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Albion Chambers CRIME TEAM NEWSLETTER

A little learning is a dangerous thing...

The Law Commission Report on Expert Evidence in Criminal Proceedings was published in 2011 and recommended that the Government legislate to regulate the introduction of expert evidence in criminal trials so as to avoid miscarriages of justice. The Government has declined to do so, but the concerns raised by the Law Commission consultation and report have been addressed in changes made to the Criminal Procedure Rules Part 33, which come into force on 6 October, and an accompanying Practice Direction.

The Law Commission identified in its report a number of concerns about the use of unreliable or inappropriate expert evidence. The problem was said by the Commission to lie in the fact that jurors inevitably and understandably place great weight on 'science'. Yet, what is often presented as scientific fact, or attributed the significance of fact, is in reality merely the expert's opinion. Such opinion is subject to the shifting tides of scientific advance, the individual expert's experience ('I have never seen X in my practising life, therefore X cannot be...', until the expert sees X), and the mindset of the individual. Further, it was noted in the report that advocates occasionally lack the knowledge with which to attack flawed methodology, premises, or conclusions, if unassisted by their own experts. Thus, as has happened in the past, unreliable science is presented as fact to unsuspecting ears, without being effectively challenged.

We all know of experts who have signed the declaration that their primary role is to assist the court, and who present themselves as unbiased, but quote only the research and statistics which support their conclusions. Only if the advocate has done their own research and can counter with the evidence which suggests an opposing likelihood or scenario, can that expert's evidence be re-balanced. It should not happen, but it does. The consequences can be catastrophic: significant miscarriages of justice such as the *Clark* and *Cannings* cases, in which there was improper reliance on flawed statistics. Or the Dallagher case[1] in which an expert stated that he was "utterly certain" that a partial ear print belonged to the defendant. DNA evidence later proved that it was not him. Or the "triad" theory in relation to non-accidental head injury in infants, which was wrongly used as evidentially diagnostic; the presence of three types of injury 'proving', said the experts, that the infant had suffered a traumatic or shaking injury.

The Criminal Procedure Rules 2014 replace the CPR 2013 (as amended). Part 33, which governs the instruction of and service of expert reports is substantially amended. The expert's duty to the court has been redefined in Rule 33.2. The change emphasises the duty to give opinion only on areas within the expert's expertise, and to define those areas both within their report and orally, and to draw the court's attention to any question which would lead them to give evidence outside that area.

Rule 33.3 sets out a new procedure for introducing a summary of an expert's conclusions. In addition, it requires the disclosure of information detrimental to an expert's credibility. This would presumably include reported cases in which the expert's reports or conclusions had been criticised by the Court of Appeal. In *Hamilton* the Court noted that the expert instructed by the defence, Dr Boakes, whose evidence was found to be inadmissible, had provided inadmissible evidence of the same kind in two previous reported cases, and was concerned to note that she had been instructed in over 200 cases since the first of those.

Rule 33.4 addresses the concern about unreliable opinion being presented as fact, by requiring the expert to include, within their report, information relevant to assessing the reliability of that expert's opinion. This is essential in order that the Court is able to apply the reliability test as set out in the Practice Direction without being required to conduct its own research in order to apply that test and rule on admissibility.

The Law Commission recommended that there should be consideration of the reliability of expert opinion, as a pre-requisite to admissibility. Although Part 33 of the CPR does not list 'indicia of reliability' of the sort recommended by the Law Commission, the Criminal Practice Directions that supplement Part 33 of the Rules do include such indicia and give courts guidance on how to apply them.

The Practice Direction bears repetition, as it is likely to be the first port of call for any argument as to admissibility (it can be found at http://www.judiciary.gov.uk/wp-content/uploads/2014/07/Criminal-Practice-Directions-Amendment-No.2.pdf). Rule 33A.5 provides that the factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include:

(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;

(b) if the expert's opinion relies on inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);

(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy

or reliability of those results;

(d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

(e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained;

(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

In addition, paragraph 33A.6 directs that in considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability such as:

(a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing, or which has failed to stand up to scrutiny);

(b) being based on an unjustifiable assumption;

(c) being based on flawed data;

(d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

(e) relying on an inference or conclusion which has not been properly reached.

