CBQ

Criminal Bar Quarterly Issue 4: December 2010

RAPE CASES:

Two articles from the judges' and victims' perspectives

Also on the inside:
Leading counsel in the Baby P trial, Bernard Richmond Q.C., on cross-examining children
Unfitness to plead
And an Exclusive interview with Lord Macdonald

Committee Members

Twelve Elected Members
Paul Garlick Q.C.
Paul Keleher Q.C.
Patricia Lynch Q.C.
Simon Mayo Q.C.
Amanda Pinto Q.C.
Tom Allen
Aisling Byrnes
Francis Hoar
Saba Naqshbandi
Mathew Orr
Ruth Paley

Nine Co-optees
Abbas Lakha Q.C.
Kirsty Brimelow
Gillian Jones
Dermot Keating
Eleanor Mawrey
James Richardson
Sophie Shotton
Monica Stevenson

Midland Circuit Representatives
Sarah Buckingham
Ben Mills

Northern Circuit Representatives
Guy Gozem Q.C.
Simon Csoka
Peter Warne

North Eastern Circuit Representatives
Claire Larton
Stephen Wood

South-Eastern Circuit Representatives
Ian Boyes
Rosina Cottage

Wales and Chester Circuit Representatives
Gregory Bull Q.C.
Owen Edwards

Western Circuit Representatives
Christopher Quinlan
Peter Glenser
James Leonard

Bar Council Members
David Etherington Q.C.
Maura McGowan Q.C.
Jeremy Barnett
Paul Bogan
Mark Bryant-Heron
Fraser Coxhill
Edward Henry
Nicola Higgins
Fiona Jackson
Hannah Kinch
Faisal Osman
Pavlos Panayi
Vivian Tanchel
Kevin Toomey
David Young

For all enquiries please contact:
Aaron J Dolan
adolan@barcouncil.org.uk

The Editor


John Cooper Q.C.

Continuing the theme from the last edition about the state of court security and how members of the Bar are treated, I received a record number of responses from colleagues expressing frustration.

It was interesting to read about a similar debate surrounding airport security and the feeling that some procedures were redundant and the unfair inconsistencies between airports, let alone nations.

Can I suggest that our effective and persuasive Bar Messes around the country speak to their courts. I suspect that it is through those approaches, honed over many hours of trust and working on our behalf, that this annoying matter may be resolved.

This final edition of the year contains an impressive number of headline articles.

Bernard Richmond Q.C. provides us with a definitive article as to the challenges of cross-examining young witnesses from the perspective of one of the most prominent barristers in the Baby P trial. We also have an exclusive interview with Lord Macdonald. As if that was not enough, His Honour Judge Peter Rook Q.C. and Robert Ward write for CBQ a leading article on rape.

Finally, a word of thanks to Sweet & Maxwell, our publishers since the beginning of CBQ. They have provided the magazine with the support and expertise which has meant that the publication has grown over the last five years from a newsletter to a magazine taken by the majority of the criminal Bar, Bench and many opinion formers beside. This is their last edition before Lexis Nexis take over the job next year.

John Cooper Q.C.

The views expressed here are not necessarily the views of the Criminal Bar Association.

Criminal Bar Association

Executive Officers

Christopher Kinch Q.C.
Chairman
christopherkinch@23es.com

Max Hill Q.C.
Vice-Chairman
max.hill@18rlc.co.uk

Edmund Vickers
Treasurer
edmund.vickers@9bedfordrow.co.uk

Lesley Bates
Secretary
lesleyBates@23es.com

Nathaniel Rudolf
Assistant Secretary
ndr1@mac.com

Jeremy Dein Q.C.
Director of Education
jdein@25bedfordrow.com

Kim Hollis Q.C.
Equality and Diversity Officer
khollis@25bedfordrow.com

John Cooper Q.C.
Editor of CBQ
jcooper@25bedfordrow.com

CHAIRMAN'S COLUMN


Christopher Kinch Q.C.

As CBQ goes to print, we are still waiting for the Ministry of Justice's paper on how it is to achieve savings of £350 million from legal aid. It is an uncomfortable time but I am sure my predecessor, the urbane Paul Mendelle Q.C., would have found a verse from his favourite Coldplay album to soothe our concerns. Instead, I feel myself strangely drawn to paraphrase the late, great Ian Dury. I see "reasons to be fearful... one, two, three."

Reason 1: The Lord Chancellor, the Criminal Justice Minister and the Legal Aid Minister have all taken up the mantra that the legal aid spend in this country is far higher than in other European and Commonwealth countries. Why should we be hearing this ministerial chorus? I fear that the intention is to spread the impression that legal aid is a bloated service from which £350 million or more can be saved without damage to the fabric of the system. They are particularly keen on citing a comparison with France saying that we spend 12 times as much per head of the population on legal aid as the French. What never gets a mention is the fact that the French pay nearly five times as much for their court service as we do for ours. Of course, in an inquisitorial system the court will play a much more active role in the investigation and prosecution of cases and will take on much of the expense. It is a case, with apologies to our neighbours, of "*comparer des pommes et des poires*" or, as I am told the Serbians put it with Balkan bluntness, "comparing grandmothers with machine guns."

The fundamental problem with this partial and loose use of statistics is that the whole exercise is unsound. The next time you hear these sorts of figures trotted out, remember that the comparisons all come from MoJ-commissioned research conducted by Professor Roger Bowles and Amanda Perry from the University of York last year. You can access the research on the MoJ website. Bowles and Perry actually warned that comparisons between jurisdictions were complex, needed to be treated with caution and could be unsafe. For example, England and Wales had a much higher level of crime than the other countries, with more suspects being brought before the criminal courts and more of them receiving legal aid. These were all factors that would add to the cost of legal aid here and distort the comparison with other jurisdictions. Frankly, the ministers should check their source material rather than rely on whoever is drawing up their briefs.

For my part, although it is unfashionable to voice the opinion right now, it has always seemed to me that it is a measure of a civilised society at ease with itself that it is prepared to provide those accused of harming its citizens or even of attacking society itself with expert advice and representation and not just the bare minimum. We have always been outraged at British citizens abroad who face difficulties getting access to advice or quality representation in court. We have been flattered for years by the visits of foreign judges and lawyers keen to learn from the example of our system. They come because there is much to admire here. We should not let those qualities wither or slip away.

Reason 2: Now, forgive me as we get a little more parochial. The Legal Services Board has issued a consultation paper on referral fees. Part of the paper addresses the payment of referral fees in criminal cases. I suspect we can all agree that whatever changes are coming down the road, at present, ring-fencing is vital to our protection as a referral profession. I wrote in the last edition of *CBQ* (Issue 3, October 2010) of the iniquitous practice of some solicitors pocketing a slice of the instructed advocate's fee for themselves (as a kind of referral fee) when they have no intention whatsoever of conducting the trial. It is a practice that has absolutely no benefit to the client and I very much doubt the client is ever told it is happening. It is quite clear that the LSB do not understand our view of this, indeed they think the Bar Protocol may be operating as a price-support mechanism. The LSB need to be shown the error of their view, otherwise the practice of treating the trial as a commodity and eroding the "ring-fenced" advocacy fee will grow unchecked.

What is at play here is at best a complete lack of understanding of how a referral profession works and of the significance of the advocate in the criminal justice process. Anyone who shares this view should respond individually and as sets of chambers. The Consultation Paper can be found at *http://www.legalservicesboard.org.uk/what_we_do/pdf/20100929_referral_fees.pdf*.
If the link does not work, you can track it down on the Legal Services Board website. Remember, just because you are paranoid does not mean they are not out to get you.

Reason 3: By the time you read this, the Government's "transparency agenda" should have led to the publication of all payments of over £25,000 to "suppliers" including barristers. "Transparency" is intended to affect payments for prosecution work from CPS, HMRC, SFO, DWP, etc. This all stems from a Treasury directive for greater transparency in public spending. The move was ordered by the Prime Minister in a letter to the Treasury in June 2010 that you will find on the Number 10 website. In due course the scheme is intended to cover monthly publication of every payment of over £500. We have made representations on a number of issues and sought to ensure that the minimum amount of personal information is published consistent with the public interest.

I suspect that the published figures will include the VAT we have to collect for the government, thus inflating each payment by 17.5 per cent. You will have to judge whether there has been a serious attempt to acknowledge that gross figures paid to an individual barrister represent gross fee turnover before the costs of running a practice, and making up for the absence of pension provision, sick pay and paid holidays are taken into account. The fear is that, once again, the occasion will be used by those hostile to the Bar as an attempt to soften the audience up for an attack on fees.

