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BALTIC JOURNAL OF LAW & POLITICS

A Journal of Vytautas Magnus University
VOLUME 15, NUMBER 7 (2022)
ISSN 2029-0454

Cite: *Baltic Journal of Law & Politics* 15:7 (2022): 1311-1322
DOI: 10.2478/bjlp-2022-007095

Reliability And Judicial Admissibility Of Tracker Dog Evidence

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Received: October 18, 2022; reviews: 2; accepted: December 07, 2022

Abstract

Dogs have been used by law enforcement agencies to aid in criminal investigation since early 1900s. Dogs have distinctive sense of smell which allows them to track and trace weapons, explosives, bodies or perpetrators. As dogs are reliable investigative instrument for crime investigations, they have been used in different parts of the world. Evidence of tracker dogs in most instances are admitted by the court as corroborative evidence. The dog handler will give testimony in the court to establish the background and reliability of the dog and also on the tracking or tracing of the individual or evidence. This evidence is called canine evidence or tracking dog evidence. The court will then evaluate and analyse the canine evidence and accept it if it is deemed to be relevant to the fact in issue at hand. The purpose of this article is to study the reliability and admissibility of tracking dog evidence in other common law jurisdiction.

Keywords

Tracking dog, reliability, admissibility, canine evidence

Abstrak

Anjing telah digunakan oleh agensi penguatkuasaan undang-undang dalam siasatan jenayah sejak awal 1900-an. Anjing mempunyai deria bau yang baik yang membolehkan mereka untuk menjejak dan mengesan senjata, bahan letupan, mayat atau penjenayah. Oleh kerana anjing adalah instrumen boleh percaya untuk siasatan jenayah, anjing telah digunakan di serata dunia. Keterangan anjing

pengesan dalam kebanyakan senario adalah diterima oleh mahkamah sebagai keterangan sokongan. Pengendali anjing akan memberi keterangan berkenaan dengan kebolehpercayaan anjing dan juga keterangan pengesanan dan penjejakan seseorang individu atau objek. Keterangan ini dikenali sebagai keterangan anjing pengesan. Mahkamah kemudiannya akan menilai dan menganalisis keterangan anjing pengesan dan menerimanya sekiranya ia didapati relevan kepada fakta dalam isu. Tujuan artikel ini untuk mengkaji kebolehpercayaan dan kebolehterimaan keterangan anjing pengesan di bidangkuasa common law yang lain.

Kata kunci:- Anjing pengesan, kebolehpercayaan, kebolehterimaan, keterangan anjing pengesan

Introduction

Crime rates around the world are on the rise especially during an economic crisis or inflation result of the recent global pandemic. This is because of rapid increase of cost of living and also unemployment. To overcome the increase of crime rates, many law enforcement agencies around the world have started using dogs to fight crime. Law enforcement agencies uses dogs to detect odour, illegal substances, search and rescue mission and to look for bodies. The main reason behind this is because when a crime is committed, the perpetrator leaves traces of odour, footprints and marks at the crime scene. The tracker dogs then identify the particular smell which the perpetrator left behind at the crime scene and follows the trail. It is prudent to note that each individual has a distinctive smell which allows the tracker dogs to distinguish the surrounding smell and track down the perpetrator. It is well established that dogs have great sense of smell. In early 1953, Walter Neuhaus has conducted experiments to test the dog's sense of smell. Based on his experiments, he found that a dog is able to detect 1mg of butyric acid dispersed through 108 m³ of air which is the size of a small town. (John Esminger, 2012)

Dogs also can be easily be trained to track and trace ten (10) different odours and the total amount of time required for the dog to be trained with new odours decreases over time as more odour discrimination were trained. (John Esminger, 2012) Dogs also have great ability to remember different odours for months. (John Esminger, 2012) A test was also conducted which shows that dogs can distinguish different odours of seventeen (17) men, women and children. The dog in this test was required to find handkerchiefs used by different person. (John, Esminger, 2012) A reliability study was also conducted with 7 different dogs which concluded that these dogs have a matching rate of 85%. (John Esminger, 2012)

