avoided. To blame experts for being biased cannot be the initial consideration, because the expert was called by the court from an independent commission to provide opinion for the court only. Also, having consultative experts by the defence will be avoidable, because cli-

ents will trust the court's expert and often clients cannot afford to call an expert. Accordingly, Professor Meadow will submit his forensic opinion which was reviewed by other qualified experts in the same field who ensure that the opinion is written based on scientific grounds and with clear unbiased language. Also, they will ensure that all scientific or forensic documents were disclosed to support the expert's statement. Ensuring the grounds and language of this opinion means ensuring a fair trial in both the adversarial and inquisitorial system.

## 6. Conclusion

Sally Clark and other similar cases raised the question of whether the neutral expert system and the expert's commission within this system help to quarantine a fair trial. In fact, changing the current expert adversarial system to a neutral expert system and considering the expert as an expert only and not as a witness requires a primary step by changing some rules and procedures. The importance of the expert's role and the need for these opinions reflects the necessity to start with these changes, especially with the disclosure issue, which is the most important in relation to expert evidence. The rapid development affects the use of experts in the current system because experts often take advantage of this development by providing their opinion in complex language or inaccurate research that influences the court often without intention. In addition, when some miscarriages of justice are identified, such as in the case of Sally Clark, the government paid attention only to the method of the criminal justice system. However, this is not the main solution to this problem. The government should pay attention to the expert evidence system and reform it with knowledge of former cases prior to allowing for more miscarriages of justice to take place.



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