In one sense, the Bar should have nothing to fear from an exercise like this when all our fees are fixed or heavily scrutinised. Will we finally be able to scrutinise the fees paid to consultants and other lawyers by the government? Will we see the cost of in-house services? An alternative view is to question whether this exercise is a sensible use of public money at a time of such austerity. Be warned however, the drive to publication is inexorable. The MoJ will follow in due course with legal aid payments in defence cases.
Of course this is hardly the time of year to dwell on our misfortunes, and Ian Dury actually found "*reasons to be cheerful, one, two, three…*" Let me leave you with some of them:

"Summer, Buddy Holly, the working folly
Good golly Miss Molly and boats
Hammersmith Palais, the Bolshoi Ballet
Jump back in the alley and nanny goats"

Here's hoping that 2011 brings some of all that.

Christopher Kinch Q.C.
Chairman

The challenge of cross-examining young witnesses, post *R. v Barker*

Bernard Richmond Q.C.

Bernard Richmond Q.C., defence counsel in this case, otherwise referred to as "Baby P", shares his expertise.

Those of us who are regularly involved in cases in which we cross-examine young witnesses know, all too well, the hours spent in preparation before the first question is asked.

The pressure on the advocate to conclude the cross-examination as swiftly as possible, coupled with the need to temper it to suit the age and ability of the witness must be balanced with the needs of the defendant whose interest is in his case being presented as effectively as possible.

The purpose of this article is to share some of the thoughts I have had on this subject since *R. v Barker* and since I have been teaching a module on the subject for Middle Temple. I do not claim for a second that I have the answers.

Attuning to the witness

One of the main problems for those of us who defend in cases involving young complainants or witnesses is one of attuning ourselves to the witness. The ABE interview is not particularly useful in that regard: it is often conducted many months before the trial; it is conducted in an atmosphere where every effort is made to make the child feel as comfortable as possible; the surroundings permit the child and questioner to interact as naturally as possible and, moreover, the interviewer has doubtless either met the child before or spent some time familiarising him or herself with the needs of the child.

Compare this with the position a defence advocate faces when due to cross-examine the child. The child is older and is meeting the questioner for the first time (either briefly face to face or via a video link). The advocate is not given the luxury of time. The judge will be concerned to keep the matter moving quickly and to minimise the length of time during which the child is detained.

Of course, there may well be reports on the child but these are no substitute for taking the time to identify (both for the advocate and the jury) the child's level of general comprehension, linguistic ability and capacity to understand and interpret more complex ideas. As a consequence, the advocate is always aware of the difficulty that any advantage gained during cross-examination of a child witness will be dismissed by the prosecution as having been obtained due to lack of understanding, inability to express a contrary view, tiredness, unhappiness at being at court etc.

Fairness

These are real concerns when one is questioning a young witness and not to be dismissed. Nobody wishes to take advantage of a misunderstanding or the child's discomfort; however, if we are not careful, the situation will arise where any answers from a young witness in cross-examination are valueless for the defence because they can always be explained away.

In my view, it is vital to a fair trial that those who cross-examine young witnesses consider very carefully the problems which they will face and to plan for them. It is clear from *R. v Barker* that the Court of Appeal takes the view that counsel will need to amend their approach when it comes to young witnesses and abandon some of the techniques which they are used to using.

Counsel has a job to do

This is doubtless correct and I support it entirely, but so too must the courts recognise that counsel who defends has a job to do. Importantly, the putting of the defendant's case is not just a formality – it is done to ensure that the jury understand, at all times, the potential significance of evidence which they are hearing. Also, the cross-examination of a child witness will usually be the first occasion upon which it will be suggested (if such a suggestion is to be made) that the child's account is either inaccurate, mistaken or false. This may well be the only time during which a child is asked to face up to the inconsistencies in his or her account and to deal with a contrary version of events.

The purpose of cross examination

The purpose of cross-examination is to undermine the testimony of evidence which is not accepted (and is relevant to the issues in the case) or to gain further material in support of that case. Sometimes, indeed quite often, the young witness is the only witness to whom such questions can be put and, moreover, is the witness whose credibility is central to the case.

The importance of questioning the child

There is a notion which is gaining credibility (and with which I profoundly disagree) that it is possible, somehow, to conduct a defence in a child sexual abuse case by questioning the adults and not asking questions of the child. When a person is facing lengthy custodial terms, such an approach is plainly wrong.

There is also a notion that the problem of cross-examining children can be solved if counsel confines him or herself to "short simple questions". Whilst this is true, it is sometimes forgotten how difficult it is to find the right short question. Further, what do we mean by simple? This must, by definition, require some understanding of the child's current level of linguistic and other ability.

An example which proves the difficulty may be as follows: if the allegation made by child A is that he was punched in the face by his father (which the father denies), there will come a time when the suggestion will have to be made to the child that this allegation is not true. There is no point saying that such a suggestion need not be put – the jury will want to hear it put and the answer given and so will the advocate.

Framing the question

How is the question to be framed? Each of the possible permutations is, frankly, unacceptable to someone in the court. Put simply, the permutations are as follows:

"What do you say your dad did to you?" This is open-ended and, in terms of competent cross-examination, an unacceptably wide question. Further, it is an open question which asks the child for a narrative, which is often criticised. Finally, there will come a point where the advocate has to say "That's not right, is it?" or something of that ilk, which is unacceptable for the reasons set out below.

"Did your dad (really) hit you?" This is a leading question and one which will lead to the child saying "yes". Again, a bit of a shot in the foot for the defence advocate.

"Your dad didn't hit you, did he?" This is the "tag" question. A question like this is a common technique used in cross-examination but is one which is criticised both in *Barker* and by educational and child psychologists as being too complex for young children to understand.

"You told us your dad hit you. Is that a lie?" No child is going to answer "yes" to the question "is that a lie?". Further, "That's a lie, isn't it?" is an impermissible "tag" question. Also, by the way, many judges won't allow counsel to call a child a "liar" – a different word must be found. It's not that children never lie – although some people seem to adopt that position, most of us can think of lies we have told as children or experienced children telling – it's that the process of *calling* them a liar is quite damaging for the child.

It is this notion of limiting damage (or any further damage) to the child which is at the heart of the drive to make us re-examine our methods of questioning children. It is a challenge which we must face if defendants are to have a fair trial and child witnesses as safe an environment as possible to give their evidence.

Pre-trial cross examination

In my view, it is plainly time to bring into effect the sections of the Youth Justice and Criminal Evidence Act 1999, the effect of which would be that cross-examination of most children (and other vulnerable witnesses) would be done pre-trial, out of court and recorded. This would give a proper opportunity to the defence to conduct their cross-examination in a more relaxed way, safe in the knowledge that the interview can be paused if counsel needs time to think or to take advice (from their psychologist, for example) before asking further questions. It would also permit the defence and crown to have edited from the tape any passages which are unhelpful, irrelevant or inadmissible (one of the main problems at the moment being that the defence are often "treading on eggshells" to avoid opening up areas of information which are irrelevant or damaging).

In the current economic climate, however, I cannot see such asuch a solution materialising. In the circumstances, we must make the best of what we have. For my part, I think that the following are essential matters for the proper conduct of these cases in the future.

(i) **Defence counsel must have adequate time to familiarise him or herself with the witness**. As well as access to school, social services and any psychological reports about the child's current state of development, I would advocate a proper period of time during which counsel and the child can talk about matters not related to the allegation. Whether this is done in a different room with the judge and prosecution counsel present or in court before the jury is a matter for discussion.

The purpose of such a period of time (which, in my view, would be about 20 minutes to half-an- hour) would enable counsel to identify the level of language and comprehension of the child – for example, some children can cope quite well with "tag" questions, concepts and the like. It would also ensure that the child familiarises him or herself with the way the advocate speaks.


Middle Temple

At the end of this period, the child can be asked whether he or she can understand counsel (and any of the other professionals present or watching can identify issues which arise with the way counsel expresses him or herself).

(ii) **Defence counsel should not be afraid to air the difficulties with the court and suggest the use of an intermediary if counsel thinks it appropriate.**

(iii) **Whilst there must be an efficient use of time, defence counsel must not rush his or her cross-examination**. Time needs to be taken to ensure that the child understands the question being asked, that any answer given is wholly unambiguous and that the child is concentrating. At times when the child's concentration starts to wander, counsel must be free to talk to the child about something non-case related. The child may need to be able to get up and walk around the room or have a toy to hold. Counsel needs to be alive to these potential problems and not be afraid to deal with them.

(iv) **The questions must focus hard on establishing *facts***. Many questions which advocates ask involve concepts. These are hard for any witness, but doubly so for child witnesses. If they must be used, it is important to discover, through an example, what the child understands by the concept. If a child uses a concept word, it is vital to discover what the *child* means by that word.

(v) **The questions must be "unpadded"**. Many of us "pad" our questions with extra pieces of information or material before we get to the main point, e.g "you told us earlier that...", "would you agree that..." or "it's fair to say that...". All of these are obstacles to a child's understanding rather than of assistance.