From the perspective of advocates, some help in the application of these factors may be found in the forthcoming tool kit which The Advocacy Training Council is in the course of preparing. However, it is the judiciary who will need the greatest assistance when considering the reliability factors. It cannot be expected that the judiciary will have sufficient knowledge of all areas of expertise to know whether an expert's conclusion is based on an unjustifiable assumption, for example, except in stark cases. How could HHJ Bloggs know whether the examination technique referred to in an expert report was improperly carried out?

The Law Commission's consultation demonstrated that there was some support for the judiciary being provided with a compendium, which would contain detailed, up-to-date information and guidance on the various types of complex expert evidence, particularly scientific evidence, which may be proffered for admission in criminal proceedings. It was noted that it would be sensible if the judiciary had access to the specific matters which have a bearing on the evidentiary reliability of expert opinions derived from fields such as psychology, psychiatry and statistics. However, it was recognised that this would have to be a long-term goal as the JSB does not have the resources to gather such a compendium, save in the area of statistics in relation to which the JSB has undertaken a project to provide advocates and judges with more information [2]. How the application of the reliability test works in practice remains to be seen, but the burden placed upon the judiciary by the Practice Direction is significant.

Ignatius Hughes QC

1. [2002] EWCA Crim 1903
2. For the resulting practitioner guides see http://www.rss.org.uk/site/cms/contentviewarticle.asp?article=1132

True or false?

Expert evidence on false memories is inadmissible...

Can you call an expert on the question of whether a witness's memory of the indicted event is false? Many practitioners would think the answer was a clear cut no, but in fact it is not so straightforward. The science of memory is an evolving area, and one in relation to which expert evidence is rarely called. When it comes to the question of whether a witness's memories are true or false, defence advocates often face the objection that this is purely a question for the jury; rightly. However, the jury's ability to assess whether the witness is giving a true or false account may be improved through hearing expert evidence in some exceptional cases.

The concept of recovered memories arises most often in historic sex cases, where a complainant purports to remember abuse suffered many years earlier. The result may be that the defence argue, not that the complainant is deliberately making a false allegation, but that these are false memories, genuinely believed by the complainant, but without factual foundation. The concept of false memories gathered steam during the 1970s and 1980s when it emerged that suggestive counselling techniques in America led to a belief amongst those counselled that they had suffered abuse. Much research has been conducted since into whether it is possible deliberately to repress a memory to the point that it is 'lost'. The current answer from psychologist researchers, who refer to this phenomenon as 'motivated forgetting', is that it can be replicated to a limited degree in controlled experiments, and thus is likely to exist in the real world. Researchers have also investigated whether it is possible to generate 'false' memories to which the answer is again, yes, to a limited extent. Experiments typically use a pool of individuals who are told that their interviewer knows of some traumatic event in their childhood (not sexual trauma for ethical reasons). They are told that the story has been confirmed by their parents, and they are asked questions about the event during a series of sessions. They are told to go away and think and/or write about it in between sessions (mirroring dangerously suggestive counselling techniques). In such studies, up to 50% of participants said that they could remember the traumatic event, which had in fact never happened. Even in a study involving much less suggestion (participants were not asked to go away and think about the event between sessions, and there were fewer sessions), 3% of the pool reported that the event had happened to them. On the face of it, this research is highly relevant to jurors who are considering the question commonly posed by prosecuting counsel about the complainant in a sex case: 'why would she make it up?'. The answer may be: 'she didn't deliberately make it up'.

However, this is not an area of relevance only to prosecution witnesses or allegations of sexual abuse. It is equally possible for a defendant to assert that they have recovered a memory of the crucial event, having previously had no recollection of it. In such an instance, the defence would wish to call evidence that it is possible to recover memories. One case in which precisely that happened was *R v Evans* [2009] EWCA Crim 2243. The appellant stabbed his wife 11 times, and pleaded guilty to her murder saying he had no memory of the incident. Years later, it was argued that fresh evidence, consisting of his recovered memories of events immediately prior to the stabbing, raised a

defence of provocation and that his conviction was accordingly unsafe. The Court of Appeal accepted expert evidence that defendants can experience truthful and reliable recovered memory after genuine amnesia. However, whether the memory is truthful and reliable remains a matter for the court, not the expert instructed, and defendants face an obvious hurdle in asserting that a self-serving recovered memory is genuine. As the Court of Appeal said in *Evans*, "It is very difficult to accept that he had genuine amnesia. The far more likely explanation is that he did not wish to reveal what had happened, as he knew that would not provide him with a defence". The court went on to find that the allegedly recovered memories were not reliable, the defendant having given various accounts of the memories at different times, and that the conviction was not unsafe.

