The Challenges of Historic Allegations – The Way Ahead

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Allegations of past sexual abuse create enormous challenges for the criminal justice process. With domestic and care home abuse cases presenting related but different difficulties to those accused of such emotive crimes. The natural desire to bring the perpetrators of such vile crimes to justice has led to the compromise of the individual's right to a fair trial and ultimately to the creation of a new genre of miscarriages perpetrated by our legal system.

This paper identifies key features which require attention and argues that it is now time for those involved in the legal process to work in collaboration to provide a solution to what has become an increasing legal nightmare. To do nothing will result in the continued prosecution of innocent people accused of historic abuse with the resulting increase in the prison population and a burden upon all the agencies involved. The balance between the rights of victims and those of the accused is never going to be an easy task. The competing demands and expectations on our justice system, resulting in an increasing cost to the public purse and the potential for undermining public confidence in our legal process justifies an extensive review of how we deal with these difficult cases and will provide guidance to all that are involved. To do nothing can never be an option where the liberty of an individual is at stake.

Many lessons have been learnt over the years concerning the conduct of retrospective investigations into care homes, not only by the police but also the legal establishment. The growing criticisms from the media, lawyers and Parliament have led to the acceptance that a new genre of miscarriages had been created. History has shown that abolishing the need for corroboration, together with the shift in the law

of similar fact evidence, has paved the way for an explosion in the prosecution of historic sexual offences and the charging of significant numbers of care home staff with abuse. It has simply becomes a numbers game, where the greater the quantity of accusers or offences the more difficult it is to challenge and, ultimately, this seals the fate of the accused. For those making false domestic allegations these changes offer extensive opportunities to advance their allegations with little chance of the system to safeguarding the interests of those accused. Unfortunately for those accused of care home cases, the 'trawling' for complainants has provided even more fertile conditions for false allegations, enhanced amongst other reasons by the desire for financial enrichment by some former residents. Whilst there has been a legal acceptance that there are inherent problems with the prosecution of care home cases, little has been said about domestic abuse cases. No doubt this is due to the numbers of such complaints coming to the courts and the very nature of the abuse being committed within a family setting. The ease at which abuse allegations can be made and the apparent acceptance that they must be true has led to significant numbers of questionable convictions resulting in substantial prison sentences. Open the file of any historic domestic allegation and you will find a background of family breakdown or argument, whilst the motives for such family allegations are many the result invariably is singular.

In the care home investigations, it is the numbers game which becomes an important feature in the prosecution. It supports the simple questions as to why would so many individuals would complain about the same person if they were not telling the truth i.e. *"There is no smoke without fire."* With no possibility of deliberate collusion between these former residents it provides strong supporting evidence that the accused is a sexual abuser. This of course ignores the reality of the situation that contamination has already occurred via the media and the expectation by former residents that they will be seen by the police. That despite the best efforts of those investigating innocent contamination has tainted these allegations long before they come to trial. These are complex issues which the law has largely ignored. Within the domestic setting multiple complaints can arise that cross between the generations or

between the children of that family. Again it is that numbers game which creates the nightmare for the defendants legal representatives. The view that they all could not be lying disguises the complexities that exist in domestic relationships and the acceptance of the principle of similar fact evidence has taken away the objective review of those complainants. In both care home and domestic abuse cases, the need to question the quality of the complainant's evidence is lost under the sheer volume of complainants and the failure of the law to recognise the ease at which similar sexual complaints can be made by a number of individuals. The blind acceptance that abuse has happened ignores the ease with which sexual abuse complaints can be made and has created the current climate that exists within the law.

Domestic allegations present significant challenges. Here the opportunity to abuse exists and all that the accused can assert is that the opportunity was never taken. It is often reported by unsuccessful defendants that they were told by their defence team "all you can do is deny it." Whilst this is patently untrue and is a recipe for disaster – it is clear that there are serious challenges in protecting the fairness of the trial where the only evidence of a single complainant provides no independent supporting evidence of abuse. The credibility of the victim and the accused is therefore played out in the court and it simply rests upon who the jury believe. Whilst this may represent the traditional legal practice, it inexpiably rests upon who the jury believes and with it the prejudices that are brought to that process.