There are many categories and functions of police dogs. In general, the categories of police dogs can be categorised into four main categories: the first category is for tracking, trailing and identifications, the second category is for apprehension and crowd control; the third category is for detection; and lastly the fourth category is for rescue and protection. Due to modern scent line ups, scent identification has separated from tracking and trailing functions. Dogs in the second

category are often also trackers and trailers, and the two functions or duties sometimes overlap each other yet the training given to the dogs are not the same. Detection dogs are by far the largest categories of dogs in the police force. Detection dogs are trained to detect, drugs, weapons, explosives, human remains, human body and accelerants.

The fourth category of dogs are search and rescue dogs together with the military sentry dogs. The increasing scope of police dog work has increased research on the trustworthiness of the dogs particularly in tracking and tracing and has led courts in the detailed consideration of the judicial limits into admitting canine evidence. (John Esminger, 2012)

Problem Statement

Tracker dogs have been used throughout the world particularly by law enforcement agencies in criminal investigations. However, the evidence by the tracker dogs are sometimes disregarded and not admitted by the Courts.

Research Questions

Research questions are set out below:-

What are the guidelines or requirements before tracker dogs are admitted?

Are canine evidence reliable?

Which common law jurisdiction has admitted tracking dog evidence?

How the courts in common law jurisdiction admitted tracking dog evidence?

Purpose of the Study

The researcher outlines three objectives to be achieved in this research which are as follows:-

To identify the reliability of tracker dog evidence;

To ascertain whether tracker dog evidence has been admitted by the courts in other common law jurisdictions;

To investigate the requirements and considerations in admitting canine evidence.

Research Methods

The researchers in this research have adopted the pure legal research method which employs qualitative design method to achieve the objectives of this research. The researchers also analyse case law decided by courts in other common law jurisdiction with respect to tracker dog evidence. The researchers primarily focus on the judicial admissibility of tracker dog evidence by the courts in other common law jurisdiction as well as the reliability of the tracker dog evidence. The researcher also conducted research using secondary sources such as legal journal, articles, writings and books on the subject matter.

The Reliability of Tracker Dog Evidence

As we all know, reliability is an important element before an evidence could be admitted by the courts. Reliability means that before an evidence can be admitted by the court, it must first be credible. In the case of *Harris v Mississippi*, the Court propounded that:-

“One and probably the only sure, test of reliability of a bloodhound in tracking human beings is to put it repeatedly in a track known to have been made for a particular person, and see if it will track therefrom to that person. These tests should be so made as to demonstrate that the dog will continue to follow the same track and not leave it for another.(*Harris v Mississippi*)

In the case of *Michigan v Perryman*, the dog handler testified to his knowledge that his dog, Schlutz was always successful and never made a mistake throughout its service. The dog handler testified that cases where the dog stopped tracking probably would involve situations such as the defendant getting into a car. In the case of *Edwards v District*, the Court had allowed and admitted the canine evidence who had experience in the past of tracking and tracing four or five absconders from a prison nearby. The court also cited the testimony given by the dog handler that the tracker dog had shown no hesitation in following the trail from the scene of the crime to a vehicle where the suspect was found to be sleeping in.

Reliability can also be established numerically by success rates. In a *Brooks v Colorado*, a dog handler testified in court that his dog has been unsuccessful 14 out of 480 training sessions. The dog handler further stated that the fourteen (14) times could be mistakes made by himself rather than to any failure on the part of the tracker dog. In the case of *Connecticut v Wilson*, the dog handler in the case stated that dogs he trained had about 80% success rate and that the dog in particular had about similar success rate. (*Connecticut v Wilson*; *Idaho v Streeper*) It is also prudent to note that a North Carolina Court had admitted a canine evidence whereby the dog was shown to have 50% success rate to track and trace. In that case the tracker dog had tracked down to where the thief had been found. In the same area, other police dogs were found to have a success rate for tracking and tracing of 65% to 70%.(*Connecticut v St John*) In this instance and despite the rather low success rate in tracking, the tracker dog evidence was admitted by the court.