(vi) **A child will often find it difficult to explain things "in abstract"** – for example, "what do we mean by lying?". It is necessary to have a store of examples which can be used to test their understanding of a concept (even if they do not know the name for it. Also, time and distance are matters which children can often only relate to by use of a specific example (e.g. "Was the room as big as the room you're in now or bigger?" rather than "How big was the room?").

(vii) **If you want to use examples which children understand, itis necessary to know a bit about what children, these days, watch and listen to**. There is no point making any reference to Andy Pandy; he has finally said "goodbye".

(viii) **One can't necessarily rely on a child telling you that he or she doesn't understand a question; it's necessary continuously to check understanding**. This can be somewhat laborious, but it is essential. Also, if a question is begun which is not as clear as one would like, it is also very important to abandon the question and start a new, clearer one.

Structure

This consequence of all the above is that it takes time to structure a cross-examination of a child. Questions need to be rethought to make sure that the simplest of language is used without losing the point of the question. Often a series of questions will be needed to reach the same place as one could reach much earlier with an adult. Sometimes, this is a frustrating process, as the "clever" point has to be lost or the "killer question" has to be sacrificed for questions which are less dynamic; on the other hand, the high regard in which the Bar is rightly held depends on our being able to say that we respond most effectively to these sort of challenges.

Bernard Richmond Q.C. is a barrister at Lamb Buildings.

Permissible judicial comment in rape cases[1]

HH Judge Peter Rook Q.C. and Robert Ward CBE apply their expertise

The recent Stern Review[2] described rape as "unique in the way it strikes at the bodily integrity and self-respect of the victim, in the demands it makes upon public authorities and in the controversy it generates." To this could be added that it is also unique in the way it attracts popular misconceptions as to the nature of the offence itself and the behaviour of perpetrators and victims. Whilst there would appear to be greater public understanding of the nature and effect of sexual assaults, combined with an increase in reporting of sex crimes, there remains a significant danger that the evidence of rape complainants will be evaluated on the basis of false assumptions based upon these popular misconceptions. This debate continues as to how this can be best addressed in a way that ensures fair trial and does not in any way inhibit legitimate lines of reasoning.

In 2006 in *Convicting Rapists and Protecting Victims – Justice for Victims of Rape*,[3] the Office for Criminal Justice Reform invited responses on the merits of making generic expert evidence admissible to counter-myths and stereotypes regarding victims of rape. The support for such a change in the law derived from the growing belief that complainants were being evaluated without juries appreciating the potential effects of the trauma of serious assault and how it might affect a victim's evidence, these being matters outside a juror's normal experience. Whilst the position remains that parties are not normally permitted to introduce generic expert evidence[4] of the range of known reactions to non-consensual offences, there has been significant development in the use of balanced judicial comment to address areas where rape myths are sufficiently well-established.

During the last few years, in the wake of the new s.74 definition of consent introduced by the Sexual Offences Act 2003, it has become increasingly recognised that it is appropriate for judges to provide juries with assistance in rape and other non-consensual cases as to the way evidence should be approached. This stems from a much greater awareness of the dangers of stereotyping and illegitimate lines of reasoning, which could lead a jury to view a complainant's evidence with unwarranted scepticism.[5] Lawyers have become used to addressing these issues in the evidence they adduce and their speeches. Balanced judicial comment enables juries to be warned about unjustified assumptions without the danger of generic expert evidence deflecting from the critical issues in the case. It is important that issues are properly and fairly distilled for juries and in most non-consensual cases, mere recital of the definition of consent will not achieve that end.

However, Neil Kibble has argued[6] that a brief judicial statement to juries rejecting myths may not be sufficient to overcome entrenched attitudes or beliefs. Some commentators still maintain a preference for the Government's original proposal of expert evidence on the ground that such evidence would enable a more detailed examination of why certain ideas are mythical and misconceived to be put before a jury. Louise Ellison and Vanessa Munro have carried out some illuminating research[7] evaluating the reactions of mock juries. They examined the impact of expert guidance upon jurors both in the form of general expert evidence and judicial comment. They concluded that their findings give cause for optimism in terms of the ability of either general expert testimony and/or extended judicial instruction to inform jurors about the disparate reactions of the victims of rape, and to generate less prejudicial assessments of the relevance of counter-intuitive behaviours, such as delayed reporting or calm court room demeanour. Their findings also support the view that expectations of physical resistance by the complainant rather than compliant behaviour may be less amenable to judicial direction. It was as long ago as 1841,[8] when rape ceased to be a capital offence, that the definition of rape was widened to include cases where intercourse had taken place without the woman's consent even though there had been no force, fear or fraud. Expectations of violent attack and sustained physical resistance persist.

Opponents of a change in the law to allow generic psychiatric or psychological evidence as to the effects of the trauma of serious sexual assault, point out that such evidence would be likely to lead to conflicting expert evidence being placed before juries which might distract the jury from the critical issues in the case. Further, some are concerned that such evidence could create in the mind of juries a conceptual model of how a rape victim would be expected to behave. Since it is clearly established that there is no one classic reaction, there would be a danger that this would be used as a yardstick against which the complainant's conduct might be measured.

Doody

However, it is clear that are now a significant number of matters which are sufficiently well-established to justify balanced judicial comment without the judge descending into the arena. In 2008, in *Doody*,[9] the Court of Appeal addressed the limits of permissible comment when a judge is summing up in a rape case. Balanced directions to the jury aimed at correcting misconceptions can be given where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning. The situation is analogous to those in which the trial judge warns the jury against apparently persuasive, but possibly mistaken, evidence of identification (the *Turnbull* direction), or against jumping to a conclusion from a defendant's lie (the *Lucas* direction). The only difference is that in respect of non-consensual sex cases, the comment is made to ensure fairness to the complainant rather than to the defendant.

There has been a recent attack upon this approach. In June 2010 in *Miller*[10] it was argued that the judge's directions in a child rape case were not properly based on evidence that was adduced before the jury. It was suggested that, in giving guidance to the jury about the content of, rather than the approach to be taken in applying, common sense, experience and knowledge of the world, the trial judge had encroached unlawfully upon jury territory. The judge's approach offended the common law principle that judicial notice can only be taken of facts of particular notoriety or common knowledge. The Court of Appeal gave short shrift to these submissions pointing

1 This article is taken from Chapter 1 of Rook *and Ward on Sexual Offences: Law and Practice*, 4th edition (Sweet and Maxwell), to be published in December 2010.
2 The Stern Review: *A Report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* (Home Office, March 2010).
3 Consultation paper published in 2006.
4 *ER* [2010] EWCA Crim 2522.
5 *Crown Court Bench Book March* 2010, Chapter 17, p.356.
6 [2009] Crim L.R. 591.
7 "Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials", Br. J Criminolgy 49.
8 *Camplin* (1845) 1 Den. 89.
9 [2008] EWCA Crim 2394. See also *MM* [2007] EWCA Crim 1558 for an example of a case where the Court of Appeal said that the trial judge had not gone beyond the bounds of permissible comment when the defence had been fabrication in respect allegations of rape and indecent assault upon the defendant's step-children. The defence had criticised the complainants for the delay in making complaints.
10 [2010] EWCA Crim 1578.

out that, as Latham L.J. explained in *Doody*, that was precisely what dealing with these generalisations was intended to do.

The Crown Court Bench Book 2010

The Bench Book addresses the need to deal with the risk of false assumptions. As Pitchford L.J. observes in chapter 17, such advice is given in the interests of securing the overriding objective of dealing with cases "justly". He writes:

> "The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice."

He stresses that the judge should not support any particular conclusion, but should focus upon warning the jury against the unfairness of approaching the evidence with any pre-formed and unjustified assumptions. The comment should be balanced[11] and not controversial. It should deal with areas where the position is sufficiently well-known to justify comment. The *Bench Book*, drawing upon research by experts in this area,[12] identifies the following non-exhaustive list of subjects which may lead to unjustified stereotyping:

- The complainant wore provocative clothing; therefore he/she must have wanted sex.

- The complainant got drunk in male company; therefore he/she must have been prepared for sex.
- An attractive male does not need to have sex without consent.
- A complainant in a relationship with the alleged attacker is likely to have consented.
- Rape takes place between strangers.
- Rape does not take place without physical resistance from a victim.
- If it is rape, there must be injuries.
- A person who has been sexually assaulted remembers events consistently.
- A person who has been sexually assaulted reports it as soon as possible.

It is of fundamental importance to appreciate that there is no classic reaction to rape or other serious sexual assaults. The following provide good examples:

Presentation in court

For instance, the experience is that people react differently to the experience of speaking about such an assault in court. Some will display obvious signs of distress, others will not. The reason for this is that people develop different ways of coping. Conversely, it does not follow that signs of distress displayed by a witness confirms the truth and accuracy of the evidence given. In other words, demeanour is not necessarily a clue to the truth of the witness's account. It depends on the character and the personality of the individual concerned.