The Police Investigation

Since the initial police operations into care homes a lot has been learnt by all concerned in the legal process. The scrutiny of the **Home Affairs Select Committee** [1] highlighted a number of concerns arising from the conduct of such enquires and resulted in the issuing of guidelines to officers in charge of operations. Leaving aside

[1] Home Affairs Select Committee Fourth Report "The Conduct of Investigations into Past Cases of Abuse in Children's Home" 22/10/02

the loss of important historic records one concern which has consistently arisen is the danger of contamination.

Given the reliance upon similar allegations as being supportive of the case against a care worker or teacher, contamination becomes an important feature at the trial and the subsequent appeal. As an investigative tool, the trawling and interviewing of former residents and staff was essential in building up material upon which a case could be present. But the trawling activity occurred in an environment where the very nature of the care home cases, and the publicity they attracted, meant that everyone who had ever been in care was aware that police operations were ongoing. The dangers inherent with this process was recognised by Latham LJ in R v Mayberry [2003] [2] when he observed " the particular problems that were identified by the Home Affairs Committee, quite apart from the problems created by delay itself, relate to the fact that in many cases the evidence is produced by trawling for witnesses which caries with it the risk of instilling into those who are providing the information, in effect, the indication that certain answers may be expected by those who are making the inquires. The fact is it is not easy to be able to make a proper inquiry into the way in which the evidence has ultimately emerged in a way which enables a court to evaluate the quality of the evidence satisfactory. There are also problems that arise as a result of the fact that in many such cases a number of allegations are tried together with the inevitable consequence that there is the prejudice to a defendant of what may appear to be the coincidence of similar fact."

The other difficulty is that any former resident who was intent upon making a false allegation was free to do so in the knowledge that the police were investigating sexual abuse against someone in their former establishment. When the matters came to trial, what was said by whom and when then becomes an important issue between the parties.

[2] [2003] EWCA Crim 782

In early trials of these cases the courts and legal teams fell into error by concentrating on the issues of collusion, as if there was some secret cabal of victims sitting down together making up these allegations. The reality was there would not be evidence placed before a court to support such a position and all suggestions of any such meetings would be strongly denied by the complainants.

So, the dangers of innocent contamination should not be underestimated. It is essential that strong safeguards be put in place to ensure the safe collection of evidence, but also the means upon which they could be tested. Concentrating on collusion disguised one of the real problems, innocent contamination. Police Officers, often due to a lack of resources, were being asked to act as both Interviewer and Welfare Officer to complainants. Then, the same officer was responsible for interviewing a number of potential victims or witnesses. The result of such practices was the real risk of innocently contamination of the evidence in the case by that single officer.

There is strong notional evidence that such contamination has occurred and has taken many forms. The most severe evidence has come from over enthusiastic police officers telling witnesses, before they gave their evidence, the name of the accused and the allegations made by other witnesses. The authors of this paper, have seen examples of witnesses being allowed to give their evidence in the presence of each other, of witness statements being circulated amongst witnesses, or simply too much information being given to witnesses during the cross over role of witness support. However, due to the lack of any independent verification of what actually occurred, many such bad practices have not made it into the public domain. .

The demand on resources and the management of complex investigations creates difficulties for the Senior Investigating Officer. Given the importance and potentional of innocent contamination occurring during the enquiry, procedures to ensure that cross contamination does not occur must be a priority to establish good practice in any Operation.

One vital way to move forward with this, building upon one of the recommendations of the Home Affairs Select Committee is that complainants and significant witnesses should be subject to recording either by audio or video of all their evidence and that this should take place from the point of first disclosure. This would be a crucial and important step forward and in fact answers serious perceived concerns over evidence collection.

The Government in its reply to the Home Affairs Select Committee Report [3] did not close the door to the recommendations for such an approach. "Although we feel that these recommendations are not fully justified, we are not closed to the possibility that there could be an argument for introducing audio or video tape recording, if it can be established that there is clear justification for the resources that would be necessary, and if it could be fairly defined which cases it should apply to. Improving the quality of witness evidence is clearly something that the Government supports and recording could be of significant value in improving the quality of prosecution decisions."

In fact the resource issue has in large part been answered by subsequent developments in the arrangements for special measures for victims of sexual or violent offences. The developments are now so far advanced down this line that it would be a relatively small step but an important one to expand this from all vulnerable witnesses to all civilian witnesses in such cases.