Another factor that has caused great concern was whether dogs began tracking or trailing in the period of their reliability or efficiency. In the case of *Kansas v Adams*, the police dog was called in 15 to 18 hours after the crime was committed. The Court in this case admitted the canine evidence even though there was also confession. In *Oregon v Harris*, the court admitted the tracker dog evidence even though the tracking was done 45 hours after the crime.(*Oregon v Harris*)

The position of judicial admissibility of Dog Tracking Evidence in Other Jurisdiction

1.1 United States of America

In America, tracking dog evidence has been canvassed and accepted by the Courts since 1983. (*Hodge v Alabama*) However, there are concerns among the judges regarding certain issues. One of the issue is that the raising of bloodhounds for selling purposes especially to enforcement bodies will be treated as a business activity especially among individuals looking to make profit. (*Pedigo v Kentucky*) Another concern was that some courts have regarded that admitting dog tracking evidence is similar to the situation whereby the dog is treated as witness:-

“There is no certainty in such evidence. It is really the dog is the witness and the evidenc would seem to be hearsay in thsi view; and one court has vigorously maintained in a very recent case, *Brott v State* that such evidenceis not admissible. But other courts have agreed that it is admissible under, and only under, substantially the following conditions: Even if it is shown that the dog is pure blood, and of stock characterized by acuteness of scent and power of discrimination, it must also be shown by prelimiary evidence that the dog in question is possed of these qualities, and have been trained or tested in their exercise in the tracking of human beings; and it must also appear that the dog so trained and tested was laid ojn the trail, whether vissible or not, concerning which testimony has been admitted, at a point where the circumstances tend to clearly show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him. (*Ohio v Dickerson*)”

In the case of *Starkes v U.S.*, the district court in held that a tracking dog could not be cross examined. The same also applies to photographs or exhibits. It is also pertinent to note that in America to date, there are thirty-six states that had accepted tracking dog evidence. However, there are five other states which have rejected tracking evidence. These states are Illinois (*Illinois v Pfamschmidt*; *Illinois v Leffer*), Indiana (*Ruse v Indiana*; *Indiana v McDonald*), Iowa (*Iowa v Grba*), Montana (*Montana v Storm*) and Nebraska (*Brott v Nebraska*).

The courts in America before admitting tracker dog evidence requires foundational elements to be met which includes qualification and background of the dog handler, (*California v Gonzales*) breed of the dog, (*U.S. v McNiece*) training of the dog in tracking and trailing, (*U.S. v McNiece*) reliability of the dog (*U.S. v McNiece*) and trail not contaminated (*John Esminger, 2012*). Handlers are required by the courts to show their training and their experiences in the use of tracker dogs. (*John Esminger, 2012*) There are plethora of cases which regarded the dog handler as an expert. In the case of *South Carolina v White*, the South Carolina Court had regarded the testimony of the dog handler as an expert and further explained what that means:-

Gunter’s testimony verified that he had acquired, by training and experience, such knowledge and skill in the area of dog handling and tracking that rendered him better qualified than the jury to form an opinion on the particular subject of dog tracking Furthermore, Gunter’s testimony was based on his

specialised knowledge, skill and experience in the use of a scent tracking dog, rather than on the validity of dog tracking as a scientific procedure. The nature of Gunter's testimony is analogous to that offered by a typical police officer who qualifies as an expert based on his experience with narcotics, not on his ability to explain the scientific theory behind his opinion.

Pedigree of the tracker dog is also important and is required to be established by the courts before the tracking dog evidence is admitted. (Louisiana v Harrison) Early cases of tracking and trailing were often only performed by Bloodhounds. (John Esminger, 2012) A Missouri case in the year 1930 described that dogs that tracked the chicken thief as being pure blood stock of bloodhounds for six generations. (Missouri v Shawley) Breeds other than Bloodhounds are now accepted by the courts. Establishing the breed enables the evidence to be strengthened but it is not an essential requirement before that the evidence can be admitted. This was stated in the case of Ohio v Dickerson where the court stated that:-

"The reliability of the dog must be proved by a person or persons having knowledge thereof. This foundation may be strengthened by proof of pedigree, purity of blood or the exalted standing of his breed in the performance of such peculiar work.

