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Preventing Miscarriages of Justice

by

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Abstract

A miscarriage of justice is the conviction and punishment of a person for a crime he or she did not commit. This article highlights the miscarriages of justice as have occurred in English case law. The following statutes, convention and cases were cited:

Coroners and Justice Act 2008;

Courts Act 2003 ss 68-69;

Police and Criminal Evidence Act 1984;

Criminal Justice Act 1967;

Criminal Justice Act 2003;

Criminal Procedure and Investigations Act 1996;

Sexual Offences Act 2003;

European Convention on Human Rights 1948;

Ambrose v Harris [2011] UKSC 43 (Sc), [2011] 1 WLR 2435, paras 61-65;

Cadder v HM Advocate [2010] UKSC 43, [2010] 1 WLR 2601;

Campbell v The Queen [2010] UKPC 26, [2011] 2 AC 79, paras 37-45;

Jude v HM Advocate [2011] UKSC 55;

R v Abbas [2012] EWCA Crim 2517, [2013] 1 Cr App R 18. R v Mendez [2010] EWCA Crim 516, [2011] QB 876, [2011] 1 Cr App R 109;

R v Alexander [2012] EWCA Crim 2768, [2013] 1 Cr App R 26, paras 25-37;

R v Anthony (Donna) [2005] EWCAS Crim 952;

R v Asmelash [2013] EWCA Crim 157, [2013] 1 Cr App R 33;

R v Atkins [2009] EWCA Crim 1876, [2010] 1 Cr App R 8, paras 1-32;

R v Bentley [1998] EWCA Crim 2516;

R v C [2010] EWCA Crim 2578, [2011] 3 All ER 509;

R v Cannings [2004] EWCA Crim 1, [2004] 1 Cr App R 63, [2004] 1 All ER 725;

R v Clark (no 2) [2003] EWCA Crim 1020, [2003] 2 FCR 447;

Rv Clinton [2011] EWCA Crim 2, [2012] 1 Cr App R 632;

R v Dowds [2012] EWCA Crim 281, [2012] 1 Cr App R 34, [2012] 1 WLR 2576;

R v Dlugosz [2013] EWCA Crim 2, [2013] 1 Cr App R 32, paras 2-30;

R v (Steve) Forster (2012) 176 CL and J 85-87;

R v Gilfoyle [2001] 2 Cr App R 5;

R v Gilfoyle [2012]; R v Williams [2011] EWCA Crim 1496;

R v Hallam [2012] EWCA Crim 1158;

R v Killick [2011] EWCA Crim 1608, [2012] 1 Cr App R 10;

R v Majewski [1977] AC 443; *R v Meadow* [2006] EWCA Civ 1390;

R v M (J) [2012] EWCA Crim 2293, [2013] 1 Cr App R 10;

R v M (I) [2011] EWCA Crim 868, [2012] 1 Cr App R 3, paras 27-29;

R v Olu [2010] EWCA Crim 2975, [2011] 1 Cr App R 33;

R v T [2010] EWCA Crim 2439, (2011) 1 Cr App R 9;

R v Wallace (1931) 23 Cr App R 32;

R v Wood [2008] EWCA Crim 1305, [2008] 3 All ER 898;

R v Stewart [2009] EWCA Crim 593 and [2010] EWCA Crim 2159;

Salduz v Turkey (2008) 49 EHRR 421l;

Taylor (Bonnett) v The Queen [2013] UKPC 8, [2013] 1 WLR 1144, paras 10, 13-20; and

Tido v the Queen [2011] UKPC 16, (201) 2 Cr App R 336, [2012] 1 WLR 115, paras 17-27.

Introduction

Miscarriages of justice do not occur very often in our criminal justice system, only in a very small percentage of convictions every year. At least, so far as is known. However, the wrongful conviction of only one person is tragic in itself. The phrase 'miscarriage of justice' may be interpreted in a variety of ways, but for the purposes of this discussion a miscarriage of justice means the quashing of the conviction and no further prosecutorial action, i.e. the presumption of innocence applies,[1] especially where a period of imprisonment has been served.

The Law

Over the years the law relating to criminal justice has generally been improved, though some changes have been seen as controversial, even

[1] For the purpose of obtaining compensation the phrase means that if not 'innocent' at least D has no case to answer, there is no possibility of a conviction on the evidence available. *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48, paras 1-237. European Convention on Human Rights article 6(2). Criminal Justice Act 1988 s 133. Compensation for miscarriage of justice, Marny Requa (2011) 75 JCL 361-367. *Allen v UK*, 254 24/09, ECHR. *R v George (Barry)* 2008, conviction quashed after 8 years in prison, discredited forensic evidence, acquitted on retrial August 2008.

damaging. The Police and Criminal Evidence Act 1984 ('PACE') laid down proper codes of procedure for the Police, access to legal advice and assistance, and recording of interviews for the purposes of admissibility. The creation of the Crown Prosecution Service ('CPS') in 1985 brought an independent legal element to the prosecution. The Criminal Procedure Rules CPR, under the Courts Act 2003 ss 68-69, issued annually, establish the rules of court for criminal proceedings. The Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003, has made provision for disclosure part I ss 1-21A,[2] a code of practice for charging part II ss 22-27, and for preparatory hearings and rulings, parts III and IV ss 28-38 and 39-43.

Science and technology have improved the quality of forensic evidence. Over the years there has been talk of 'rebalancing' the criminal justice system, and a number of traditional safeguards for D have been removed or weakened, e.g. the right to silence and the right against self-incrimination,[3]

[2] Disclosure of evidence in criminal trials, Steve Forster (2012) 176 CL and J 85-87. Strictly speaking there appears to be no legal duty on the Police or CPS to disclose post-conviction unless required by a judge or the CCRC. *R v Gilfoyle [2012]* revelations. On the CCRC reference in 2000 the Court of Appeal dismissed the appeal on the basis of poor quality profiling of the deceased and the reluctance of the Court to accept such evidence R v Gilfoyle [2001] 2 Cr App R 5.