However, the investigation must go further in that once evidence has been collected it should be subject to statement validity analysis and its reliability rigorously tested. Case investigators must ensure that they approach the case with an independent mind seeking, where ever possible, clarification of the assertions being made. This may be a daunting task due to the very nature and complexity of the allegations. The

[3] Governments Reply to the Fourth Report on the Conduct of Investigations into Past Cases of Abuse in Children's Homes [2002]. [2003]

abolition of the need for corroboration may well have assisted in allowing such cases to come to trial, but, in historic cases it should not prevent the police from looking for such collaboration.

When investigators approach the task from only one party's perspective, no doubt under pressure from various sources including the media, the danger of miscarriage is heightened. There is again considerable notional evidence that when a complainant(s) has come forward investigators leap into the "perceived truth" of the allegations and undertake a "trawl" for further supporting evidence by obtaining more complainants without consideration of whether it could have happened in the first place.

This highlights the real danger with trawling, not its use as a general method but, the way it is deployed and more importantly why it is being deployed.

If the past mistakes of investigation are to be addressed and corrected, there needs to be a direct investment by Government in tackling the causes of these miscarriages, the answer will not be found in restricting Police budgets or removing safeguards which protect those who may be innocent.

Recent Jurisprudence on Historic Allegations

There is now a collection of authorities on the issues arising from the care home investigations providing the foundation for challenging convictions. The principle which has occupied the minds of the appellant court has rested upon the individual's right to a fair trial given the delay in bringing the matter to court. Chiefly they have concentrated upon the issue of missing records and have, in the main, ignored the concerns arising as to the process of the investigation and the inherent dangers arising from multiple complainants.

It was in the wake of the Waterhouse Inquiry, into allegations of abuse from a number of **North Wales Care Homes**, that large scale police operations were launched in the 1990's. This inquiry created an urban myth that all children were abused by their carers, resulting in a modern day witch hunt. The extent and numbers of complaints received during the police operations created fear that paedophiles had been running our care homes for decades. Such a view is reflected in the recent sensational media reporting of the Haut de Gerenne children's home investigation in Jersey. The concern is that the desire to do justice for the victims ignores the question of the quality of justice being provided for those unfortunate enough to be accused.

Given the delay the natural starting point for the Defence was to argue that any resulting trial would amount to an abuse of process and the traditional approach was to raise the issue of abuse of process before the trial judge. The leading authority for many years was **AG Reference No 1 of 1990 [1992].** [4] This ensured that it was only in the most exceptional cases that the Court of Appeal would interfere with the discretion of the trial judge who allowed a case to go before the jury. Regardless of the prejudices created by the delay no consideration was made upon the actual effect upon the fairness of the proceedings. In the context of the care home cases, the loss of records or death of important witnesses very rarely stopped the prosecution and less still in a domestic case. The arguments did not concentrate upon the fundamental right to a fair hearing and ignored the consequences of the missing evidence upon that right. The accepted jurisprudence was that so long as an adequate delay direction was given the trial was considered fair. Following **R v Smolinski [2004]**[5] any application for a stay because of the delay is now made once all the evidence has been heard, thereby enabling the judge to be able to evaluate the prejudice caused. It was this refusal to properly analysis the prejudices caused by missing evidence which prompted a change in approach by Defence lawyers in challenging the safety of the resulting convictions in care home cases.

[4] [1992] 95 Cr App R 296
[5] [2004] EWCA Crim 1270

The two significant cases which have reinstated first principles were **R v Burke [2005]**[6] and **R v Anver Sheikh [2006]**[7]. Lord Justice Hooper's reasoned judgements provided a breath of fresh air and hope to many convicted care workers. In the opinion of the authors these two cases signalled an important benchmark in preserving the individuals right to a fair trial and acknowledges that in many cases no trial could be fair given the delay and the destruction of documents.

In the appeal of Anthony Burke, Tony Jennings QC concentrated his arguments upon the missing documents, records of when the appellant was on duty, and the resulting prejudice that it had caused. The complaint was that the former resident had been abused having returned to the establishment following a period of absence. It was the prosecution's case that the appellant had been on duty when the resident had been returned by the police during the early hours of the morning. However important staff rotas and Day Books that would have proven the appellants location had long since been destroyed. Lord Justice Hooper recognised that those crucial records, the absence of which made it impossible to confirmed whether the appellant had the opportunity to abuse the complainant in the circumstances alleged, prevented the accused from having a fair trial. This was an important step forward within the context of care home appeals.