Late reporting

In *Doody*, where the defendant raised the issue of late reporting as undermining the credibility of the complainant, Latham L.J. approved the suggested direction below as providing, in very general terms, an appropriate form of direction which should be tailored to the facts of the particular case:

> "Experience shows that people react differently to the trauma of a serious sexual assault. There is no classic response. The defence say that the reason the complainant did not report this until her boyfriend returned from Dubai ten days after the incident is because she has made up a false story. That is a matter for you. You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint. That is a matter for you.".

Feelings of shame and guilt

The Court in *Doody* acknowledged that it is sufficiently well-known that the trauma of rape can cause feelings of shame and guilt which might inhibit a woman from making a complaint, that a comment to that effect is justified. In that case the trial judge had been entitled to add to that general comment, a reference to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner. The Court did, however, conclude that in other areas the judge had gone too far. His extensive comments on possible reasons for the delay in reporting should have been balanced by reference to the appellant's case on the significance of the delay.

Forced sex within a relationship

The Court in *Doody* also stated that there was no need to emphasise the effects of "relationship rape" in as much detail as the trial judge had done and, in any event, it should have been done in a more measured way. In his commentary on the case, Neil Kibble suggested that the Court of Appeal's criticism of the judge's comments on forced sex within a relationship may have been unduly harsh[13]:

> "In relation to the appropriate level of detail on the effect of forced sex in a relationship, it is arguable that the judge's comments were directed at correcting another common rape 'myth', namely that relationship rape is not as traumatic and serious as 'stranger' rape, which is why he referred to breach of trust and 'the invasion'."

None of this is designed to usurp the function of the jury. Judges who try sex cases are already reporting that lawyers are much more alive to points which are based upon false assumptions, and so are less inclined to pursue them or are ready to deal with them. This suggests a stronger commitment by all parties at trial towards ensuring that complainants' evidence is evaluated on a proper basis without recourse to illegitimate lines of reasoning.

Rook and Ward on Sexual Offences, 4th edition is published by Sweet & Maxwell in December

11 See *Breeze* [2009] EWCA Crim 255, where the trial judge was held to have gone too far in his drum-like repetition that there was no obvious motivation for the complainant to tell lies. The Court of Appeal could not exclude the possibility that the jury may have been influenced by the "refrain".

12 See chapter 23; Temkin and Krahe, *Sexual assault and the Justice Gap: A question of Attitude* (Hart Publishing); Ellison and Munro. This latter illuminating research showed that some jurors may have difficulty accepting lack of violence by the defendant and lack of resistance by the complainant as being consistent with absence of consent.

13 [2009] Crim. L.R. 590 at p.595.

Does psychological trauma in victims play a role in the attrition of sexual assault cases?

Dr Amy Hardy, Ms Kerry Young and Dr Emily Holmes consider this sensitive issue


Amy Hardy


Kerry Young


Emily Holmes

Introduction

The conviction rate for reported cases of sexual assault, for example rape, is notably low compared to other crimes. This has been the subject of increased public and media attention in recent years. Whilst recent legislative reform and public service developments have improved aspects of the criminal justice processing of sexual assault, the attrition of sexual assault cases still remains high. Efforts to improve the criminal justice process for victims of sexual assault have not yet explored fundamental psychological reactions that are predicted to be of key importance. That is, the potential impact of trauma-related psychological processes in the attrition of cases remains neglected.

What is the problem with assuming that sexual assault narratives should be consistent and coherent?

In this article, we highlight the potential obstacles to successful prosecution that trauma-related reactions in sexual assault victims may present. The criminal justice process tends to question victims' credibility if they are unable to provide a consistent and coherent account to the police and in court of what happened during the assault (Office for Criminal Justice Reform, 2006). Yet, critically, *the expectation that trauma narratives should be consistent and coherent is incompatible with well-established psychological reactions to trauma*. Indeed, real trauma reactions have specific qualities (e.g. vivid intrusions, jumbled narratives and avoidance) that lead to fragmented and inconsistent accounts of sexual assault.

This proposal will be considered by first describing the nature of our memory for everyday events compared to traumatic events. Second, the likely impact of trauma memory and related psychological reactions on the criminal justice processing of sexual assault will be outlined. Finally, potential barriers to exploring the role of psychological trauma in attrition of cases will be detailed, together with suggestions for improving the criminal justice processing of sexual assault.

How are everyday memories stored and recalled?

Trauma memory has different and defining characteristics compared to our memory for everyday events. Everyday memories of events tend to contain contextual information (i.e. how events can be understood in relation to someone's goals and life) together with event specific information about what is experienced (e.g. what is thought, seen, heard, smelt and felt). The recording of contextual information is necessary for the organisation and categorisation of memories. For example, a memory of going to a new destination on holiday would consist of an ordered series of smaller events (planning the route, picking up the hire car, stopping at a café, reaching the castle, doing a guided tour) and also the contextual information pertaining to the event (the first outing of a much anticipated holiday). Memory is structured according to this contextual information, and we then use contextual cues to intentionally recall organised memories of past events. On returning from holiday, for example, a neighbour may ask what we did whilst we were away. We can then use this cue to deliberately retrieve the structured memory of the outing to recall an ordered and coherent account of what happened during the trip.

How are traumatic memories stored and recalled?

The formation and retrieval of trauma memories is different to everyday memory. Sensations and perceptions are recorded in vivid detail whilst the contextual information that organises and categorises the memory is less well stored. Researchers believe that focusing on the key, or worst, moments of trauma at the expense of recording the context of what is happening is an evolutionary adaptation that allows us to direct our resources towards finding safety. This means that trauma memories tend to consist of fragments of vivid sensations and perceptions, with gaps and inconsistencies in the rest of the memory due to poor encoding of contextual information. Traumatic memories can be in the form of images of the event (typically visions, though also sounds, smells, tastes and physical sensations), nightmares or flashbacks. For example, the memory of a road traffic accident may consist of a vivid image of a burning car and the smell of burning. A recollection of being mugged could involve the sound of the attacker's footsteps and the sensation of being forced to the ground. Flashbacks occur when the person suddenly acts or feels as if the event is happening again, such as an assault victim feeling as though they are being attacked again and trying to fight off the perpetrator, even though the assault is in the past and they are not in danger.

Importantly, trauma memories are likely to be triggered when victims are reminded of trauma. These distressing, vivid intrusions are unintentionally recalled, such that the victim may not be aware of what is triggering their memories. Reminders of the trauma can include stimuli present at the time of the event (e.g. being in the dark, hearing the rain and the smell of tarmac) and also cues that become associated with the memory of what happened (e.g. the police, healthcare services and the CPS). When trauma memories are involuntarily triggered, victims are overwhelmed by vivid recollections of what happened that feel as intense as they did at the time. For example, someone who was raped may experience vivid intrusions of fear and confusion, together with frightening images of the perpetrator's face, whenever they someone in the street who looks similar to their attacker, walk past a police station or see a crime drama on television. Understandably, trauma victims tend to avoid any reminders of trauma as they do not want to relive the distress that they experienced during the event.

In summary, trauma memory is defined by vivid and distressing intrusions of the worst moments of trauma with jumbled and inconsistent recall of the remaining events. Overwhelming intrusions are triggered by reminders of trauma meaning that victims naturally attempt to avoid any trauma-related cues. When sexual assault victims are asked by the police or in court to recollect the crime, they are therefore likely to experience distressing intrusive memories (e.g. the smell of the attacker, feeling frozen with fear and the physical sensation of being raped). They may then want to avoid triggering these memories meaning that, together with the poor storage of contextual information, they could have significant difficulty in recalling a coherent narrative, as is expected by the criminal justice system.

How may psychological reactions to trauma impact on attrition in sexual assault cases?

As just mentioned, sexual assault victims will experience difficulties deliberately coherently recalling what happened during the event, so they are likely to provide a jumbled and inconsistent account of the crime to the police and during the judicial process. The impact of trauma on memory will therefore potentially present a barrier to successful prosecution of sexual assault cases. In addition, psychological reactions to trauma are then likely to make it even more difficult for victims to meet the expectations of the criminal justice system. The most common psychological disorder experienced following trauma is Post-traumatic Stress Disorder (PTSD). Research has established that a staggering 50 per cent of sexual assault victims will develop PTSD, with the remainder of victims likely to experience some symptoms but not enough to meet the threshold for diagnosis.