[3] Criminal Justice and Public Order Act 1994 s 34.

the right to exclude bad character[4] and the right to exclude hearsay.[5] There is also the duty to disclose now imposed upon D.[6]

In criminal law, especially in the more serious cases, subjective criminal or dishonest intent is expressed or implied, consistent with the fundamental principle of culpability and the rule of law. However, in rape, a most serious matter, both for the complainant victim and the alleged perpetrator, it suffices for the prosecution to prove that D did not reasonably believe that the victim consented. Reasonableness or unreasonableness is certainly evidence of intent, but should not be conclusive. Subjective intent should in all fairness be required for a conviction.[7] D should be judged by his intent with the consequence of his act, although foresight of consequence is relevant in assessing intent Criminal Justice Act 1967 s 8.

It may be argued that some aspects of the criminal law itself are unjust and any conviction based on such law represents a miscarriage, for example that infidelity cannot be a ground for loss of control in a murder case,[8] or that for

[4] Criminal Justice Act 2003 part 11 ss 98-113. Recognising propensity, M Redmayne [2011] Crim LR 177-197.
[5] Criminal Justice Act 2003 part 11 ss 114-135.
[6] Criminal Procedure and Investigations Act 1996 ss 5, 6A, 6B, 6C, 6D, 6E.
[7] Sexual Offences Act 2003 s 1(1)(c) and 2. A Heaton-Armstrong, 'Rape: Myth and Reality', (2010) 50 Med Sci Law 111-115.
[8] Coroners and Justice Act 2008 ss 54-55. *R v Clinton* [2011] EWCA Crim 2, [2012] 1 Cr App R 632.. See Carole Withey, 'Loss of Control: Loss of opportunity', [2011] Crim LR 263-279. *R v Williams* [2011] EWCA Crim 1496.

involuntary manslaughter no foresight of harm is required.[9] However, the judge must clearly take the law as he finds it.

Alcohol and drugs

Allowing D to escape conviction for a serious injury or worse inflicted upon a victim V because D had lost control by reason of the voluntary taking of alcohol or drugs would not be acceptable, because the criminal would be able to take advantage of such a situation for nefarious purposes, e.g. by "tanking up" before the event in order to give himself 'Dutch courage'.

The logical problem is that in reality the sober subjective criminal intent may be very difficult, if not impossible, to prove. The law has struggled with the unconvincing distinction between the crimes of assault variously requiring a basic intent and a specific intent, registering a conviction for grievous bodily harm ('GBH') but refusing a conviction for GBH with intent.[10] Self-induced intoxication is no defence. The test is not whether D voluntarily or

[9] *R v M (J)* [2012] EWCA Crim 2293, [2013] 1 Cr App R 10.

[10] *R v Majewski* [1977] AC 443; *R v Dowds* [2012] EWCA Crim 281, [2012] 1 Cr App R 34, [2012] 1 WLR 2576. *R v Asmelash* [2013] EWCA Crim 157, [2013] 1 Cr App R 33.

involuntarily took the alcohol as whether he had become medically ill that he no longer had the power of abstinence, the power of self-control.[11]

Is D capable of abstinence? Even where a recognised medical condition can be shown the judges are extremely reluctant to accept any form of voluntarily taking alcohol as a defence or partial defence.[12] Logically the law[13] should differentiate between the reckless insobriety of the normally sober D, who may reasonably be expected to be responsible for possible consequences known to him of insobriety, and D who because of persistent abuse has become addicted and medically ill, unable to control the taking of alcohol or drugs. Then D should be responsible for originally embarking on alcohol or drugs and not stopping when he reached the point of loss of the exercise of self-control, initially giving into craving. The law is reluctant to accept or recognise the difference; although the prison sentence can be adjusted by hospital order, hospital treatment, prison regime, and Parole Board release.

No responsible person condones the abuse of alcohol and drugs. We all know their incapacitating effect and the release of inhibitions, and the consequential risks. But a conviction for murder or manslaughter may be seen as a

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[11] *R v Wood* [2008] EWCA Crim 1305, [2008] 3 All ER 898. *R v Stewart* [2009] EWCA Crim 593 and [2010] EWCA Crim 2159. On manslaughter see Smith and Hogan, 13 edition, Criminal *Law*, Oxford: Oxford University Press, at pp 505-538.

[12] *R v Dowds* [2012] EWCA Crim 281, [2012] 3 All ER 154.

[13] For logic and the criminal law see Lord Edmund-Davies in *R v Majewski* [1977] AC 443, 493.

miscarriage of justice when the real offence lies in irresponsible abuse of alcohol and drugs, which unfortunately led to the death of the victim V.

The Police

The Police are governed by strict ethical and disciplinary principles, though like all groups of men and women they occasionally produce a "rotten apple in the barrel". Also in the nature of their work they can become over-enthusiastic in the pursuit of the criminals, as they see them. Incompetence may jeopardise justice.

Police misconduct could lead to a wrongful conviction and miscarriage of justice. Examples, depending always upon the facts, include abduction, entrapment, unlawful surveillance, unlawful “hacking”, breach of legal privilege, breach of an undertaking not to prosecute, inordinate delay, lying to and misleading the court, fabricating evidence. The defence if early enough alive to the issue the defence will seek a stay on the basis of abuse of process.

