

The Challenges of Historic Allegations – The Way Ahead

Allegations of past sexual abuse create enormous challenges for everyone involved in the criminal justice process. Domestic and care home abuse cases present their own difficulties to those accused of such emotive crimes. The natural desire of bringing to justice the perpetrators of such vile crimes has led to the compromising the individuals right to a fair trial and ultimately to the creation of a new genre of miscarriages perpetrated by our legal system.

This short paper is designed to highlight the author's view in this troublesome area, to identify features which need attention and to argue that it is now time that those involved in the legal process should act together to provide a solution to what has increasingly become a legal nightmare. To do nothing will result in the ever increasing prosecution of those accused of historic abuse with the resulting increase in the prison population and burden upon all the agencies involved. The balance between the rights of victims and those of those accused is never going to be an easy task. The competing demands and expectations on our justice system create a challenge that requires action. The cost to the public purse and the potential for undermining public confidence in our legal process justify 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 amongst 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 become a numbers game, where the greater the quantity of accusers or offences the more difficult it is to challenge and, ultimately, seals the fate of the accused. Unfortunately for those accused of care home cases, the 'trawling' for complainants has provided fertile conditions for false allegations, enhanced by the desire for financial enrichment by some former residents. Whilst there has been an

acceptance that something was not right about these care home cases, little has been said about domestic abuse case. 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. However, it is these domestic cases which have been largely ignored by the Appellant Court leaving each case to be decided on their own individual facts ignoring the growing acceptance that the care home cases may well have led to miscarriages. 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.

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 complain about the same individual if they were not telling the truth. 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 true situation that contamination has already occurred via the media and the expectation by former residents that they will be seen by the police. These are complex issues which the law has largely ignored. Within the domestic setting multiple complaints can arise crossing the generations or between the children of that family. It's that number game which creates the nightmare for the Defendants legal representatives. The very attractive retort of the prosecution as to they all could not be lying disguises the complexities that exist in any given situation and conveniently hides away the requirements of the Defence to look deeper into the process of investigation. The acceptance of the principle of similar fact evidence has taken away the objective review of those complainants. The questioning of the quality of their evidence is hidden by the number games and failure of the law to recognise the ease at which similar sexual complaints can be made by a number of individuals. It has always been that blind acceptance that abuse has happened which has created the current climate that exists within the law.

Domestic allegations present significant challenges. Here the opportunity to abuse exists and in the majority of cases the accused can only assert that the opportunity was never taken. The challenge of the law is how to protect the fairness where the only evidence of a single complainant provides no independent supporting evidence to

support the abuse. It simple rests upon who the jury believes. The credibility of the victim and he accused being played out in the court. Whilst this may represent the traditional legal practice, it inexpably rests upon who the jury believes.

The Jurisprudence on Historic Allegations

There is now a collection of authorities dealing with the issues arising from the care home investigations which have become the foundation upon which care homes convictions can be challenged. The matter which has chiefly 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 trial. Chiefly they have concentrated upon the matter 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 police operations were launched seeking out complainants of institutionalised abuse. This frenzy of activity ensured the creation of the urban myth that all children were abused by their carers and created a modern day witch hunt. Throughout the late 1990's these extensive operations pursued former care workers for serious sexual abuse of their charges. The extent and numbers of complaints received during the police operations created fear that paedophiles had been running our care homes for decades. That climate extended to the judicial system creating the atmosphere upon which miscarriages of justice were allowed to take place. The sensational media reporting of the Haut de Gerenne children's home investigation in Jersey is reminiscent of that surrounded the North Wales Inquiry and the resulting police operations in Cheshire and Liverpool in the 1990s. That desire to do justice for the victims ignored the question of the quality of justice that was to be provided for those unfortunate to be accused.

Given the delay in bringing the proceedings the natural starting point for the Defence was to argue that any resulting trial would amount to an abuse of process. 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] 95 Cr App R 296. 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 prejudices caused or the 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. Less still in a domestic case. The arguments at that time 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] EWCA Crim 1270 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. Whilst sensible in principle it ignores the clear cases where the prejudice is obvious. 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.

The two significant cases which have reinstated first principles were R v Burke [2005] EWCA Crim 29 and R v Anver Sheikh [2006] EWCA Crim 2625. Lord Justice Hooper's reasoned judgements provided a breath of fresh air and hope to many convicted care workers. In the author's opinion 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 such important records.

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 bugged having been returned to the establishment following a period of being absent. It was the prosecutions case that it was the appellant who had been on duty when the resident had been returned by the police during the early hours of the morning. The important staff rotas and Day Books 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 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 some material upon which they undermined 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] 95 Cr App R 296.