Anver Sheikh was convicted in May 2002 of committing serious sexual assaults upon two residents of a care home in North Yorkshire. The conviction was quashed by the Court of Appeal in February 2004 and a retrial ordered, and during the retrial the judgement in Burke was handed down. Similarly Anver Sheikh was accused of abusing a resident whilst he was on duty, however, the date identified covered a very narrow time period, during which it was not even possible to ascertain that Anver was actually employed at the home. No staff rotas or personal files could be found and only these could have established whether the opportunity to abuse

[6] [2005] EWCA Crim 29
[7] [2006] EWCA Crim 2625

arose. An application, made by Paddy Cosgrove QC that no fair trial was possible due to the loss of crucial records was rejected and the jury convicted.

Lord Justice Hooper, in quashing the convictions from the retrial, highlighted that a trial judge had to carry out a very careful scrutiny of the evidence in order to establish whether a fair trial was possible. It was the resulting prejudice which had to be at the forefront of that analysis. Without those records, no trial, regardless of any directions to the jury could safeguard the Defendant. Significantly it did not matter how well the Defence case went or whether they had material upon which to undermine the particular former resident. The whole process had shifted to a careful analysis of the effect of the missing records or witness upon the central issue as to whether the opportunity to abuse arose in the first place. This was a task for the trial judge.

The effect of these judgements can be summarised as: (a) where the missing records would settle the matter one way or the other, then no fair trial was possible; (b) where the missing records would merely have been further evidence in the case, their absence did not render the trial unfair, especially if the judge gave the jury a strong direction on the prejudice to the defendant within the delay direction. Thus supporting the original judicial reasoning found in AG Reference No 1 of 1990 [1992].

Whilst these judgements are to be applauded there is a real need for the Courts to appreciate that, given the rather unique nature of care home cases, it must be the protection of the accused which should be at the forefront of the criminal process thus preserving the burden and standard of proof. These two important judgements concentrated upon the effect of the missing documents and specific allegations of sexual abuse which appeared on the indictment. Whilst providing a clear marker, the judgements ignored the fact that in historic cases, the former residents were free to assert any thing they liked, without fear of being contradicted by those records. Those important contemporaneous daily records of their lives and those of their carers represented the only independent evidence upon which their accusations

made years afterwards could now be challenged. As with all historic cases, it boils down to the credibility of the individual.

The question raised is how willing were the Courts in protecting those accused of serious sexual abuse? Where specific prejudice can be easily demonstrated the Courts are willing to step in and safeguard a Defendant. However, this ignores the reality of care home cases in that the delay always creates prejudice to the accused. By limiting the prejudice to the specific allegation of abuse, the defendant's ability to demonstrate the falsity of the accusers' account, by reference to contemporaneously recorded documents questioning the credibility of the complainant, also creates serious prejudice to the fairness of the trial. In a trial where credibility is central, the inability to undermine the complainant because of loss records does infringe the right to a fair hearing and which no legal direction from the judge could remedy.

In the appeals of **R v Wake [2008]** [8] and **R v Gillam [2008]** [9] the Court was reluctant to extend the Sheikh principle any further. They took the view that the missing records would not have resolved the central issues before the jury namely whether the offences were committed. This ignored that the fundamental issue before the jury was the credibility of the former residents against the former carer. If shown to be unreliable on one matter or even shown to have lied from the evidence of that independent record, it would have affected the credibility of the former resident in the eyes of a jury. This in turn would have an affect upon their specific complaints of abuse against the accused. This lost opportunity can only create additional unfairness to the accused. The Court in Wake also appeared to avoid the issue and the consequence of the Crowns reliance on similar fact.