The issues for the court are whether the police misconduct prevented or would have prevented a fair trial or whether it offends the court's sense of justice and propriety and damages the integrity of the criminal justice system and public confidence.[14]

The Police like to be seen to be active, competent and successful. Following a murder somebody is usually arrested very soon, even if released on bail and not charged. The charging, if it comes, comes rather later. Even householders defending themselves and their home by injuring burglars have been arrested and detained for excessive periods, though the law now recognises the honesty, genuine belief, instinct and reasonableness of the person defending himself, his family or his property Criminal Justice and Immigration Act 2008 s 76.

Peter Sutcliffe, the Yorkshire Ripper, was convicted of 13 murders and 7 attempted murders committed 1975-1980. The Police were found to have been at fault in allowing themselves to be overwhelmed by information overload (in pre-computer days), not following up information supplied to them, and allowing themselves to be deceived and distracted by a malicious informant falsely claiming to be the murderer.[15] Police inability to retrieve

[14] Warren v AG Jersey [2011] UKPC 10, [2012] 1 AC 22, paras 21-37. R v Maxwell [2010] UKSC 48, (2011) 2 Cr App R 448.

[15] Byford Report 1981. Hill v Chief Constable West Yorkshire Police [1989] AC 53.

vital information or error in recording or retrieval can lead to a wrongful conviction.[16]

The Police can suffer from "fixation". Having instinctively identified D as their man, all their efforts are concentrated upon making the case against him, often ignoring the evidence in his favour, or explaining or suppressing it. Colin Stagg[17] and Barry George are classic examples of the police persisting against the wrong man and ignoring the right man.

A long-standing problem has been where two police officers give evidence, and the evidence is either identical or different. If identical they are accused of unreliability. The better practice appears to be that the police officers should not confer in compiling their reports.[18]

Detention in police custody can be intimidating for D. He may be "roughly handled". He may be deprived of sustenance, and sleep, even medical attention. He is "induced" to confess. He is deprived of early legal advice and assistance as the duty solicitor is not called until a late stage. He is made ready to confess on tape or video. He may not be guilty. The confession is unreliable.[19] Guidance exists upon proper conduct.[20] Experience and

[16] The Cardiff Three and the murder of Lynette White, and IPCC investigation.

[17] The Rachel Nickell case: Reflections on the significance, Alec Samuels (2012) 52 Med Sci Law 181-183.

[18] Anne Owers, Chairman of Independent Police Complaints Commission, IPCC, Times 29 July 2013. The IPCC will issue new guidance. Mark Duggan Inquest January 2014.

[19] *R v Blackburn* [2005] EWCA Crim 1349, [2005] 2 Cr App R 30.

research have long shown the potential unreliability of a confession. The suspect may be tired, confused, anxious, stressed; he may not fully understand the situation; he may be of a poor intellectual standard; he may be a pathological liar; he may think that a confession will bring him some sort of publicity and celebrity status.

The duty of the Police and the CPS is to disclose all relevant evidence to the defence, i.e. material which would assist the case for D or might reasonably be considered capable of undermining the case for the prosecution. For example, vital evidence relating to the location of jewellery at a particular time might be disclosed.[21] And crucial identification evidence in a policeman's notebook.[22] An element of subjective judgment rests in the prosecution. There is no duty to disclose "everything". Though what may turn out to be highly relevant may not be perceived as such and may not be disclosed. Following conviction the defence may encounter real difficulty in gaining access to the material.[23] It is 'lost', it has been destroyed, it is

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[20] Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses and guidance on using special measures, MOJ March 2011, on interviewing skills and quality video recorded evidence.

[21] *Fraser v HM Advocate* [2011] UKSC 24.

[22] *R v Mattan*, Times 5 March 1998, CA.

[23] *Nunn v Chief Constable of Suffolk* [2012] EWHC 1186 (Admin). Post-conviction disclosure and miscarriages of justice, K Kerrigan and A Jackson (2012) 176 CL and J 473-475. Attorney-General's Guidelines on Disclosure. DPP's Code for Crown prosecutors. Felicity Gerry (2012) 176 CL and J 481. *R v Gilfoyle*, 2012. An earlier written suicide note made by the victim was not disclosed to the defence, the

"irrelevant"; or the defence is welcome to look through the evidence, which on inspection turns out to be a massive collection, files and files, boxes and boxes, a room piled high, a ‘warehouse’. The time and trouble needed for sifting through such material can be daunting. It was the painstaking and persistent search through such material that enabled the husband of Sally Clark, himself a solicitor, to discover vital evidence relating to the incidence of cot deaths, sudden infant death syndrome SIDS, in families for genetic and not criminal reasons.

Modern forensic science requires the utmost knowledge and skill and care. The first to arrive at the scene of the crime, the police officer all too often disturbs the scene, or allows others to disturb the scene, before the senior officers and the forensic experts arrive. Disturbance can lead to false inferences, damaged evidence, and contaminated evidence. However in serious cases in due course a thorough search of the crime scene should take place.

The Court of Appeal, on a reference from CCRC, quashed a conviction after some seven years. The Police had a fixation, they were convinced that they "had their man". They did not investigate mobile phones that came into their possession. They did not investigate the alibi proffered by D. There was no

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suggestion at the trial being that the suicide note there produced was made at the instigation of D. R v Arshad [2010] EWCA Crim 18.

forensic evidence. There was not a full disclosure. Prosecution witnesses gave contradictory and retracted evidence. The Turnbull[24] identification rules were not observed.[25] The fallibility of identification evidence is well known. The witness may confuse resemblance with identity. Human memory and recognition are unreliable. The witness may be over-confident and too insistent, too proud to acknowledge the possibility of error. The prosecution may rely too heavily upon the evidence. The jury may be too ready to accept such evidence. The jury should be warned of the limitations of Face Book evidence.[26]

The Crown Prosecution Service ('CPS')

The CPS, directed by the Director of Public Prosecutions DPP, answerable to the Attorney-General AG, constitutes an independent legal element into the system. The AG and the DPP issues codes of practice, such as the Code for Crown Prosecutors. The Police collect the evidence, submit it to the CPS who decide whether or not it is sufficient for a prosecution, i.e. there is at least

[24] [1977] QB 224.