The courts have grappled with expert evidence about memory a number of times in recent years, with varying conclusions. In *R v Bowman* [2006] EWCA Crim 417 Professor Bowman's evidence regarding the unreliability of memories of children of five years after 20 years was held to be admissible by the Court of Appeal. However, the Professor's views went little further than commonsense and ordinary human experience. As he rejected the theory of false memory syndrome and so would not have assisted the defence to establish that the memories in question were false, it was held that the failure to admit his evidence at trial did not render the appellant's conviction unsafe. It is of note that the Court did not hold that his evidence was inadmissible per se.

In *R v E* [2009] EWCA Crim 1370 Hallett LJ said that evidence as to the reliability of a witness's memory is not admissible unless there are 'exceptional features'. In *E* the issue was the unexceptional question of the plausibility of a child's account of alleged sexual abuse and the extent of the detail provided, which were matters for the jury. The Court contrasted the facts of *R v JH & TG* [2005] EWCA Crim 1828 which were considered to be an exceptional set of circumstances: an adult woman who purported to remember in considerable detail what had happened to her at the age of three. Thus, on the authorities, it is necessary for defending advocates to argue that there is some exceptional aspect of the function of memory in issue in their case, which necessitates expert input.

In *R v Hamilton*, reference the complainant had made allegations against the defendant, her father, and had prior to and since making the allegations suffered serious mental health problems including hallucinations and delusions. An expert instructed for the defence, Dr Boakes, purported to diagnose the complainant as suffering from 'false memory syndrome'. Whilst it is agreed by memory experts both that true memories can be recovered, and that genuinely believed memories may be false, 'false memory syndrome' is not a syndrome recognised in the ICD-10 or DSM-IV diagnostic manuals. Dr Boakes said that the complainant's account was apparently credible but entirely false. Her conclusion was based on ABE interviews, the medical records and the other evidence, although she did not attend the trial to watch cross examination. She did not examine or assess the complainant herself.

The Court of Appeal held that the trial judge had been right to exclude her evidence, saying that the bulk of her reports consisted of her personal commentary and opinions on the complainant and her family situation. The Court stated that this was not her function and should not have formed part of a report served as 'expert' evidence. Beyond this, the Court noted that there was no sound evidence that the complainant had 'recovered' or 'retrieved' her memories. Her evidence, and the chronology of events, suggested that the abuse had always been present as a memory but that she was unable or unwilling to report the matter previously. Further, the complainant had never been subjected to hypnotherapy or serious psychological counselling during which any revelation of abuse first emerged. As such, the Court agreed with the trial judge that there was thus "no basis whatsoever" for admitting Dr Boakes' evidence.

It is clear, therefore, that there must be some evidential basis for an assertion that a memory has allegedly been 'recovered', such as evidence of a period of time during which a complainant says they had no memory of the abuse (one possible example would be a complainant saying they had always had a fear of being held down but did not know why, or that they had believed a sexual encounter post-dating the abuse to have been their first). However, in Hamilton the judge found that the use of the phrase 'blocking out' by the complainant was insufficient to amount to evidence that the memories had been recovered. It was "no more consistent with Dr Boakes' "theory of repression" or "traumatic amnesia" as it is with someone simply getting on with her life and putting it to the back of her mind".

It is thus clear that evidence about memory may sometimes be admissible, but any advocate who seeks to rely on expert evidence about memory will immediately be met with the Ultimate Question Brick Wall from opposing counsel and the judge: a declaration that such evidence can never be admissible as it trespasses on the ultimate question for the jury of who to believe. Any successful attempt to demolish the wall is likely to start with a reminder of the basic approach to expert evidence which has been applied for nearly 40 years, *R v Turner* [1975] QB 834 in which the Court said "If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary".