The case of **R v Joynson [2008]** [10] heard before the LCJ, Toulson LJ and Maddison J on the 26th November 2008 has recognised this important point highlighted above

[8] [2008] EWCA Crim 1329
[9] [2008] EWCA Crim 1744
[10] [2008] EWCA Crim 3049

and has extended the principles that are found in Sheikh. It is a significant judgement and should be warmly received as being a landmark decision in this difficult area. This was a historic care home case with five complainants, where the alleged abuse occurred between 25 to 38 years before the trial and the Crown relied upon reprehensible behaviour [similar fact evidence] to support their case. No records, save for the register from the school existed nor any Social Services Department documents in respect of either of the complainants. Toulson LJ observed at para 13 "It follows that when considering prejudice it is necessary to consider the prejudicial effect of delay and the absence of documents not only in relation to any particular complainant, but also its secondary effect in relation to others whose evidence may have been bolstered by the evidence of another complainant. In short, it is necessary for us to consider the prejudice alleged in relation to the specific complainants and then to stand back and look at the matter in the round."

What is significant in this judgement is that the missing records did not go to the issue as to whether the opportunity to abuse arose, but rather to the credibility of the complainant or witness, making an important and welcome step forward in recognising the prejudice caused by missing records. In the matter of PF he told his mother that he was worried about being placed on the lap of this appellant. She took the matter up with the SSD. In the mother's statement she confirmed that her son had complained about having to sit on the teachers lap but she was definite that his complaint was about Mr EAGLES, the headmaster and not the accused. PF said at trial that it was not Mr EAGLES. His mother asserted that she made a complaint to the SSD at the time of the incident, however no SSD records had survived the test of time. The relevance of the records was now obvious and went to the issue of the credibility and reliability of PF.

There were further accusations made as PF stated that the same man who abused him also made lewd sexual remarks about another boy DC. However, DC had not attended the school until after the appellant had left so whilst the Crown called another former resident to confirm PF's account, the conflict of evidence regarding

DC further impacted on the credibility of PF. The point being that despite the lack of cross examination by the Crown of the Appellant on his employment history, If the employment records had existed they would have resolved the matter beyond doubt. This would have demonstrated that PF's evidence was clearly false. Two pieces of hard contemporaneous material for challenging the accuracy of an otherwise seemingly reliable witness were denied to the appellant because of the delay. What is significant is that such evidence did not relate to the specific allegations contained on the indictment nevertheless it was important evidence which went to the credibility of the complainant. Frank Joynson could not receive a fair hearing.

Further, in respect of the complainant KC, the Court recognised that even where a jury acquitted on one count but convicted on another, missing records would have gone to the credibility in respect of the other counts and should not be ignored in deciding whether a fair trial was possible.

The Court agreed that the absence of relevant records not only prejudiced the appellant in relation to meeting the allegations, because he lacked the means to test the complainant's story by reference to contemporaneous evidence, but impacted on the overall case. The prosecution relied on the complainants credibility to support the credibility of other complainants who in isolation may well have been regarded as significantly less credible. LJ Toulson's judgement is an important step forward and recognises the inherent dangers that exist in these types of cases. The unavailability of contemporaneous records, due to the delay, prevents the appellant undermining the credibility of the complainants, creating the prejudice and undermining the fairness of a trial. Because of the very nature of the offences, credibility is everything in front of a jury. It is only by the production of contemporaneous independent records which undermine the witness that any Defendant has a chance to establish their innocence.

It is also important to note that the Court took the view that no general warning to the jury could be a substitute for the missing documents. . These cases represent solid principles of law upon which the criminal justice system should take note. It has taken almost a decade for these fundamental principles to be enforced in care home cases and the recognition that no direction could overcome the prejudiced caused.

These principles are applicable not only in care home cases but also in domestic cases of abuse. The fundamental right to a fair hearing cannot be ignored simply because the abuse is within a domestic setting. The complex legal issues that arise during domestic historic cases are no different to the care home cases. However, the one distinction is the Court's willingness to allow domestic historic abuse cases to be left to the jury. It has long been recognised that children abused within a family do not complain until many years after reaching adulthood. Whilst attitudes and awareness to sexual abuse has significantly changed over the last decade, the 'conspiracy of silence' of family sexual abuse has been a long standing feature within the law, with many abusers maintaining dominance over their victims for years, 'secrets' being taken to the grave. But this position should not be used as a vehicle to deny those accused the fundamental right to a fair hearing. This is a difficult issue and the law struggles to maintain these two important but conflicting needs of protecting the accused whilst bring justice for the abused.