PTSD is characterised by re-experiencing symptoms (i.e. flashbacks of the sights, sounds, smells, sensations and/or tastes that occurred during trauma) and extreme arousal (e.g. being jumpy, irritable and wound up). Sufferers then experience symptoms of emotional and behavioural avoidance (e.g. drinking more alcohol to numb feelings, withdrawing from life to avoid reminders) in an attempt to prevent the re-experiencing symptoms being triggered. Victims with PTSD are also likely to feel responsible and blame themselves for the occurrence of the trauma. The biggest predictor of developing PTSD when you have been raped is whether you "dissociate" (which in everyday language means switch off, have an out-of-body experience, go limp and/or freeze) during trauma. Dissociation further disrupts victims' ability to recollect what has happen during trauma, and so those with PTSD have even more fragmented accounts of their assault experience and have particular difficultly providing coherent accounts of what happened to the police. Sexual assault victims with PTSD may be even more likely to withdraw from the criminal justice system, as they want to avoid the re-experiencing symptoms that are triggered by reminders of the crime.

To explore the proposal that trauma memory plays a role in attrition of sexual assault cases, we have conducted a pilot study with 22 victims of sexual assault (Hardy, Young and Holmes, 2009). Participants completed questions about memory-related processes and their experience of being interviewed by the police when they reported the assault. The key finding was that participants with more fragmented memories of sexual assault reported that they gave more incoherent accounts of their trauma experience to the police. Consistent with our proposal, those people who gave more incoherent accounts also predicted that they would be less likely to proceed with their legal cases. Victims with more fragmented narratives of what happened during assault therefore appeared more likely to doubt that they had sufficient ability to report the crime to secure a criminal prosecution.

To summarise, we have argued that, *paradoxically*, genuine victims of sexual assault may be those who are most likely to have their credibility questioned. That is, having a distressing reaction to trauma can actually contribute to the attrition of sexual assault cases. Trauma memory is by definition disorganised and does not lend itself to providing a coherent account of crimes. Victims with PTSD may have increased difficulty in meeting the expectations of the criminal justice system, due to them having even more fragmented memories of sexual assault and being avoidant of their re-experiencing symptoms (e.g. intrusive memories of the trauma).

Potential barriers to addressing the impact of psychological trauma on attrition of sexual assault cases

If psychological reactions to sexual assault are actually contributing to attrition of cases, it seems timely for the legal and psychological communities to work together to address these obstacles to prosecution. However, we are aware that there may be barriers to researching and making progress in this area. As has been mentioned previously, the criminal justice processing of sexual assault has been subject to increased public and Government scrutiny in recent years (HMCPS and HMIC, 2007). We anticipate that this may present a dilemma for those working in the legal system, who may on the one hand be motivated to highlight the role of psychological reactions to trauma in attrition, whilst at the same time be concerned about whether this may jeopardise the prosecution of cases. Sexual assault victims need to be able to talk about how they have difficulty with recalling what happened, feel responsible for the crime and want to avoid any reminders of it, without their credibility being questioned.

We are curious to hear from professionals working in the legal system on how we might address these barriers. From our own position, we are mindful that research should focus only on victims' *subjective* experience and reactions to the crime and not only on the *objective* facts. We are also aware of ensuring that any clinical or research endeavours with victims of sexual assault should be in accordance with the Crown Prosecution Service's guidelines regarding appropriate clinical practice in rape cases (*http://www.cps.gov.uk/publications/prosecution/pretrialadult.html*). In terms of supporting the judicial process, we also strongly advocate for the British Psychological Society's recommendation that memory experts should be more routinely used to advise the courts ("Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory", British Psychological Society, 2008). This would ensure that the interpretation of the subjective reactions of sexual assault victims, such as those disclosed in clinical or research settings, is done by appropriately qualified professionals.

Summary

In this article, we have highlighted the potential contribution of trauma memory, and related psychological reactions such as PTSD symptoms, to the attrition of sexual assault cases. To summarise:

- The criminal justice system expects that victims should provide consistent and coherent accounts of sexual assault.
- Sexual assault victims are likely to have jumbled, incomplete and fragmented memories of what has happened to them, and also experience involuntary, vivid and distressing intrusions of the worst moments of trauma.
- Victims' fragmented recall, vivid intrusions and avoidance of trauma-related distress could result in them having significant difficulties in providing consistent and coherent accounts of the crime when asked to by the police and in court.
- *Paradoxically*, real victims of sexual assault may be those that are most likely to have their credibility questioned and least likely to see their case successfully prosecuted.
- We believe that the legal and psychological communities need to work together to promote best practice and evidence, thereby addressing the unjust obstacles to prosecution faced by genuine victims of sexual assault.

Dr Amy Hardy, Camden & Islington Foundation Trust

Ms Kerry Young, University College London

Dr Emily Holmes, University of Oxford

British Psychological Society, *Guidelines on memory and the law: Recommendations from the scientific study of human memory* (Leicester: British Psychological Society, 2008).

Hardy, A., Holmes, E. A. & Young, K., "The role of memory in the experience of reporting sexual assault during police interviews", *Memory*, 2009,17(8) 738–788.

Exclusive interview with Lord Macdonald by Tessa Mayes


LORD MACDONALD

As soon as I shake hands with Lord Macdonald at Matrix Chambers, it's almost straight down to business. He is effervescing with ideas on the state of the criminal justice system and its future. I like his efficiency. If he needed a personal slogan at this point, it could be "Just Do It". Macdonald is clearly on the go, decisive and up for pushing legislation and public policy in new directions.

Terrorism

In the week I meet him, his government review of counter-terrorism legislation has not yet been published. As the Director of Public Prosecutions from 2003 to 2008, Macdonald was in charge of the Criminal Prosecution Service (CPS) during some crucial years. Tony Blair's government was transforming anti-terrorism legislation after the 7/7 bombings and the trials of the failed 21/7 bombers. He has also been a defence lawyer in terrorist cases including those relating to the Provisional IRA, Sikh separatists and Al Qaeda.

Can he say what the government review will conclude? "No," he says. "But I can say it's a horrible mistake to overreact to terrorist incidents by bringing in unnecessarily repressive legislation. The problem is that you can end up destroying the very thing you're supposed to be protecting, the constitution, the due process system, fair trials. Why would we want to give all that up to protect ourselves from people who want to take it away from us? When we get attacked by terrorists, one of the most important responses is to protect our constitution from them. I feel that very strongly."

Blair's recently published autobiography, *A Journey*, stresses that he had a risk perception change towards terrorist threats after 9/11, as did George Bush. Can he agree with Blair now? "As the DPP during that period I was clear about what powers we needed. We didn't need 42 days to get evidence against people as Blair proposed," he says. "Using our regular criminal justice system with expert counter-terrorism prosecutors who were brilliant we prosecuted more terrorism cases than any other country in the world. Scores and scores and scores. We got a high conviction rate and proved we were right."

While Macdonald supports the thrust of the new government's opposition to New Labour's anti-terrorism policy, he is opposed to some of the government's cuts to the criminal justice system detailed in the Comprehensive Spending Review.

Legal aid cuts risk miscarriages of justice

"Legal aid cuts will be quite serious. People will notice it. Legal aid cuts will no doubt make a big impact on the poorest people," he says. "The people who are homeless, asylum seekers or who aren't getting their correct benefit payments and they'll find it much harder to get lawyers. We're going to see firms of solicitors closing down, contraction in the size of the Bar as being a barrister becomes more challenging in the face of competition from solicitors. The risk is that the quality of service may now decline. It risks miscarriages of justice."

"I believe the state has a responsibility to provide decent legal, independent representation to people. This is particularly important in the criminal area where the state has the power to deprive them of their liberty. No barrister fights a case less hard because he's been paid by the government," he adds.

Macdonald is favourable towards the Coalition Government's criminal justice policies overall. He agrees with the policy of reducing the number of prisoners and support for restorative justice. Surely he can't be in favour of a 30 per cent budget cut to the department and the closure of about 150 English courts opposed by Mark Serwotka, general secretary of the Public and Commercial Services union, which represents more 300,000 public sector workers? I ask.

Too many magistrates' courts?

The 57-year-old Liberal Democrat life peer replies, "We've got too many magistrates' courts. Originally the idea would be that every locality would have its own court. But some courts are underused but they still have to be serviced. It's woefully inefficient. It was one of the banes of my life as the DPP."

And the "rehabilitation revolution"? Macdonald agrees with Ken Clarke, the Justice Secretary. Even though the system will involve extra funding upfront, he argues it will save money in the long run by helping people stay out of prison.

Ken Clarke is a radical

"I think Ken Clarke's quite a radical figure who likes to approach problems from a different angle," he says. "I think our prison population is far too high. There are too many people who don't really belong there, people who are a nuisance rather than dangerous. It's hugely expensive and destructive in terms of their futures. It's just warehousing people."

In terms of restorative justice forward thinking, the future Macdonald seeks is modern and restorative rather than old-fashioned and punitive. We debate for some time the merits and demerits of restorative justice for young people. Won't they be punished twice, punished and also shamed publicly or in front of a victim? Isn't this a backward-looking, archaic form of justice compared to the modern, more objective idea of simply committing a crime, doing time and then you're free?