It may be arguable that in the field of recovered memory, it may be dangerous for a jury to draw conclusions based on common sense, without a scientific basis. For example, it might be considered fair comment for a prosecutor to suggest that vagueness in a complainant's account may be explicable by the events having been repressed for years, or for a defence advocate to suggest that is simply incredible that someone could forget for 40 years horrendous abuse which itself took place over a protracted period. The existing scientific research reveals that neither point is quite accurate or fair.

To increase the chances of expert evidence being admissible, the expert should be directed not to give her views about whether the complainant's alleged memories are true or false, but evidence as to:

(a) the science of memory as relevant to the issues in the case;

(b) whether memories can be repressed, and/or recovered;

(c) whether there are factors or circumstances which make recovery and/or repression more likely; and/or

(d) whether there are factors which make allegedly recovered memories more or less reliable.

Anna Midgley

Convictions based on inference

Money laundering

Money Laundering, or to use the modern vernacular, the Conversion etc. of Criminal Property, is one of the big guns in the arsenal of the prosecutor. Whether the defendant is buying a Mars bar, topping up her mobile or simply taking the money out of the hole in the wall, if she knows or suspects that money to be criminal property, the act, the conversion, is a criminal offence.

A generous interpretation

On the face of it, the conversion offences would seem to give a pretty wide goal for the prosecutor to shoot at, nevertheless, the Court of Appeal decided that it would be even fairer for the goal keeper to be tied to one of the posts – in comes *Anwoir* [2008].

Anwoir, in short, states that criminal property can be proved in one of two ways;

- by reference to specific criminal conduct, or
- the circumstances in which the property was handled give rise to an irresistible inference.

This short missive will focus on the second limb, that of 'irresistible inference'.

Irresistible or resistible?

'Irresistible' is a pretty strong word, one would expect a pretty high standard of circumstantial evidence to be able to satisfy the 'irresistible' test. However, post-*Anwoir*, the Court of Appeal has looked at a number of authorities where prosecutions (and convictions) have been based on the second limb. What is obvious from these authorities is that beauty, or irresistibility, really is in the eye of the beholder.

Case Law Review

R v F & B [2008] – in this case two passengers attempted to board a flight to the Middle East, in the passengers' bags officers found over £1million. At trial the prosecution did not allege specific criminal conduct, rather it relied on circumstantial inference. The judge stopped the case relying on pre-*Anwoir* authority, the prosecution appealed.

The Court of Appeal found that having over £1million in cash, a few lies were told when questioned at the airport and providing some dodgy answers to questions in interview, was sufficient for a money-laundering prosecution. Consequently, the Court ordered a re-trial. So, as our starting point, £1million of cash and some mud slinging is enough.

In *Gillies* [2011], an unemployed man, aged 21, was seen to deliver £200,000 to an individual under surveillance. Though there was no legitimate explanation for the cash, neither was there direct evidence of a criminal source. A half-time submission was made by the defence and refused by the judge. The jury convicted and the defence appealed. The Court of Appeal dismissed the appeal. So, £200,000 and a lack of explanation is also irresistible.

In another case, *Anwar* [2013] (rather confusingly), the sums involved were circa £2,240, £38,500 and £12,500, let's call it £55,000, to be generous to the prosecution. These sums related to the purchase of two cars and cash seized from the defendant's home. The defendant had a modest income. The defendant was convicted by the jury. The defendant appealed.

It is right to say that the convictions were overturned on appeal. However they were not overturned on the basis that the circumstances were not irresistible, it was not the value of the sums that was the problem, but the judge's response to an enquiry from the jury as to what would be criminal conduct (the crown has placed its cards on the table, it was a limb two case). So, £55,000, some dodginess and a modest income is enough.

The final case of illustrative use is *R v MK & AS* [2009]. In this matter, the two protagonists parked up, in separate vehicles. One flashed the car lights at the other, the other got out of the vehicle, carrying a plastic bag, and delivered to the first vehicle. The plastic bag had inside it £22,000 in cash. The delivery boy, 22 years of age, was on benefits. Once again, the Court of Appeal found this perfectly capable of being 'irresistible'.