[25] R v Hallam, [2012] EWCA Crim 1158. Sam Hallam: The failures that led to conviction, Jon Robins (2012) 176 CL and J 441-442. The two eyewitnesses said nothing about identification in their first statement. Their evidence was inconsistent and contradictory. They may have been colluding. They caught only a fleeting glimpse.

[26] R v Alexander [2012] EWCA Crim 2768, [2013] 1 Cr App R 26, paras 25-37.

a 51 per cent prospect of conviction. The lawyers in the CPS are subject to the normal legal professional ethics. The disclosure rules must be observed.[27] Inadmissible evidence, if permitted to go to the jury, could lead to wrongful conviction and a miscarriage of justice. Dock identification, if a first identification, and no reason is given for not holding a parade, and no appropriate warning direction to the jury, could destroy a fair trial for an innocent man.[28] Any form of abuse of process, if sufficiently serious, may lead to a miscarriage.[29]

Failure to call a witness could lead to a miscarriage of justice if the impact of the evidence of that witness would have altered the result if called. If the prosecution are unwilling to call the witness the defence should be given the opportunity to do so if they wish.[30]

In a joint enterprise case particular care must be taken to identify the alleged role of each defendant as the part played by each defendant may differ markedly, and indeed an innocent party may be caught up simply by being at the wrong place at the wrong time.[31]

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[27] *R v Olu* [2010] EWCA Crim 2975, [2011] 1 Cr App R 33.

[28] *Tido v The Queen* [2011] UKPC 16, (201) 2 Cr App R 336, [2012] 1 WLR 115, paras 17-27.

[29] *R v Killick* [2011] EWCA Crim 1608, [2012] 1 Cr App R 10.

[30] Taylor (Bonnett) v The Queen [2013] UKPC 8, [2013] 1 WLR 1144, paras 10, 13-20.

[31] *R v Abbas* [2012] EWCA Crim 2517, [2013] 1 Cr App R 18. *R v Mendez* [2010] EWCA Crim 516, [2011] QB 876, [2011] 1 Cr App R 109.

The CPS suffers from problems. Funding is restricted; skilled staff is in short supply. CPS staff can develop "too cosy" a relationship with the Police; although sometimes quite serious differences of opinion can arise. CPS staff can be lacking in diligence when the Police are not making adequate enquiries or not making proper disclosure to them.

The CPS may not adequately appraise the evidence before authorising a prosecution. The quality of in-house advocacy is sometimes not as good as one might wish; the practice of restricting the number of cases in which instructions are sent to the Bar, and grading the Bar, has resulted in an adverse effect upon the conduct of cases. Providing advocacy career and advancement opportunities for CPS staff is admirable in principle, but can be taken too far.

The defence lawyers

The quality of solicitors and barristers is generally high. The profession is governed by the traditional ethical and professional standards, and by the regulators, the Solicitors Regulation Authority (‘SRA’) and the Bar Standards

Board (‘ BSB’), under the Legal Services Board (‘LSB’). But investigation, preparation, presentation and advocacy sometimes fall short. There are limited rewards in criminal work, and it does not always attract the best lawyers. Young barristers may lack experience, and be thrust into heavy work too early in their career. The reduction in legal aid is reducing their opportunities.

The advocate may be not only inexperienced, he may be poorly prepared, even unaware of elementary matters such as the Turnbull [32] identification rule, and the complexity and significance of scientific and forensic evidence.[33] In DNA cases today the challenge has to lie in allegations of staleness or contamination or muddle in the laboratory. An unusually inept and incompetent counsel for D did not raise the good character of D which was of the greatest potential significance for D. The verdict was unsafe.[34]

[32] [1977] QB 244.

[33] In Sally Clark the defence lawyers were not aware of genetic cot deaths SIDs, and in the trial were unable to discredit the prosecution expert witness Professor Meadow.

[34] Campbell v The Queen [2010] UKPC 26, [2011] 2 AC 79, paras 37-45.

Legal aid

Legal representation is usually highly advantageous. The relevant and critical evidence is tested in the adversarial system. The trial is kept within proper limits. The best case that D can proffer is put before the judge and jury. The chance or risk of a miscarriage of justice is greatly reduced. The inherited deficit and the economic recession inevitably mean a reduction in funding for public services. Legal aid funding must play its part, but the consequences are unfortunate. The impact of article 6(3)(c) of the 1948 European Convention on Human Rights will undoubtedly be increasingly brought before the judges: Everyone charged with a criminal offence has the following minimum rights: to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. The law appears to be that where D is in police custody and subject to police interrogation and either charged with or suspected of a crime, i.e. is in a coercive situation, then although the rule is not absolute he is entitled to

access to legal advice and assistance if the requirements of fairness and a fair trial so dictate.[35] There may be an issue over waiver.[36]

D's right not to self-incriminate does not entitle him to legal advice and assistance simply because he is being questioned by the Police. But when he is in custody or detention the right does protect him from the effects of coercion, from being coerced into a confession by unfair police methods.