Macdonald defends his view by arguing that it doesn't shame anybody. "It's not getting people to walk around in fluorescent jackets," he says. For him it's about getting people to face up to the responsibilities of

committing a crime and have a personal encounter with the victim in appropriate cases such as public disorder and graffiti. He says it is unsatisfactory for victims to be just "stuck in the witness box", asked "hostile questions" by defence counsel and then go home. Restorative justice is better at "engaging the victims in heart of the process" and the young perpetrator's interest too. With this system, young people will "understand the consequences" of what they've done and "make amends."

New Labour lacked the right sort of courage

Isn't current political support for restorative justice just copying the New Labour government, who championed victim-centred justice as their Big Idea? "They said a lot but they didn't do a great deal about it," he replies. "They always ran scared of doing anything that looked as if they were soft on crime. They didn't really have any courage in criminal justice." But what of the huge number of laws that New Labour was famous for enacting? "Oh well, they lacked the right sort of courage. They were very good at hanging tough, bringing in very strong criminal legislation. They lacked the courage sometimes to do the right thing. I don't think what they did demonstrated courage," he adds.

Now restorative justice thinking looks set to have wider influence if not be realised in parts of the legal system. A few months ago The Independent Commission on Youth Crime and Anti-Social Behaviour (which Macdonald was on) came down in favour of restorative justice for young people, although not for rare, very serious cases which could involve imprisonment.

Macdonald describes the youth restorative justice system in place of the juvenile court in Northern Ireland as "impressive". At youth conferences the young person, victim, parent, teacher and police officer talk about what the person's done. "Many kids would rather go to court. It's quite painful sitting in front of the old lady whose window you've thrown a brick through to apologise and listen to her telling you how scared she was. She's sitting there crying and you're sitting there squirming in your seat. If you're a 13- or 14-year-old boy that's a very challenging encounter," he says.

At the end of this process everyone in the room agrees a plan for the perpetrator of the crime to make amends. Victims can't demand any old punishment. The plan gets approved by a prosecutor which keeps punishment for nuisance crimes standardised.

Is restorative justice successful? Yes, he says. Reoffending rates, the key indicator, have declined. I still have my doubts yet it seems restorative justice is here to stay. "I think the Coalition's quite keen on restorative justice. I know this," Macdonald tells me. "I went to see Crispin Blunt, the Justice Minister, and he's very keen. So we're hoping the report that we did will make some progress."

Busy life

Macdonald's expertise ranges from the development of criminal justice policy to human rights, extradition, international criminal liabilities, fraud reform, anti-terrorism, grave cross-border crime and international treaties. He leads a busy life as a deputy High Court judge, a member of the Advisory Board of the Centre for Criminology at Oxford University and a visiting professor at law at the London School of Economics. Now he is no longer the DPP, he can be more outspoken about his views. However, does Macdonald think he was perhaps too outspoken as the DPP?

Disagreements with the Prime Minister

"The DPP is not elected or appointed by a politician either. He's interviewed by the Civil Service Commission. They make a recommendation to the Attorney General who makes the appointment. The DPP is not influenced by politics or politicians but an independent figure who is entitled to express his or her views about criminal justice issues," he explains. "I very often disagreed with the Prime Minister. And he very often disagreed with me. That's life. I was summoned to the Home Affairs Select Committee as the head prosecutor, for example, and when asked about 42 days' detention without trial I said we don't need it. Parliament then rejected the legislation."

Talking to the press

What of being outspoken outside of official committees? Isn't talking to the press politicising the job, something that decades ago would never have been done? "I did an interview in *The Times* about it [42-day detention without trial]," he replies. "I think the public are entitled to know what the chief prosecutor thinks. The DPP is a very powerful figure. His views on these issues ought to be transparent. It's not a bad thing. Public life is becoming more transparent. It used to take place behind closed doors. That no longer works. On the internet people are much more aware, educated about things and they expect to know."

Yet how can the government control its criminal justice policy if a DPP is speaking out so much?

"The government governs. If it can't persuade parliament, legislation won't be enacted," he replies. "The 42 days' detention without trial caused a huge rebellion in parliament. It was an obnoxious proposal. The proposal was really a political stunt. It was designed to show up the Tories because they knew they would be against it. They wanted to portray the Tories as weak on terrorism. It was just nonsense."

Is Keir Starmer, the current DPP, balanced correctly between being independent and also outspoken on key matters of the day?

"I think he is, yes," says Macdonald. "You've got to pick your issues and use your judgment."

Any advice he'd give to Starmer?

"No. He doesn't need my advice," Macdonald says, smiling. "I think he's doing an excellent job. The big issue for the CPS is going to be maintaining frontline services when your budget is being cut. It is going to be challenging."

Tessa Mayes is a writer and filmmaker based in London.

Reforming the law on unfitness to plead


Clare Wade


Helena Duong

Clare Wade and Helena Duong consider the present and look to the future

This article outlines some of the proposals in the Law Commission Consultation Paper, "Unfitness to Plead" (Law Com CP No.197). The paper addresses the whole of the law on unfitness to plead as defined by the Criminal Procedure (Insanity) Act 1964 ("the 1964 Act") as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 ("the 1991 Act") and the Domestic Violence, Crime and Victims Act 2004 ("the 2004 Act"). It also looks at the common law in the broader context of the law relating to vulnerable defendants and the Mental Health Act 1983 as amended by the Mental Health Act 2007.

Problems with the current law

The legal test for unfitness to plead

The present legal (*"Pritchard")* test is based on common law: *R. v Pritchard* (1836) 7 C. & P. 303. The basis of the test is whether the accused can plead to the indictment, understand the course of the proceedings, instruct a lawyer, challenge a juror and understand the evidence.

The test was left untouched by the procedural changes effected by the 1964 Act and the 1991 Act and is not consistent with modern psychiatry. It places a disproportionate emphasis on the cognitive ability of the accused, without attributing any weight to the question of the accused's decision-making capacity. It therefore does not pay heed to the concept of "effective participation" that has developed as part of the jurisprudence on Art.6 of the European Convention on Human Rights (the right to a fair trial): *Stanford v UK* App No.16757/90. One possible practical effect of this might mean that an accused who is suffering from a mental disorder such as schizophrenia, who nevertheless has an understanding of the procedure, will be fit to plead notwithstanding that he or she might not be able to make decisions which are in his or her best interests or is suffering from delusions at the time of his or her trial (*R. v Moyle* [2008] EWCA Crim 3059). This can lead to miscarriages of justice where an accused who is suffering from mental disorder is making flawed decisions which courts of first instance are unable to remedy (*R. v Erskine* [2009] EWCA Crim 1425 at [95]) .

R. v Murray [2008] EWCA Crim 1792 provides further illustration. M, who suffered from paranoid schizophrenia, had pleaded guilty to the murder of her daughter despite the partial defence of diminished responsibility being available to her. Notwithstanding that M was "fit to plead" there was psychiatric evidence that she was unable to weigh up the contribution of her mental illness to her behaviour at the time of the killing and wished to be punished for what she saw as "murder" (at [4]). The Court of Appeal quashed the conviction for murder – substituting it with a conviction for manslaughter on grounds of diminished responsibility.

The present law does not permit disjunctive consideration of the (arguably) separable factors of plea and ability to participate in a trial. Although it may not always be appropriate to hold an accused fit to plead when he or she is not fit for trial, many people consider the law to be too inflexible in this regard.

The legal test is also inconsistent with the capacity test in civil law both in common law and as provided for by statute in the Mental Capacity Act 2005. This inconsistency is highlighted when it is considered that an accused could face criminal and civil proceedings relating to the same subject matter; for example, child abduction.

In addition to the problems with the legal test, the law on unfitness to plead has developed in a haphazard way, which means that it does not take account of the practice in relation to vulnerable defendants (see paragraph III.30 of the Consolidated Criminal Practice Direction). Special measures which are deployed to assist vulnerable defendants to be able to participate effectively in the trial process are not always used consistently.

The section 4A hearing as to the facts when an accused has been found unfit to plead

Section 4A of the 1964 Act was introduced by the 1991 Act in order to allow for the appointment of a representative who is able to test the evidence against the accused with a view to seeking an acquittal. The s.4A hearing is distinct from a trial by virtue of the fact that the accused can be acquitted of the offence with which he or she is charged but he or she cannot be convicted. The accused can only be found to have "done the act or omission charged" (s.4A(2)(b)). Although this was a significant development, it has brought its own problems.

In essence, the deficiencies of the present procedure flow from a tension between the need to give an unfit accused the opportunity of testing the evidence and thereby obtaining an acquittal and the need to protect the public from an accused who may be dangerous because he or she is suffering from mental disorder.