Registration under the Kennel Club Association is also important to show that the dog is reliable. In a 1936 Mississippi case, the Court considered American Kennel Club registration a factor on the qualification of a dog. The Court also stated there are important matters which ought to be considered including the kennel where the dogs were bred-

Jenkins [the handler] testified that the two bloodhounds used by him on this trail were full blooded English Bloodhounds and registered by the American Kennel Club; that he had such registration papers that one of the dogs he had owned for seven years and the other for not so long. He did not produce in court the registration papers of the dogs nor did he know the sire or dam of the dogs. He testified that he had been an expert trainer of bloodhounds to follow the trail of human beings for fifteen years; that the dogs were reliable and true on the trail, and that they have been permitted to trail no other animal; that once they started on the trail they would not leave it, and that he had tested them by running a thousand or more human beings, and that they had not failed in such trails. He stated that where a human being gets upon a train or into a car the dogs have failed to follow the trail. He further stated that these dogs were purchased from the Rookwood kennel, a kennel recognised throughout the world for its bloodhounds. (Hinton v Mississippi)

The American Courts have always required evidence of tracker dog training and also its reliability in tracking humans. (Davis v Florida) In 1917, the Georgian Court admitted the tracking dog evidence because the dog handler managed to prove to the Court on the breeding, accuracy and reliability of the tracker dogs. (SWGDOG, 2010) It is also important for the dog handlers to keep all records,

including maps of the tracks they teach and train their dogs on. It is imperial that the record should include weather conditions, terrain, wind direction, time, length of the tracking, time spent tracking and how the dog worked on the track at the material time. Period or time is also an important factor in admitting tracker dog evidence as clearly stated above.

Weather conditions is also important particularly when it affects the efficiency of the dogs in tracking and tracing. There are many instances whereby dog handlers testify to surrounding factors that affects the trackers dogs ability to track and trace perpetrators. A tracking dog handler in a 1936 Mississippi case informed the Court that "a trail was harder for the dogs to follow in a dry spell than it a wet and that on this occasion it was wet".(Hinton v Mississippi) In the case of Missouri v Freyer, the tracking dog handlers testified to the Missouri Court that the "scent is stronger on moist ground than dry and on occasion involved in the case the ground was dry". (Misourri v Freyer)

In most jurisdictions including America, a conviction cannot be uphold solely by tracking dog evidence alone, it must be corroborated with other evidence. In the case of Brooks v Colorado, the Court found that tracking dog evidence that is not corroborated by the other evidence is too prejudicial for conviction. (Brooks v Colorado) Corroboration can take in the form of eye witness identification.(Michigan v Harper) Example of a corroborated evidence can be seen in the case of Washington v Nicholas where the scratches found on the rape suspect's face which is consistent with the rape victim's report of what she subsequently did to defend herself from the rapist. In Schell v Georgia, a tracking dog tracked from the screen that was removed for the robber to get into a house, through fields, pastures and "various other hazards, finally arriving at the porch of the defendant." Some of the corroborating evidence arose from the trail that the dog followed and the bottoms of the suspect's pants were wet. There was dew and dampness throughout the trail which was sufficient to cause his shoes and pants to be wet. The tracker dogs followed the defendant's trail. Additionally, the defendant's shoes traces which had special identification marks, were also all along the track.