Conclusions

The law has moved a very long way from the pre-Anwoir position. Pre-Anwoir the prosecution had to point to a particular 'type' of criminality, Anwoir swept this requirement away, proffering 'irresistible inference based on the circumstances' as a proper way to convict defendant.

Since Anwoir, the irresistibility of certain circumstance has been tested. Cash, as one would expect, is a key feature in all of the cases, as is a little mud slinging by the prosecution (falling short of any bad character application), but other than that, based on our review of the cases decided since 2008, when it comes to irresistibility, it would appear that the criminal law has pretty low standards.

Richard Shepherd

You're not going in if you're not on the list

Since the coming into force of the Legal Aid Sentencing and Punishment of Offenders Act 2012, and with it the new provisions relating to Specified and Listed offences, it has become apparent that there is still some confusion as to how exactly the new provisions work. I would refer everyone to Edward Hetherington's very informative article in the previous edition of this newsletter.

"Hold on!" I hear you say, what's the point of reading this article when I've just told you to read someone else's? Well, the reason for that is this, having read the provisions on Specified and Listed Offences one of the reasons why there is still some confusion is because it is difficult at first glance to see how the different provisions all work together. They are, (even by normal standards of statutory drafting), particularly tortuously written and don't read easily in conjunction with each other.

With this specific object in mind, I have made a (potentially!) dangerous foray into the world of flow-charts and diagrams and have created one with the aim of making the overall process much clearer for everyone involved in these sentencing exercises to follow at-a-glance. It is not intended for this to replace the other guidance available, but simply to make it easier for practitioners to see what aspect they should be looking for, and where to find it.

I should point out that the chart below is drafted in relation only to adult offenders. The provisions relating to young offenders are very similar but with some specific differences which are explained in the relevant sections of the Criminal Justice Act ('CJA') 2003 (ss.226 and 226B.)

There are five key sections of the CJA 2003, as amended, which relate to Specified and Listed offences for adult offenders: the first, s.224, defines the forms and combinations of offences which make up the various categories in addition to defining other key terms.

Turning to the substantive provisions, the criteria in s.224A require the imposition of a mandatory life sentence, unless the court can be convinced otherwise, whereas the criteria in s.225 require a life sentence where the court finds in the circumstances that such a sentence is justified. s.226A provides for the imposition of extended sentences in the

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appropriate circumstances and defines their operation. Finally, s.229 explains the criteria for assessing the question under any of sections 225 to 228 whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences (i.e. dangerousness).

However, before diving head first into the dizzily exciting flow-paths one must take when preparing to advise a defendant, it is important to note some key points of interpretation.

As mentioned above, section 224 defines several different categories of offences under the Act, the first are 'Specified Offences'. Under s.224(1) an offence is apparently a 'Specified Offence' if it is either a Specified Violent Offence' or a 'Specified Sexual Offence'. Thankfully, this rather circular definition is clarified by s.224(3) which explains that 'specified violent offences' are listed in Part 1 of Schedule 15 of the CJA 2003 and that 'specified sexual offences' are listed in Part 2 of the same.

An offence is a 'Serious Offence' if it is (a) a 'Specified Offence' and (b) it is (apart from s.224A) punishable either by life imprisonment, (custody for life if the offender is over 18, but under 21), or imprisonment or detention for a determinate period of ten years or more (s.224(2)).

In addition, an offence is a 'Listed Offence' if it is listed in Part 1 of Schedule 15B.

Finally, under s.224 the term 'Serious Harm' is described as referring to death or serious personal injury, whether physical or psychological.

For the purposes of s.224A, a life sentence is 'relevant' if the offender was not eligible for release during the first five years or would have been ineligible but for a reduction of that period to take account of time served on remand (s.224A(5)).

An extended sentence under the new provisions is relevant if the appropriate custodial term is ten years or more. Similarly, other extended sentences and determinate sentences are relevant if the custodial term imposed was for ten years or more. They remain relevant even if the sentences are reduced to take account of relevant pre-sentence periods.

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