In *R. v Antoine* [2000] UKHL 20, the House of Lords held that the partial defence of diminished responsibility was not open to an accused in the s.4A hearing because it could not result in a conviction. In addition, it was held that the "act or omission" only referred to the conduct element of an offence. This requirement for a strict division between the conduct and fault element has led to difficulties. This is because it is not always possible to discount the fault element of an offence when assessing whether or not the accused has committed the conduct element of the offence with which he is charged (*R. (Young) v Central Criminal Court* [2002] EWHC 548 (Admin)).

Modern criminal law provides numerous examples of offences which are not divisible in the way required by s.4A. An obvious example would be the offence of possession of an offensive weapon

contrary to s.1(4) of the Prevention of Crime Act 1953 whereby a person is not in possession for the purpose of the act unless he has an intent to use the weapon to cause injury. Other examples include and are not limited to the following substantive offences: supporting proscribed organisations contrary to s.12 of the Terrorism Act 2000 (the 2000 Act), possession of an article for a purpose connected with an act of terrorism contrary to s.57 of the 2000 Act. Further examples can be found in the money laundering offences under ss 327 to 329 of the Proceeds of Crime Act 2002. The problems are apparent when it comes to inchoate offences such as conspiracy where the conduct element is an agreement which, when separated from the fault element, may actually be an agreement to do something lawful. A finding that the accused has done the act in such circumstances may operate unfairly against an accused who is under a disability.

The same problem applies to defences. Although the House of Lords have said that a defence can be considered if there is "objective evidence" of it (*Antoine*), this may not always be available and it means that the outcome in any given case can be arbitrary.

The provisional proposals

A new "decision-making capacity" test

The paper proposes that the present legal test should be replaced with a new decision-making capacity test. Meaningful participation involves having the capacity to make decisions. This test is based on the capacity test in civil law which was placed into statutory form by s.3 of the Mental Capacity Act 2005. The accused should be found to lack capacity if he or she is unable to understand the information relevant to the decisions that will have to be made in the course of his or her trial, to retain that information, to use or weigh that information as part of the decision-making process or to communicate his or her decisions.

In line with the Mental Capacity Act 2005, we are proposing that decisions made by an accused do not have to be rational. This is because the emphasis under the new test should be on the decision-making process as opposed to the decision itself.

We have made alternative proposals on the question of whether or not the principle of proportionality should apply to our new decision-making capacity test. The principle of proportionality dictates that the threshold of capacity should be determined by the complexity and/or seriousness of the circumstances and consequences of the decision which the accused has to make. The more complex the circumstances of the decision, the higher the threshold of capacity should be. Although proportionality is an integral aspect of civil law, we are unsure about whether it will lend itself so readily to the criminal process. Broadly speaking, we are concerned to prevent inconsistent decisions across the board. There are also differences between civil and criminal procedure which suggest that a fully functional test may not be suitable for the criminal jurisdiction. For example, in civil litigation, the fact that a litigant does not have litigation capacity does not mean that the litigation cannot take place, rather it means that the litigant will litigate with the assistance of his litigation friend. In criminal procedure, if an accused is unfit to plead, the issue will change from one of guilty or not guilty to the issue of whether or not the accused has done the act.

We are also proposing (Part 5 of the paper) that there should be a defined psychiatric test for decision-making capacity in crime – another factor which will effectively maintain a distinction between the criminal and civil jurisdictions.

The paper proposes that there should be consideration of the application of special measures and that this should form an integral part of the new decision-making capacity test. In a relevant case, a defendant who does not have sufficient decision-making capacity to participate meaningfully in his or her trial, may be able to plead guilty with the assistance of special measures.

We are proposing an increased use of special measures generally so that where a defendant with a mental disorder or other impairment is subject to a trial and wishes to give evidence, then expert evidence on the general effect of that disorder should be relevant (see *R. v S (VJ)* [2006] EWCA Crim 2389). A greater commitment to the use of special measures will ensure that the trial process is more inclusive and that a number of people who at the moment may be found to be unfit to plead will be able to participate in the trial process.

The role of psychiatrists in determining the issue

In addition to proposals for a defined psychiatric test to assess whether or not an accused has decision-making capacity (see above), the paper is clear that need for consistency with the provisions of Art.5(1)(e) of the ECHR (*Winterwerp v Netherlands* (1979) 2 EHRR 387 (App No 6301/73) at [39]) means that the present requirement that a person cannot be found to be unfit (or, under our proposed test, to lack decision-making capacity) unless it is on the evidence of at least one psychiatrist (s.4(6) of the 1964 Act) should continue.

The section 4A hearing as to the facts

We are proposing a new procedure for determining the facts of the case.

First, as was originally recommended by the Butler Committee (Report of the Committee on Mentally Abnormal Offenders, paragraph 10.24), all the elements of the offence (in other words fault as well as conduct) should be considered. This would lead to one of three possible outcomes:

1) a finding that the accused has done the act or made the omission charged and that there are no grounds for acquitting him or her;
2) an outright acquittal; or
3) an acquittal which is qualified by reason of mental disorder.

Following a finding under either (1) or (3) the court would have available to it the same disposals as it has under the 1964 Act as amended by the 2004 Act: namely, a hospital order with or without restriction, a supervision order or an absolute discharge.

This procedure (which would still depend on the appointment of a representative for the accused) would have more of the qualities of a trial than at present because it will allow for consideration of the fault element of the offence charged and because it may lead to a special verdict namely, a qualified acquittal on the grounds of mental disorder existing at the time of the offence. Contrary to the House of Lords' decision in *R. v H* [2003] UKHL 1, the right to a fair trial under Art.6 of the European Convention should apply to the new s.4A hearing.

If the accused is acquitted, a further hearing should be held, at the discretion of the judge, to determine whether or not the acquittal was because of mental disorder existing at the time of the offence.

The paper also asks whether it should be open to a jury to be able to decide that the accused has done the act and there is no basis for an acquittal of an offence other than the offence with which he or she is charged as would be consistent with the new structure and the fact that all the elements of the offence are to be considered. In effect, this amounts to reversing the decision in *Antoine* and it may well be thought appropriate from a labelling point of view.

We particularly welcome the view of practitioners on our proposals. The consultation period is open until the end of January 2011.

Clare Wade is a lawyer at the Law Commission and a barrister at Tooks Chambers. Helena Duong is a research assistant at the Law Commission.

Louise D'Arcy Q.C.

Members of the Criminal Bar will be very sad to learn of the sudden death of Louise D'Arcy Q.C. on Friday October 22, 2010, aged 44. She leaves a husband and two young daughters.

Louise was called to the Bar in 1988 and took Silk in 2010. She was a much loved and highly regarded member of the Chambers of Anthony Berry Q.C.

Louise was not only an outstanding advocate but also one of the great personalities of the Criminal Bar. Her warmth, her sense of fun and irreverent wit will be sadly missed by her many friends and colleagues.

BOOK REVIEW

Blackstone's Criminal Practice 2011

It is that time of year again when the heavyweights emerge from the press.

First to blink in the sunlight is *Blackstone's*, with its impressive list of contributors headed by Lord Justice Hooper and the great friend of the CBA, Professor David Ormerod.

The new edition continues the accessible content and indexing approach which takes you to the point with the minimum of page turning, making it the book to turn to when issues arise needing quick solutions.

There is clear analysis of critical developments over the last year, including the Coroners and Justice Act 2009, in relation to sentencing, partial defences and special measures, and the consideration of the much needed Bribery Act 2010 also merits praise.

The publication also continues the very popular Quarterly Update, which is invaluable, particularly in relation to the most recent sentencing editions.

This is the 21st edition of the book, but it seems as if it has been with us for longer than that.

There is a tremendous amount of criminal law out there at the moment and any work of *Blackstone's* pedigree must, of necessity, be weighty. But this one is definitely worth taking out the gym membership for.

Blackstone's Criminal Practice is published by Oxford University Press.

John Cooper Q.C.

Preparing for prison

A suggestion from Patrck Gibbs Q.C.

There is a first time for everything. It is always scary. We manage the fear by preparing. We turn to those who have done it before to discover the "do"s and the "don't"s. Information helps. We all remember our first bail application, our first jury trial, our first exposure in the Court of Appeal, and we can advise those who are facing theirs. We have lay clients who face unknowns more daunting than ours. Prison is the greatest of these. Most of us have never been imprisoned, and yet one of the questions which we are most often, most predictably and most reasonably asked is "How can I prepare for prison?"

How well do we answer that question?

If you think that your standard answer could be better, may I recommend that you visit a website called First Time in Prison: *http://www.firsttimeinprison.com.*

This is a site set up by a lay client of mine who found that the advice on the subject that I and my instructing solicitor had been able to give him fell short of the practical reality. He has therefore at his own expense provided, free to all, the information which we could not. The next time that I am asked this question I shall refer to and rely upon the comprehensive and intelligent and practical resource which he has created. You may wish to do the same.

"But he's still breathing!"