In a 1922 Kentucky case, two tracker dogs were called to the scene of the crime to track the perpetrator. The tracker dogs followed the trail to the perpetrators house. These tracker dogs later came to the door of the house of the perpetrators. The perpetrators then came to the door where one of the tracker dogs went to the perpetrator. Although in this case it can be presumably taken as an alert, there was no other supporting evidence to corroborate a conviction. In the case of California v Gonzales, the suspect was involved in a robbery. Tracker dogs were called in and the K-9 unit arrived 25 minutes. The tracking dog and its handler followed the trail to the vineyard. The suspect was found hiding behind a berm. The tracking dog barked to alert it's handler to the suspect and bite him. However, the case was later reversed due to the lacking of other supporting evidence to support his conviction. The California Court propounded that:-

“We emphasize that the corroborating evidence necessary to support dog tracking evidence need not be evidence which independently links the defendant to the crime; it suffices if the evidence merely supports the accuracy of the dog tracking.”

1.2 United Kingdom

The English Courts has not discussed on the admissibility of tracker dog evidence until 1930s. The court in the case of R v Pieterston and Holloway, extensively dealt with the evidence of tracker dog following a trail and identifying a strap that was found in alleyway. The tracking dog, Ben was used to track down a suspect in a robbery case. There was no authority at that time and this was even highlighted by the court. The defendant’s counsel argued that the tracking dog evidence is hearsay as the tracking dog cannot be cross examined as it was only the evidence and testimony of the dog handler on the actions and reactions of the dog in trailing and tracking. Besides that, evidence of its non reliability was also put forth before the court.(Ian Freckelton, 2020) It was argued that the evidence in relation ot the behaviour of the tracker dog was unreliable and should no be admitted. All these arguments raised were canvassed in other jurisdictions. The Court in this case referred to the statement of Innes CJ in the South African case of R v Trupedo:-

“We have no scientific knowledge as to the faculty by which the digs of certain breeds are said to be able to follow the scend of one human eing, rejecting the scent of all others..... There is too much uncertainty as to the constancy of his behaviour and as to the extent of the factor of error involved to allow us in drawing legal inferences therefrom.”

The Court then emphasied on two safeguards:-

“First the proper foundation must be laid by detailed evidence establishing the reliability of the dog in question. Secondly, the learned judge must, in giving his directions to the jury, alert them to the care that they need to take and to look with circumspection at the evidence of tracker dogs, having regard to the fact that the dog may not always be reliable and cannot be cross examined.”

However, the court found that the statement tendered by the dog handler was insufficient because the dog handler failed to provide information and background of the dog’s training, the reliability of the dog on any test carried out to determine whether the training has produced a reliable response.(Ian Freckelton, 2020)

In Northern Ireland, the Court of Criminal Appeal found that the tracker dog evidence had been properly admitted. Curran LJ stated that it would be:-

“Unreliastic to close ones eyes to the fact that it has been known fora long time that dogs can follow human scent. It is also a common knwoledge that dogs can be trained to obey commands. We see no reason to doubt that a dog can be trained to obey a command which tells him that he is to look for a scent and to follow it.

The tracker dog might be aptly described as a tracking instrument guided by a trail of human scent, and its handler as an expert tained to set it on a trail by

the appropriate word of command to observe whether it is tracking and whether at any point it has lost the scent it was following. As an expert the handler gives the evidence of the tracking operation and its subject to cross examination.”(Ian Freckelton, 2021)

1.3 Africa

The District Court in South Africa has admitted tracking dog evidence because dogs were regarded as an instrument. (Keith Shear, 2008) Additionally, tracking dog evidence was accepted because studies have shown its reliability. (Keith Shear, 2008) However, as stated above, Chief Judge Innes has decided that it is not scientific, unreliable and should not be admitted by the court.(R v Trupedo) Chief Judge Innes said that a conclusion can be made on the dogs movements. For example when the dog barks at an individual, a conclusion can be drawn that he is an intruder. However, this type of conclusion can be done particularly for the prosecution of a crime. Further, it was decided that the evidence is hearsay because the evidence cannot be cross examined. To date, there is no South African case which overrules the case of Trupedo.