The Expert

The expert is governed by the Criminal Procedure Rules. The expert should be independent and impartial; a practising specialist in the particular field, preferably experienced in court work, accredited, reliable, and his reports ideally should be available for inspection. The expert who changes his mind, or disagrees with the experts on the same side, may lack credibility, though flexibility and willingness to change his mind rather than dogmatism should be seen as a merit.

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[35] *Ambrose v Harris* [2011] UKSC 43 (Sc), [2011] 1 WLR 2435, paras 61-65. *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601. Sins of the father? The sons of Cadder, RM White and PR Ferguson [2010] Crim LR 357-368. *Salduz v Turkey* (2008) 49 EHRR 421. Police and Criminal Evidence Act 1984 s 78, exclusion of unfair evidence. The right to legal advice in the police station: past, present and future, Layla Skinns [2011] Crim LR 19-39. Repercussions of the Cadder case: The ECHR's fair trial provisions and Scottish criminal procedure, P Ferguson [2011] Crim LR 743-757. The justice lottery? Police station advice 25 years on from PACE, P Pascoe, V Kemp and N Balmer [2011] Crim LR 3-39.

[36] *Jude v HM Advocate* [2011] UKSC 55.

Freddy Patel, pathologist, was struck off by the Medical Practitioners Tribunal Service(‘ MPTS’) 22 August 2012 for unwarranted confidence, lack of insight, incompetence and dishonesty. He was involved in the Tomlinson case, and the subsequent prosecution of PC Harwood, who was acquitted of manslaughter of Tomlinson 19 July 2012.

In court there could be real potential benefit from the emerging practice in the civil court known as ‘hot-tubbing’, the principal witnesses for both sides give their evidence in the witness box together as it were, so that significant contentious issues may be taken in such a way that both simultaneously but in an orderly fashion give their evidence and can be questioned by the advocates on both sides, so as to assist the jury in the ascertainment of the better view. A miscarriage of justice can arise where the expert has ‘blinded the jury with science’. For example, the shaken baby syndrome; the repeated cot deaths; the single particle from a gun shot in a pocket of Barry George in the Jill Dando murder; footwear and footprint evidence.[37]

[37] *R v T* [2010] EWCA Crim 2439, (2011) 1 Cr App R 9. Forensic science in question, M Redmayne [2011] Crim LR 347-356. Juror comprehension of expert evidence: A reform agenda, M Coen and L Heffernan [2011] Crim LR 195-211.

An inaccurate or incorrect toxicology report could lead to false inferences and a wrongful conviction, e.g. drugs, or the wrong drugs, erroneously attributed to D.

Problems which could lead to wrongful conviction include: Excessive reliance upon hair analysis for drugs; inadequacy of saliva testing; and failure to recognise that cocaine can be found on the hands of police officers and bank clerks handling banknotes contaminated by cocaine by cocaine users.

Then there was the innocent policewoman, Shirley McKie, wrongly convicted on a fingerprint. Concern has been raised over fingerprint evidence, with regard to organisation, training, overseas qualification, independence, presentation, reasons, records, and quality and standards generally.[38] In the absence of DNA evidence A was convicted of murder. Subsequently DNA of B was found. A's conviction was quashed, after six years. B was convicted.[39]

[38] *R v Smith (Peter)* [2011] EWCA Crim 1296, [2011] 2 Cr App R 16, particularly paras 61-62. *HM Advocate v McKie*. Scottish Fingerprint Enquiry, Rt Hon Sir Anthony Campbell.

[39] *R v Ahmed*, Luton Crown Court. 4 September 2013, Times 5 September 2013. A's conviction had been based on totally implausible evidence.

In a DNA case the expert must give the basis of his analysis, the threshold for validity, and the limitations of DNA evidence.[40]

There is a risk that the jury may be misled by attaching false weight to an evaluative opinion without a sufficient scientific basis.[41] In historic cases, i.e. the alleged offence took place a long time ago, when the samples taken could not be tested for DNA, but now have been, particular care must be taken in respect of antiquity, quantity, threshold (the so-called stockastic threshold) and quality.[42]

Sally Clark was wrongly convicted because of three reasons:

(1) Failure by the CPS and the pathologist to disclose microbiological test evidence which might have suggested death from natural causes.

(2) The flawed statistical evidence of prosecution expert Professor Sir Roy Meadow. The Court of Appeal held that the evidence of Professor Meadow was mistaken and flawed but honest, and did not constitute serious professional misconduct.[43]

[40] *R v Reed* [2009] EWCA Crim 2698.

[41] *R v Dlugosz* [2013] EWCA Crim 2, [2013] 1 Cr App R 32, paras 2-30.

[42] *R v C* [2010] EWCA Crim 2578, [2011] 3 All ER 509.

[43] *R v Meadow* [2006] EWCA Civ 1390.

(3) The failure on the part of everybody involved to discover that cot deaths may be attributed to genetic factors.[44]

The Royal Statistical Society has published papers on probability and the prosecutorial fallacy.

The Law Commission has suggested a pre-trial enhanced admissibility test or vetting procedure for experts. Any inadequacy on the part of the expert ought to be picked by those instructing him, or at the pre-trial hearing. But expecting the judge to hold a sort of investigation in detail into the quality of the expert at the pre-trial hearing is expecting too much, and is not the best use of the judge's time.[45]

Streamline Forensic Reporting SFR has recently been advocated by Goldring LJ. The advantages may lie in reducing delay and irrelevancies and expense, but the disadvantage may lie in reduction in quality.

The profession is regulated by the Forensic Science Regulator, and accreditation is available from the UK Accreditation Service UKAS including the International Laboratory Accreditation Co-operation ('ILAC') G19.