The increase in the number of domestic allegations could be explained by a number of different factors. A greater understanding and willingness to 'speak out' by the victim is a major contributor and the willingness of the police to investigate and the CPS to prosecute has contributed to more cases coming to trial. Whilst each case is fact sensitive the domestic abuse cases vary from single to multiple accusers from within a family grouping. The difficulties faced by a suspect is that unlike care home cases, there is always the opportunity to commit the abuse and in many instances, the allegations are specimen ones over a period of years. All that can be done is to assert that the opportunity was never taken in the first place. The ease, at which

allegations can be made, can only increase the risk that false or unreliable complaints are made.

How can the system separate the false allegations from the genuine? Without a review of the credibility of the complaint by the Prosecuting Authorities the danger is that the decision making process is left with the jury. . This highlights again, the very difficult nature of the subject matter and the expectations of the public, together with the quality of the evidence obtained during the investigation. In many cases the determination of truth simply rests on one word against another for there is no forensic or corroborating evidence to support the abuse. The outcome of the trial rests upon so many differing factors it is almost akin to playing Russian roulette

The concerns that surround historic domestic cases can best be demonstrated in the matter of **R v Brian Bell [2003].** [11] The appellant had been convicted of indecently assaulting his step daughter when she was a child. Her mother had since died, the complainant had a history of psychiatric care and the delay in the case was in the region of 30 yrs. The principle ground of appeal was that the learned judge had refused the application for a stay because of the delay. In a short but important judgement, Lord Woolf observed that, "This appeal raises a worrying point of general interest, difficulty and sensitivity in relation to complaints arising out of sexual offences alleged to have been committed many years before trial. The problem arises because in criminal law, unlike civil law, there is no Statute of Limitation. Furthermore in relation to sexual offences Parliament has removed the common law protection which was provided by the requirement of corroboration in cases of allegations of sexual offence." Whilst the Court would not criticise the refusal to stay the indictment and observed that no complaint could be made of the summing up, this was a case in which the Court used their residual discretion to quash the conviction. It was clear that in this case there was limited material upon which any challenges could be made by the Defence, all that he could do was deny the allegations.

[11] [2003] EWCA Crim 319

Lord Woolf went further and made the important observation that, "The heart of our criminal justice system is the principle that while it is important that justice is done to the Prosecution and justice is done to the victim, in a finer analysis the fact remains that it is even more important that an injustice is not done to the Defendant. It is central to the way we administer justice in this country that although it may mean that some guilty people go unpunished, it is more important that the innocent are not wrongly convicted."

A succession of recent cases has sought to distinguish and explain the LCJ reasoning behind Bell. In **R v Hooper [2003],** [12] Rose LJ V-P stated that no statement of principle that delay should be regarded as being determinative of a decision in relation to a stay on the grounds of abuse by reason of delay can be derived from Bell. That has to be right. **R v Mansoor [2003]** [13] recognised that even where a trial has been fair and the summing up impeccable, the Court may feel bound to interfere on the ground of what used to be "the lurking doubt" test.

The value of Bell is the realignment and restatement of the very basis of the trial process which is the question of fairness to an accused. The delay creates specific problems for historic allegations in effectively challenging false allegations. All that can be done is simply deny all the allegations and, wherever possible, prove from contemporaneous records or witnesses that the assertions being made cannot be true. A simple denial itself is never a strong defence before a jury of such crimes.

Young Memories

One particular feature which raises concerns is when as an adult complains of being abused when they were very young. The inherent dangers of reliance upon such memories have, until recently, been largely ignored by the law. When the

[12] [2003] EWCA Crim 2427
[13] [2003] EWCA Crim 1280

complainant provided graphic details of the abuse and the surrounding circumstances this was looked upon as supporting their credibility, with the more detail given the greater the confidence in their accounts. The 30 years of research by Professor Martin Conway into young memories has highlighted the dangers of such reliance as a tool for assessing credibility. We had ignored this difficult area and the landmark decision in **R v JH TG (Deceased) [2005]** [14] and **R v Jonathan CWS and Malcolm W [2006]** [15] are significant within the context of historic domestic abuse cases. Adult recall of very early childhood experiences is subject to amnesia and such early memories are usually enigmatic in nature and feature only a few details. The recalled memory of the abuse should be isolated, not associated with other memoires and perplexing to the individual. They should also contain evidence of trauma memories. Typically childhood amnesia covers the period from birth to around seven years of age. In a historic case where the complainant recalls detail of the alleged incident and claims emotions alien to a child it raises concerns as to the reliability of that memory. Research has shown that an audience attaches greater credibility to a detailed verbal account to that of a confused and limited one therefore, in the context of a trial, such recall will always impact upon the credibility of the witness and ultimately upon the verdict.