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. The desire to do ‘justice to a victim’ can interfere with that fundamental right due to the

emotive nature of the accusation and the prejudice caused by the delay. The individuals who, later in their lives find themselves accused of abusing children in their care, have an expectation that they will be protected from false allegations.

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 reality that in historic cases, the former residents were now adults and were free to assert any thing they liked, safe in the knowledge that those important records no longer existed. 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 credibility. Should the law continue to provide a marker in the sand, on one side no fair trial is possible, whilst the other represents the acceptable face of unfairness upon which the Courts were prepared to tolerate.

How keen were the Courts willing to go in to protect 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 arbitrary line ignores the reality of care home cases in that the delay will always be prejudicial to the accused. By limiting the prejudice to the specific allegation of abuse, the defendant's right 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. Where credibility is central, the inability to undermine the Prosecution's case because of the delay should be recognised as an infringement of the right to a fair hearing and resulting convictions cannot be considered to be safe.

In the appeals of R v Wake [2008] EWCA Crim 1329 and R v Gillam [2008] EWCA Crim 1744 the Court was reluctant to extend any further these principles. 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 was unfortunate and 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 that independent record that, would affect their credibility in the eyes of a jury. This in turn would have an affect upon their specific complaints of abuse against the accused. That lost opportunity can only create additional unfairness to the accused.

The case of R v Joynson [2008] ECA Crim 3049 heard before the LCJ, Toulson LJ and Maddison J on the 26th November 2008 has, in the author's opinion recognised this important point and has extended further 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 where the alleged abuse occurred between 25 to 38 years before the trial. There were five complainants and the Crown relied upon reprehensible behaviour [similar fact evidence] to support their case. No records, save for the register from the school existed and no SSD documents either in respect of each 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 to the credibility of the complainant or witness. This is a significant, 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 and not the accused. PF said at trial that it was not Mr EAGLES. His mother asserted that at the time she made a complaint to the SSD; 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 or reliability of PF.

It did not stop there. PF stated that the same man who buggered him also made lewd sexual remarks in the shower about another boy DC. It was significant in regard to his credibility. DC had not attended the school until after the appellant had left. The Crown called another former resident, to confirm PF's account. The point was 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 their allegation, because he lacked the means to test their stories by reference to contemporaneous objective evidence but it had a knock on effect in relation to the case generally, since the prosecution relied on their 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. It is the unavailability of contemporaneous records due to the delay which prevents the appellant undermining the credibility of the complainants which creates the prejudice and undermines the fairness of a trial. 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 could in the case be a substitute for the documents which were missing. Whilst many cases

can be said to be fact specific, these cases represent a solid foundation 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 solid principles whilst applicable in care home cases also represent the foundation for the domestic cases. That 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 been long 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. That many of the abusers maintain their dominance over their victims for years and in many cases, the 'secrets' are taken to the grave. It is right that victims of such abuse receive justice. Sentence guidelines rightly reflect society's revulsion at such crimes. But those genuine sentiments should not be used as a vehicle to deny those who are accused the fundamental right to a fair hearing. It is ultimately the legal establishment's responsibility to protect the accused. This is a difficult issue and the law struggles to maintain these two important but conflicting needs.

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. Together with the willingness of the police to investigate and the CPS to prosecute each has contributed to the every increasing number of 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 deny 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 and

the genuine claims? Ultimately the danger arises that the decision making process is left with the jury with no review being undertaken by the Prosecuting Authorities. Again this highlights 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 it simply rests word against word. 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 cases can best be demonstrated in the matter of R v Brian Bell [2003] EWCA Crim 319. The appellant had been convicted of indecently assaulting his step daughter when she was a child. Her mother had since died and the complainant had a history of psychiatric care. 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 their residual discretion to allow an appeal. It was clear that this was a case in which there was limited material upon which any challenges could be made by the Defence. All that he could do was deny the allegations.

He went further “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] EWCA Crim 2427 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] EWCA Crim 1280 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. In R v Smolinski [2004] EWCA Crim 1270 the LCJ was of the view that any abuse of process argument due to delay should be heard once all the evidence had been heard in order to decide whether the trial should proceed to the jury. Such a process will enable the trial judge to assess better the prejudice caused to a defendant as a consequence of the delay. More importantly the test to be applied is whether the evidence is such that it would not be safe for a jury to convict.

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. That historic allegations create their own distinct problems for the courts and those standing trial. The delay creates specific problems in effectively challenging those false allegations. All that can be done is simply deny all the allegations and wherever possible prove from contemporaneous recovered records that the assertions being made cannot be true. A simple denial itself is never a strong defence before a jury of such crimes.