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[44] *R v Clark* (no 2) [2003] EWCA Crim 1020, [2003] 2 FCR 447. The first two reasons were the reasons of the Court of Appeal. *R v Cannings* [2004] EWCA Crim 1, [2004] 1 Cr App R 63, [2004] 1 All ER 725. *R v Anthony (Donna)* [2005] EWCAS Crim 952.

[45] Expert Evidence in Criminal Proceedings in England and Wales, Law Com 325, March 2011. Expert evidence: Time to grasp the nettle, Ken Shaw (2011) 75 JCL 368-379. Away from the numbers: opinion in the Court of Appeal, Adam Wilson (2011) 75 JCL 503-537, especially 526-527. The Law Commission's Report on expert evidence in criminal proceedings, G Edmond and A Roberts [2011] Crim LR 844-862. *R v Henderson* [2010] EWCA Crim 1269, (2010) 2 Cr App R 24. *R v Harris* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5.

UKAS issues codes of practice, e.g. on ethics and DNA. Forensic experts aspire to proper professional ethics and standards, through the Professional Forensic Science Association.

The House of Commons investigated the Service in 2011 and was concerned to find work by unaccredited laboratories in DNA analysis, toxicology testing and firearms analysis.[46]

The Judge

The role of the judge in any criminal trial must always be controlling. If he is inexperienced in crime, or ill prepared, or unaware of the rules of evidence, or unable to comprehend scientific and forensic evidence, or not in command of the witnesses and the advocates and indeed the court, or gives unclear directions to the jury, then the risk of something going wrong, a miscarriage of justice, is increased. The jury should be advised against drawing an adverse inference from a failure by the defendant to say more than a denial when that is all that he could reasonably have been expected to say.[47] The judge tends to be sceptical about new or innovatory forensic evidence, such as

[46] The Forensic Science Service, Evidence in Court, Select Committee on Science and Technology 1 July 2011. Forensic Science on Trial, First Special Report 2004-5, HC 427.

[47] *R v M (I)* [2011] EWCA Crim 868, [2012] 1 Cr App R 3, paras 27-29.

facial mapping,[48] ear prints, footprints, auditory or voice recognition, ambulatory recognition, polygraph evidence, and psychology and psychiatry. Fortunately the quality of the judge is good. Though Lord Goddard LCJ did not always maintain the duty to ensure a fair trial. In the famous Craig and Bentley case he made prejudicial and unfair comments regarding the reliability of witnesses, the direction on the burden of proof and the standard of proof was unclear and misleading, the direction the law relating to constructive malice and joint enterprise was inadequate, and indeed the summing-up overall was inadequate.[49] It is said that it is very rare that the judge will let the jury convict a man the judge sees as innocent. Suspicion will not suffice.[50] Circumstantial evidence is admissible, but carries dangers.

The Jury

Theoretically the verdict of the jury is constitutionally sovereign, sacrosanct, inviolable and unchallengeable. Though the judges in the Court of Appeal are statutorily entitled to set aside the verdict of the jury if it is not 'safe'. They are very reluctant to do so, and when they do so it is usually on a technical

[48] *R v Atkins* [2009] EWCA Crim 1876, [2010] 1 Cr App R 8, paras 1-32.

[49] *R v Bentley* [1998] EWCA Crim 2516, a most compelling judgment by Lord Bingham LCJ.

[50] *R v Wallace* (1931) 23 Cr App R 32.

point, i.e. a serious flaw in procedure, admissibility of seriously inadmissible evidence, rather than witness credibility. Then the Court of Appeal will frequently order a retrial, before a new judge and new jury.

Although police officers and prosecutors may lawfully serve on a jury there may be exceptional circumstances where this could be seen as unfair and raising the risk of a miscarriage. An example would be a CPS employee working in the area.[51]

If information about a jury irregularity comes to light after verdict and sentence the prosecution and defence must be told, and the Attorney-General and the matter referred to the Registrar of Criminal Appeals, who will consult the Vice-President of the Court of Appeal. The Court of Appeal may wish to refer the matter to the CCRC for investigation.[52]

The problem is that we do not know what goes on in the jury room, and the jury do not give reasons. Perhaps the jury should be video-recorded in the jury room, the video to be shown initially only to the judge, and only on well

[51] *R v L* (L) [2011] EWCA Crim 65, [2011] 1 Cr App R 27.

[52] Jury irregularities in the Crown Court: A Protocol issued by the President of the Queen's Bench Division [2013] 1 WLR 486, (2013) 1 Cr App R 22. *Taylor (Bonnett) v The Queen* [2013] UKPC 8, [2013] 1 WLR 1144 paras 23-29.

founded application, and only to be further released, in whole or in part, on the authority of the judge. Individual identification of jurors should be prohibited, except in very special circumstances on the authority of the judge.

Criminal Cases Review Commission

The Criminal Cases Review Commission CCRC, belatedly set up in 1997, has certainly in principle overcome the previous Home Office virtual refusal to review convictions and refer them to the Court of Appeal. The CCRC is an independent body, able to review the evidence, and refer a case to, or back to, the Court of Appeal. Over the last fifteen years or so the CCRC has achieved some notable successes in ensuring the exposure and rectification of miscarriages of justice.[53]

But the benefits must not be exaggerated. CCRC funding is limited. CCRC staff are limited in numbers and qualification and quality. Many applications are received, about 1,000 a year, often very poorly presented. CCRC is

[53] Righting Miscarriages of Justice: Ten years of the Criminal Cases Review Commission, Laurie Elks, JUSTICE, 2008, is a most detailed, reflective and perceptive study of the first decade of CCRC. Criminal Appeal Act 1995, part II ss 8-25.

usually looking for fresh evidence, rarely contained in an application. Many applications are only very cursorily examined. CCRC has no independent investigative arm, so has to rely heavily upon the Police, and many applications allege misconduct of some kind against the police.