Alison de Burgh, a professional theatrical fight director, lets us into some trade secrets

Alison de Burgh

We have probably all experienced the moment following a dramatic piece of violence on stage, when the audience is hushed, and a young voice pipes up: "But mum… he's still breathing". Death and violence on stage and screen can be spectacular, but to create a fight or fatal moment which looks totally real – especially on stage where CGI cannot do the gory bits for you – is not easy and requires a specialist fight director.

For me, the most interesting part of my job is understanding the psychology of violence, why people fight, in that manner, with that as a weapon? The most challenging part of my job is enabling an actor to explore their character and find those answers, and, together, produce a believable piece of violence. This side of my job changes from script to script, director to director. What does not change are the basic methods of killing and maiming people; and making these look real provides a different, slightly macabre, yet fascinating aspect of my job.

Those with a weak disposition are advised to stop reading now.

Hanging

Hanging generally requires an actor to wear a harness beneath their costume; at the vital moment a wire, concealed in the noose, is clipped to the harness, the "executioner" gives a tug to the rope, as if testing it – in actuality they are signalling to the stage crew that all is well – and the victim either steps, drops, or is pushed to their doom.

The problem with hanging is that it hardly ever looks real. The main obstacle is the mechanism itself, it neither gives a realistic jerk, nor suspends the victim in a realistic manner. The wire from which the actor hangs is attached to the harness at a point between the shoulder blades. This means that the body hangs from the wrong point. Often attempts are made to disguise the fact by placing a sack over the victim's head, or giving them a costume which is bulky around the neck and shoulders, but they can never totally disguise the "trick" and make the hanging look real.

Having worked on several hangings at the Coliseum and National Theatre, I was asked to work on a new play at The Gate Theatre, where we were able to devise a new method of hanging, without a harness.

Throughout the play a father and daughter frequently handled ropes and pulleys. During one section of dialogue the daughter was handling rope, knotting it, making loops and threading it through a pulley suspended from the roof whilst talking to another character. Whilst talking, she put her foot in one loop, placed the other around her neck, and then stepped off the table onto which she had climbed to reach the pulley. Her bodyweight made the rope race through the pulley only to stop with a sudden jerk and resounding crack as the rope to her neck came tight. The lights went to blackout, leaving a shocked audience in silence but for the sound of the rope creaking and the body swinging.

The trick was twofold. Firstly, the actress had to learn how to balance on one foot suspended by a rope. Secondly, the "dead" stop in the rope had to be at exactly the right place so that the rope both balanced the actress, and put the noose under tension. There was a failsafe: the noose had a release that the actress held in her hand, just in case. As with all theatre, the "sell" was down to the skill of the actress, and she was brilliant. The noise of the rope racing through the pulley, the crack of the rope as it went taut, and the jerk the actress put on her body made for a truly horrific and realistic hanging. Totally safe, totally believable.

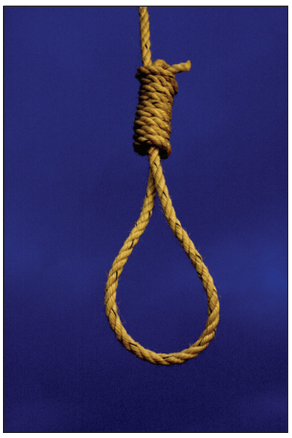
Stabbing

Death by blade is a little more tricky. Unlike hanging, the "kill" is relatively simple; it is the actions before that now become of crucial

importance. Sometimes blade attacks "come from nowhere", yet, even so, arguably more so, the moves which the attacker does have to fit in perfectly with their state of mind, experience, and physicality otherwise the moves will look unreal and choreographed.

In real life, blade fights are short, bloody, and very messy. In recreating such fights, a constant battle is fought between the reality, and the wardrobe department.

Blood, even stage blood, makes a mess. It stains if left unremoved for long. If, when watching a fight, you spot a character taking a jacket, coat, jumper or shirt off before a fight it is not necessarily because that is what people do in real life, but often because the wardrobe department do not want blood on their costumes. Also, blood does not show up very well on dark fabrics; white shirts are the best for a gore fest.



Expensive gadgets and gizmos are not always necessary for a blade fight. Yes, there are fake knives with pumps in the handle that can create marvellous arterial spray, but a squeezy bottle hidden in the palm of the hand does an equally good job. Prosthetic pieces can be made. I recently worked on an opera at Glyndebourne where death by masonry occurred. This involved Don Giovanni smashing the Commendatori's skull with a piece of fallen masonry. The prosthetic head piece created by the props department was truly amazing. Unfortunately, the amount of blood spilt to inflict the damage the prosthetic emulates often means, as it did in the case of the Commendatori, that the prosthetic cannot be discerned beyond the second row of the stalls. On-screen CGI can make all of these gadgets and gizmos unnecessary, as blood and gore can be added later via the skill of the graphic genius. Theatre has no such option, but there are low-tech solutions which can appear as realistic as the best CGI or most expensive gadget or gizmo. An example of which would be a gruesome throat cut I did this year on a production for the National Theatre of Wales.

An actress had her throat cut in such a horrific manner that a piece of wind pipe had to fly across the floor. The actor cutting her throat concealed a blood bag in his hand, which he then burst as he stabbed the knife into her throat. He then flicked the bloody remains of the bag across the stage as he finished the cut. A little sleight of hand … and another truly gruesome moment.

Blades can sometimes be so small that often the first indication of a wound is blood. A razorblade can cut so cleanly that a victim may at first not notice that they have been cut. On stage, a razorblade becomes almost invisible to the audience when held between the fingers. This kind of blade fighting relies heavily on the movement of the actors, they have to "sell" the psychological and physical truth behind the action. With no shiny sword to impress us, no big stick to wave around, or gun to tote, we as the audience focus solely on the actor, their mood, motivation, and intention … and their blood.

Bleeding

Blood bags. Most of us remember school productions where cling film was twisted into a blood bag and secured at the top with tape – the more rebellious of us made water bombs in the same way. These blood bags are cheap to make, but a nightmare to use: they either burst prematurely or are impossible to burst. Unfortunately, some props departments still insist on making blood bags this way. In this age of domestic food bag heat sealers and a wide variety of food bag plastics, cling film has no place in the blood bag world. A food bag can be cut to the appropriate size and shape, sealed with a heat sealer on all four sides, so that it now resembles a teabag, and presto, a blood bag for all occasions.

Teabag blood bags are great for cuts or stabs which do not involve prolonged blood loss. Unfortunately, stabbing or slashing certain areas can create slow and prolonged blood loss. Not all characters are as considerate as Mercutio in *Romeo and Juliet,* who exits after his stabbing, bleeding to death off stage. Some characters remain on stage, and for these a teabag will not suffice.

I first encountered this problem when working on a new play for the Traverse Theatre in Glasgow. A character had to be stabbed in the stomach on stage, and then slowly bleed from his wound, in full view of the audience, for the next 20 minutes of the show. My solution was to use a hospital "drip" bag. This was filled with stage blood and taped to the actor's torso. The wardrobe department did an amazing job with the actor's costume for, even though he only wore a t-shirt, the bag could not be seen, so well was it molded to his torso. The "trick" was for a blood teabag to be burst as he was stabbed, then, as he clutched his stomach in agony, the actor opened the drip valve and produced a bloody patch that magically grew as the show progressed.

Stabbing someone is relatively simple. A fake knife with a retractable blade is an easy solution. Unfortunately, these are now of the plastic toy variety due to an accident some years ago when a metal blade did not retract and an opera singer was accidentally stabbed (he survived). Since that incident, the health and safety people have been terrified of "real" retractable knives. There is a method of stabbing which does not require a retractable blade, body armour or padding, is totally safe, and yet looks very realistic. The only requirement is that the blade is not longer than roughly five inches – the size varies in relation to the size of the victim. The technique is very simple … but I am afraid I am not going to describe it. Taught properly it is safe, half-taught it is lethal. It was this method that I used for the stomach stabbing in Glasgow. So effective was the move in that production that, during a fight call before one of the shows, one of the other members of cast watched the fight and said that the move was too real, it was too dangerous. This foolish actor frightened the actors with his words, they lost their confidence, and the knife was replaced with a fake. The previously horrific move lost its power – I have yet to see a believable rubber knife.

Fights are dangerous. You are simulating the infliction of serious, if not lethal, bodily harm. That is why my job exists. I am there to make sure performers do not really kill each other, but appear to do so, thus ending dead but still breathing ... imperceptibly.

The CBQ is published 4 times a year by:
Sweet & Maxwell
100 Avenue Road
London NW3 3PF
Editorial queries (020) 7393 7000
Typeset by EMS Print Design
Printed by St Austell Printing Company

All submissions for articles for the CBQ should be sent to:
John Cooper Q.C.,
25 Bedford Row, London WC1R 4HD
jgcooper58@yahoo.co.uk
no later than January 10, 2011.

Merry Christmas to all our readers

423487