The issues that arise in domestic cases can be complex. One particular feature which is common in domestic historic cases is the young ages of the complainants at the time of the abuse. This has become an increasing difficulty in the Courts. The dangers inherent to complaints of sexual abuse suffered at an early age have been largely ignored by the Courts. The difficulty with the tests laid down in R v JH TG (Deceased) [2005] EWCA Crim 1828, R v Turner [1975] 60 Cr app R 80 CA & R v Jonathan CWS and Malcolm W [2006] EWCA Crim 1404 is that the whole premise as to whether Prof Conway is admissible is based upon a subjective view of the video interviews of the complainant. If Professor Conway's opinion is admissible then the jury will have evidence of childhood amnesia and the dangers of relying upon the said recollections at the forefront of their minds when they retire to consider their verdicts. Therefore if the view taken by a Court that it does not meet this uncertain threshold,

then the evidence of childhood amnesia is inadmissible and the Defendant's expectation of a fair trial and the opportunity to challenge the complaint is dealt a blow. It simply becomes a lottery dependent upon the discretion of the trial judge. But then to ignore totally the dangers of such 'young memories' in the summing up, renders the whole process unfair and results in miscarriages of justice. Where is the line drawn?

If evidence of childhood amnesia is admissible it for the jury properly directed to decide upon the evidence before them whether or not it is safe to convict upon the complainant's recollection. Where such evidence is ruled inadmissible, but remains a feature in the case, then how can an accused person best be protected to ensure fairness.

By way of example the case of R v Makanjuola [1995] 2 Cr App R 469 best demonstrates where a direction can ensure fairness in a criminal trial. Whilst such a direction is at the discretion of the trial judge, depending upon the evidence and the issues, it is the warning to a jury of 'the special need for caution' which provides the safeguards to a fairness of any trial and ensures that a jury are directed to those dangers.

The abolition of the requirement for corroboration in sexual offences came about as a consequence of s 32 of the Criminal Justice and Public Order Act 1994. The justification for the need for corroboration was stated by Salmon LJ in R v Henry [1968] 53 Cr App R 150 that "Human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons.....and sometimes for no reason at all." However, the change in the law was based upon the criticism that the then current position cast a particular and unwarranted slur on women. That has to be right. At that time historic cases seldom came before the Courts. It was by the abolishing of the requirement for corroboration, which enabled such cases to be brought before the Courts. In any final analysis the concerns of the Court must be in favour of an accused in order to prevent a miscarriage.

It was recognized in *R v Makanjuola* by the then LCJ that trial judges had a discretion to warn the jury of the need for caution, but not simply because the witness complains of a sexual offence. If such a warning was to be given there had to be an evidential basis for suggesting that the evidence of the witness may be unreliable? The LCJ gave guidance as to the circumstances in which a judge should urge the jury to caution in regard to a particular witness and the terms in which that should be given. At p 472 he stated “Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness’s evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness’s evidence. We stress the these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury.”

It is arguable that evidence based upon young childhood memories can fall within this special category of cases where such a warning is required. It is the question of the reliability of that evidence which is at the forefront of the case. As a matter of practice in historic cases of past sexual abuse where the abuse is alleged to have occurred when the complainant was very young at the time, but the complaint is made many years later – a jury should be warned of the need to take special care in assessing that evidence because of the question of the reliability. That is the only way in which a fair trial can be maintained and maintains the delicate balance.

The Way Ahead

[These are just bullet points]

The recent decisions of the Appellant Court in the recent cases concerning care home convictions are warmly welcomed. However, the challenge to the legal system is that fresh care home investigations are now rare. Save for the current investigation in Jersey, this jurisdiction is left with the legacy of those convicted following those early police operations.

Those convictions of care home abuse continue to protest their innocence. The CCRC 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 being made by convicted sex offenders from historic cases appear to be reluctant to make bold incentives in reviewing the cases. It must be the ability to think outside the 'box' and to question not only the investigative process but also the law which must be at the forefront of their deliberations. The recent cases highlight that the willingness is there by the Appellant Court to 'robustly review' the issues of safety and are prepared 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 seriously consider whether in such cases it is necessary for a judge to direct the jury of the need for caution. Also the point whether Prof Conway's expert evidence is admissible as a matter of course when the Crown rely upon such young memoirs to secure a conviction.

More resources and training for the police. Perhaps separation of investigations between current and historic sexual abuse.

Greater understanding and specialisation of CPS on historic cases in deciding whether a case should go to trial.

Better training for lawyers in preparation and conduct of cases of historic allegations.

Funding for appeal work