Whereas in Uganda, in the appeal case of Wilson Kyakurugaha v Uganda, Wilson was convicted for the murder of one Francis Kahwa. One of the prosecution witnesses which is the dog handler from the Kyegegwa police station had given testimony to the court that he and his team had rushed to the murder scene once alerted. The dog then started tracking for a distance of 3 kilometres where it finally tracked to the appellant’s house. The Appellants counsel cited the cases of Abdallah bin Wendo and Anor v R and Omondi and Anor v R asking for the court to admit the evidence carefully because there is no development of the evidence in Court around Uganda and that the experience and training of the dog handler must be proven to the court before the court admits the evidence. The Court of Appeal Judge maintained the Appellant’s conviction. The Judge further referred to the case of Abdallah and stated that the court in that case did not admit the evidence because the dog handler did not testify before the court.

In the case of Abdallah, two issues of tracker dog evidence were decided on. The first issue is on the admissibility of the evidence and the second is on the weightage of the evidence. In that case the Court stated that:-

“We are fully conscious of the assistance which can be rendered by trained police dogs in the tracking down and pursuit of fugitives, but this is the first time we have come across an attempt to use the actions of a dog to supply corroboration of an identification of a suspect by (a human). We do not wish it to be thought that we rule out absolutely evidence of this character as improper in all circumstances but we certainly think that it should be accompanied by the evidence of the person who trained the dog and who can describe accurately the nature of the test employed. In the instant case the dog master was not called and the evidence as to what the dog did and how they did it is most scanty.”

The judge also referred to the case of Omondi, where the High Court decided that before the evidence is accepted, its reliability must be proved with caution that: "the court must never forget that even a pack of hounds can change foxes and that this kind of evidence is quite obviously fallible." In *S v Shabala*, Kriek J did not accept the tracking dog evidence because there was some disparity in the testimony given by the dog handler, Pead. He mentioned to the court that the scent will remain for up to two three days. Such statement did not convince the court. Besides that there were merits raised by the Defendant's counsel that the qualification of the dog handler has yet to be proven.

Additionally, in *Kennedy Maina v Republic*, the Court of Appeal did not admit the tracker dog evidence. The main reason court did not admit the tracker dog evidence is because the background of the dog including its experience, breed and training was not established. The Court of Appeal in this case set aside the decision made by the lower court. In the case of *Uganda v Muheirwe and Anor*, the High Court stated that there are 6 requirements to be met which are as follows:-

"(1) The evidence must be treated with utmost care (caution) by court and given the fullest sort of explanation by the prosecution.

(2) There must be material before the court establishing the experience and qualifications of the dog handler.

(3) The reputation, skill and training of the tracker dog [is] require[d] to be proved before the court (of course by the handler/ trainer who is familiar with the characteristics of the dog).

(4) The circumstances relating to the actual trailing must be demonstrated. Preservation of the scene is crucial. And the trail must not have become stale.

(5) The human handler must not try to explore the inner workings of the animals mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog.

(6) The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth-eliciting process of cross-examination.

(7) It should be borne in the mind of the trial judge that according to the circumstances otherwise deposed to in evidence, the canine evidence might be at the forefront of the prosecution case or a lesser link in the chain of evidence.

Conclusion

During the earlier introduction of the tracker dog evidence to the courts, the courts expressed serious reservation in admitting the evidence to support a conviction. However, many countries in the common law jurisdiction today have uniformly accepted and admitted dog tracking evidence with the exception of India and South Africa. Tracker dog evidence is very important particularly for the prosecution team but if the evidence is not carefully scrutinised, it can be more

prejudicial than its probative value. Courts have recognised the intelligence of the dogs and also its amazing capability in particular its sense of smell. The Courts in common law jurisdiction have set up requirements and guidelines to be met before the tracker dog evidence can be deemed as reliable and admitted by the court against an accused person. If all these conditions are met, the tracking dog evidence can be admitted. Courts are also of the view that tracker dog evidence alone cannot support a conviction. Tracker dog evidence must be supported by other corroborative evidence to hold a conviction against an accused person.

Acknowledgement

This research has not received any specific grant from any funding agency in the public, commercial, or non profit sections.

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