This expertise in childhood amnesia is of significant value to anyone involved in the criminal justice process that relies upon such young memories. From the reported cases to date, it appears that the reaction of the Courts has been to concentrate too much on the restriction of calling expert evidence in order to assist the jury. That restriction ultimately has the potentional of creating miscarriages. Whilst such an approach is more in keeping with legal policy it ignores the importance as to why such young memories can be unreliable. If childhood amnesia is admissible then a properly directed jury would be in a position to evaluate the evidence. When it is ruled inadmissible the accused has no protection to ensure that such a vital element of the case against them is evaluated correctly. The argument that young memories

[14] [2005] EWCA Crim 1828
[15] [2006] EWCA Crim 1404

are an issue on which a jury has their own experiences ignores the vital question as to how reliable or true those memories are.

Regardless of the issue as to the admission of such expertise, is it now time for the jury to be given a special warning by the judge before proceeding upon reliance of such evidence. A **Makanjuola [1995]**[16] style direction may suffice. It would need to be tailored to deal with the specific concerns that arise on the subject of young memories but at least a jury would be on guard against placing too much reliance upon that evidence. Careful thought must be given to the content of any such direction, without hearing expert evidence due to the laws of evidence. In some cases a general direction would be sufficient, in others, the jury will have to hear expert evidence as to why, in that specific case, those memories may well be unreliable.

This is a new area within domestic abuse cases, highlighting the critical importance in understanding the development of the human mind in indentifying wholly unreliable evidence.

The Future Direction of these cases and the CCRC

These recent authorities in the care home cases have highlighted the unease surrounding the safety of convictions and there are a significant number of cases currently under review before the Criminal Cases Review Commission. There is now a basis upon which they can be reviewed and the legal system, once again, appears to be at a crossroads and much will now depend on the interpretation given to these cases.

It is arguable, from past applications, that the Commission have become too reactive resulting in a clear divergence of the approach taken by the Commission and that of

[16] [1995] 2 Cr App R 469

the Court of Appeal. There is no doubt that the increase in the number of applications being made following historic sexual abuse convictions has placed a burden upon the limited resources of the Commission. When operational budgets are being cut, it may be easy to find a reason not to conduct a detailed and complex review. However, these difficult decisions need to be made within the context that many accused of both care home and domestic abuse are of good character, determined to clear their names and challenge the safety of their convictions.

In a recent interview the new head of the Commission, Richard Foster CBE, advocated a bolder approach from the Commission with a greater number of referrals, this no doubt built upon the leaving remarks of its former head Professor Zelleck who made similar comments. This is warmly welcomed by those who represent applicants. If the Commission needs more powers to extend the test for referral then it should be bold in saying so and importantly, they should have the funding to deal with the ever increasing numbers of referrals of historic allegations.

There is no doubt the Commission have a difficult job and one within a tight remit of the Criminal Appeal Act 1995. However, that argument often advanced and in fact referred to in Laurence Elks book on *"Righting Miscarriages of Justice"* belays the fact that the Court also operates from within the same restrictions and yet we have seen, in the cases of Burke, Sheikh and Joynson, a willingness to be bold and apply common sense.

The Commission was set up following the crisis in confidence of the legal system after a number of high profile miscarriages of justice. There is a danger that the very reason for the Commission existence has been lost and that a bolder and more confident approach is now needed. They have the authority, the good will and respect of the legal community to challenge and develop the law by referring cases such as care home convictions back to the Appellant Court. These convicted men will not give up the fight to clear their reputations where so many concerns arise as to the safety of their convictions.

The same sentiments arise in domestic cases as, in many instances the convictions are not supported by independent evidence. They pose significant burdens upon the Commission and it is accepted that each case will depend upon the specific facts. Nevertheless, given the ease at which complaints are made, the Commission must be robust in their review and revisit the whole of the investigation.

In considering the way ahead we should not be slow to forget those men and women who currently stand convicted of miscarriage based on an earlier flawed approach, we must be forthright in putting right the mistakes of the past so we can move forward.