Fresh evidence is narrowly defined in law, and in practice, namely that it is admissible, capable of belief, there is a reasonable explanation for failure to adduce at the trial, it might reasonably have affected the decision of the jury, and it affords evidence for allowing the appeal.[54]

The Court of Appeal have taken a hard line towards CCRC. There must be a compelling case for reference, such as strong fresh evidence, narrowly interpreted. "Thin" cases and "stale" cases are discouraged. Posthumous cases are largely pointless. Legal incompetence by the defence lawyers, not calling a vital witness, or running the wrong defence, will not suffice.[55] A ground of appeal on a point not raised at trial, or a new line of defence, will not suffice. Human rights arguments are usually seen as no more than common law arguments in another guise. Technical or procedural issues find little favour. Witness reliability and credibility is very much a jury question.[56]

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[54] *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72, Para 18. It was fresh evidence that after conviction it emerged that D had concealed his schizophrenia R v Neaven [2006] EWCA Crim 955, [2007] 2 All ER 891.

[55] *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48. R v Clinton [1993] 2 WLR 1181, [1993] 2 All ER 998.

[56] Witness Testimony, A Heaton-Armstrong, E Shepherd, Gisli Gudjonsson, D Wolchover, OUP, 2006.

The "lurking doubt" is not enough; the conviction must appear to be ‘unsafe’. Strong evidence of police corruption or significant non-disclosure looks promising.

New forensic evidence, on matters such as ear prints, facial mapping, voice and auditory recognition and ambulatory recognition, is treated with considerable scepticism. The Court of Appeal does not like the incompetent, biased, inferential non-specialist trial expert, e.g. in sudden infant death syndrome SIDS, e.g. Sally Clark, Donna Anthony and Angela Cannings. The result has been that only a handful of cases are now referred annually to the Court of Appeal, and only the virtually "overwhelming" cases.[57] The percentage and number of cases referred are markedly diminishing in recent years, from an average of 30 cases a year to around 10 or 12. The rate of "success" has been around 70 per cent, now down to 60 per cent. In earlier times there was a concentration upon the more serious crimes such as murder, rape, robbery. Recently the cases have concerned women involved in drug trafficking or "slave" trafficking, when they may in essence be victims, or in child abuse cases, when fresh medical evidence may be found. Also there

[57] Criminal Appeal Act 1968 s 23(2). Annual reports of CCRC. Addresses by various Chairmen of CCRC. Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission, Laurie Elks, JUSTICE 2008.

have been a number of asylum and immigration cases of alleged wrongful conviction. Quashing only after a long time in prison remains a worry.[58] Police corruption or irregularity, or non-disclosure, or admissibility, or witness credibility, or procedural flaw, will not suffice in themselves, the conviction has to be unsafe, and this does not necessarily follow.[59]

A refusal by the CCRC to refer is susceptible to judicial review, but the chances of success in challenging CCRC are exceedingly slight.

The persistent denial, the persistent claim of innocence

Following conviction and imprisonment D frequently claims to be innocent and wrongly convicted. As time passes, and the time for release comes nearer, the claim tends to cease. However, experience has shown that the prisoner who is really persistent, never gives up his claim even after many years, may in fact be innocent, for example Sam Hallam. Some have even refused release on parole. Indeed there is some reason to think that a persistent claim of innocence reduces the chance of parole because the Parole Board take the view that the prisoner ex hypothesi is showing a lack of remorse for the crime which the Parole Board have to take as a rightful

[58] *R v Davis* [2011] EWCA 1258. *R v Hallam* [2012] supra.

[59] *R v Lane* [2011] EWCA Crim 2745. *R v Wilkinson* [2011] EWCA Crim 1525.

conviction unless and until quashed by the Court of Appeal. The CCRC are not bound to accept guilt in such situations, being free to examine the evidence.

The Court of Appeal

The Court of Appeal is the last resort. They are reluctant to grant leave to appeal, though the convicted person may appeal as of right against conviction. They are reluctant to allow an appeal, to upset the verdict of the jury. They will do so if persuaded that a conviction is unsafe and cannot stand. The rate of success for referred appellants is now about 60 per cent.

Mercy and Pardon

The Crown may exercise the prerogative or mercy[60] and also grant a pardon, but that happens only in very, very unusual cases and then only in the clearest possible cases.

[60] Criminal Appeal Act 1995 s 16.

Prison Service

When a life sentence or indefinite sentence for public protection IPP reaches his tariff date he is entitled to a review relating principally to dangerousness. The Prison Service has been guilty of considerable delay in preparing for the review date, and missing it. The continued detention of a prisoner who might otherwise have been released is a sort of miscarriage of justice, certainly a breach of human rights.[61]

Fresh evidence

Fresh evidence may emerge, which will suffice to justify quashing a conviction. For example, a recently deceased body can in fact exhale blood, contrary to the pathological evidence given at the trial.[62] If the scientific information did not exist at the time of the trial, or could not reasonably have been expected to have been discoverable, then the miscarriage may be said to be bad luck; but if it could and should have been discovered then the miscarriage is truly unforgiveable.

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[61] James, Wells and Lee (2012) EHRR, September 2012. Similarly an erroneous attribution of continued dangerousness attributed to D by the Parole Board may lead to the wrongful denial of release.

[62] *R v Sion Jenkins* [2004] EWCA Crim 2047.

The baby died. Before being taken to hospital he was in the care of the babysitter. He had some bruises. The babysitter was convicted of murder. Subsequently credible medical evidence to the effect that the baby died from an epileptic seizure. "As knowledge increases, today's orthodoxy may become tomorrow's outdated learning" Said Doulson LJ. The verdict was quashed.[63]

A child was murdered. Male sperm was found on her underclothing. Stefan Kiszko, of Ukranian origin and of low intelligence, was suspected. Some girls alleged that the day before the murder he had exposed himself to them. Interviewed by the police, with no solicitor or other person present, after three days he confessed. Apparently he thought that this would enable him to go home whilst the police continued their investigations and cleared him. At the trial in 1976 he retracted the confession, pleaded not guilty, but also ran diminished responsibility, a dangerous two-headed defence. He alleged that at the material time he was visiting a grave, with relatives who were not called. He was convicted.

Subsequently the girls admitted that their allegations had been false. It emerged that Kiszko had had a broken ankle at the time, which would have made the murder difficult to commit, a matter not disclosed at the trial. Also,

[63] *R v Holdsworth (Suzanne)* [2008] EWCA Crim 971. The experts called at the trial had no direct contact, as would have been useful *R v Harris* [2005] EWCA Crim 1980.

he was in fact infertile and incapable of producing sperm. After 17 years his conviction was quashed in 1992.[64]

Stephen Downing was convicted in 1974 of the murder of a young woman in a cemetery. He was 17 years old, and intellectually retarded. With no solicitor present, he confessed. In 2002 the Court of Appeal quashed the conviction,[65] on the basis that the confession was unreliable and secondly that the blood found on Downing at the time he found the body could come from shaking her head as he claimed and not necessarily because of a criminal assault.

David Carrington-Jones was convicted in 2000 of rape and indecent assault upon V, and sentenced to 10 years. It subsequently emerged that V made a number of similar allegations about a number of different men. The Court of Appeal held that her credibility had been damaged beyond repair and the conviction was demonstrably unsafe.[66]

[64] *R v Kiszko*, Court of Appeal, February 1992.

[65] *R v Downing* [2002] EWCA Crim 263.

[66] *R v Carrington-Jones* [2007] EWCA Crim 2551.

The latest miscarriage[67]

Victor Nealon was convicted in 1997 of attempted rape and sentenced to discretionary life imprisonment with a tariff. The conviction was quashed by the Court of Appeal in 2013.[68]

The garments of the victim were not tested for DNA, though Nealon asked for DNA testing. There was no forensic evidence against him. Years later DNA testing was carried out, and the DNA did not match Nealon, nor was a match found to any identified person.

A witness said that the perpetrator wore a checked shirt and spoke with a Scottish accent. Nealon did not have a checked shirt, and was of Irish origin. Seven persons attended the identity parade. Two picked him out. The victim did not attend. The perpetrator was said by witnesses to have a natural egg-sized lump on his forehead. Nealon had no such lump. The investigating officer attended the parade.

[67] *R v Nealon*, Court of Appeal Criminal Division 13 December 2013.

[68] Bob Woffinden Inside Time Issue April 2006.

The defence was alibi, that Nealon had been at home with his family watching videos hired from a video shop. The prosecution found that he had indeed hired videos but that they were different from those he had claimed. Although this information was known to the prosecution before the trial, at the trial, after the close of the defence, this information was with the permission of the judge belatedly adduced, a sort of ambush. Does incorrect evidence about the names of the videos discredit the defence that videos were hired and were being watched at the material time?

The competence of the defence legal team must be open to criticism in view of the weak prosecution case.

Nealon always maintained his innocence. Accordingly he was refused parole on the tariff date.

The performance of the CCRC was disappointing. CCRC declined to require DNA testing, which was eventually commissioned by the defence. Eventually CCRC did refer the case to the Court of Appeal.

The history

A good source of the history of miscarriages is to be found on the web, ROUGH JUSTICE TV, a new concept in campaigning, compiled by Peter Hill,[69] who has been very closely involved for many decades. The material includes the autobiography of Tom Sargant 1905-1988, the first Secretary of JUSTICE, indomitable and very active 1950s-1980s, setting out in detail his views upon miscarriages of justice, and the Tom Sargant memorial lectures delivered since his death, and the television material.

It is most interesting to see the 'risk' situations identified by Tom Sargant, and to reflect upon their relevance today.

- The Police collect the evidence, virtually unsupervised.
- Identification evidence is weak.
- D is framed.
- D is involved in a gang, or by association, but is wrongly accused as the culprit in the particular case.
- The evidence is only circumstantial.
- The prosecution call convicted prisoners as witnesses for the prosecution, perhaps in return for undisclosed benefits.

[69] peter.hill@raybrook.co.uk. See also the JUSTICE Report on Miscarriages of Justice, 1985.

- The prosecution decline to call a particular witness, who the defence wish to cross-examine, but feel inhibited in calling him as a defence witness.
- The defence are inhibited from approaching prosecution witnesses.
- Two persons are jointly prosecuted and tried, in the hope and expectation that they will fall into the trap of a "cut-throat" defence and both accordingly damage each other.
- D looks guilty simply by being placed in the dock (compare the practice in the United States of America).
- Witnesses are restricted by the rules of evidence and the practice in the court and not given the opportunity to state their "full story" in their own way.
- The defences of provocation (now loss of self control- Coroners and Justice Act 2009 ss 54-56), self-defence and duress are extremely difficult to run.
- The defence is poorly conducted by the defence lawyers.
- The defence lawyers mistakenly do not call D or an important witness.
- The defence lawyers are too deferential to the judge.
- The adversarial system results in a distorted view of what actually happened being presented to the jury.
- The judge himself may be adversarial in attitude, not having overcome his experience at the Bar; and his summing up may be damning to the defence but difficult to challenge on appeal.

- The Court of Appeal is far too cautious and reluctant to find a conviction unsafe.

Ends+