The Way Ahead

The recent decisions of the Appellant Court are a welcome development and represent clear foundations upon which these historic cases should be dealt with. There is a need for a greater understanding of the difficulties and challenges faced by the all those involved in the legal system and the recognition that miscarriages do happen.

The legacy of those early care home investigations remain with us today. Whilst the extent and scale of those early days are now absent in England and Wales they still continue on a lesser scale. The current investigation in Jersey highlights once again the difficulties of sensational media reporting and the acceptance in the mind of the public that children were abused in care. As we have learnt that is a dangerous position to be in. The lessons learnt in this jurisdiction, together with the guidance from the Court should not be ignored by those involved in the Jersey cases.

Those convicted of care home abuse continue to protest their innocence. The Commission have the responsibility to review these cases and for many of these former care workers, the Commission represent their final hope in achieving justice.

In the opinion of the authors the Commission, whilst concerned about the increase in referrals, appears to be reluctant to made bold incentives in reviewing the cases. It must be the ability to review the case in the round, questioning not only the investigative process but also the law, which must be at the forefront of their deliberations. The recent cases highlight the willingness by the Appellant Court to 'robustly review' the issues of safety and to extend the fundamental right to a fair hearing to those convicted of historic abuse. These cases are complex, time consuming and difficult. To simply turn down applications on the basis of the overwhelming evidence by the number of complainants is not a review but an unconditional surrender by the body entrusted to seek out injustice.

In respect of domestic historic cases the appellant court must deal with the troublesome area of childhood memories and to serious consider whether in such cases it is necessary for a judge to direct the jury of the need for caution, together with the issue as to whether expert evidence should be admissible as a matter of course.

The Police ultimately are responsible for the investigation of crime. Within the historic allegations of sexual abuse more resources and training is required. It is recognised by everyone involved within the legal system that a trial can only be as safe as the evidence obtained by the police. Serious considerations should be made as to the setting up of dedicated historical abuse units, with the necessary resources to investigate claims made by complainants. It is unreasonable to place the responsibility of investigating historic allegations on police officers dealing with current allegations of sexual abuse as the investigative processes are significantly different and the priority must be the safeguarding of children and vulnerable adults in continuing danger of abuse. The setting up of historic units has the potentional of early identification of the cases which no fair trial is possible and can only assist in the decision making process as to whether a prosecution is in the public interest.

The role of the CPS lawyer is important. Again, specialisation and greater understanding of the issues surrounding historic cases will ensure that inherently weak cases are not prosecuted. This reduces the dangers of miscarriages occurring and will have an effect upon the cost of justice. It is recognised that the decision making process involves consideration of the rights of the complainants, however, better investigation by the police and early involvement of a lawyer can only be of benefit.

Better training for lawyers in preparation and conduct of cases of historic allegations is also essential. The growth in the number of historic cases coming to trial has resulted in a number of very experienced and excellent legal firms being available. However, for the majority of Defendants the standards they received from other less experienced firms is less than satisfactory. The need for a greater understanding amongst both solicitors and barristers of these difficult cases is evident. The advocacy skills required are also another important area upon which further work is required. The need to ensure that the legal profession are aware of the challenges and the work that needs to be done can only impact on preventing miscarriages occurring.

Funding for appeal work is always a difficult area. The constraints on the public purse for legal aid are an ongoing issue with the Profession. The current review of appeal funding as part of the LSC Reforms raises worrying concerns as to the provision of the current limited funding for those seeking to overturn convictions. We must clearly put down a marker that funding should not be restricted, as the appellate level is the last point of hope for those who stand convicted. The role of the Profession in filtering out unworthy appeals has a direct impact upon the work of the Commission and the Appellant Court. Early intervention by lawyers can often assist the Commission in the identification of the appeal points. Importantly successful appeals result in tangible results to society and savings in the cost of imprisonment.

Critically all of us who work in this challenging environment must begin a constructive dialogue so that the mistakes of the past can be rectified and a safer and fairer process can be developed. Sexual abuse in our society has happened and it will continue to happen. Those who are guilty deserve punishment and the victims deserve the full protection of the law. For those who have been falsely accused they too deserve that protection. The challenge for us is to acknowledge that responsibility and be prepared to defend it.

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