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Radical Changes in DNA Analysis

Emerging technologies in forensic genetics

Historic Sexual Offences

Effect of Delays

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VIEW FROM THE EDITOR

New Generation

EDITOR
John Cooper QC

I have just finished a weekend away advocacy training law students studying for, what I called the Bar Finals.

To say that I was inspired by their drive and enthusiasm would be an understatement.

These young people from different backgrounds studying at places all over the country displayed the talent and tenacity which would be welcomed in any profession. The fact that many expressed real ambition to come to the Criminal Bar only reinforced my determination to do what I can to protect the Criminal Bar as a diverse profession.

Of course, these students realized what a challenge making out at the Criminal Bar is in the present day and they listened carefully to the wise words of caution regularly directed at them. But if we are to prevent the Criminal Bar degenerating into its privileged and elitist model of only a few decades ago, these are the very people who we should be encouraging to seize the chance of becoming a part of the future generations of our profession.

For my part, I am fed up with the monotony of pessimism expressed by some. Yes, lets be realistic, lets give the practical advice, but then, when the next generation decide to take their chances we should encourage them, rather than foisting upon them our own dissatisfaction, bitterness or disappointment with our lot.

My work with a number of charities and voluntary organizations supporting the chances of students from diverse backgrounds to succeed, not only in the law, exposes me to the drive, talent and, yes, courage that is the preserve, perhaps of youth. We have a responsibility to inform it, but not to destroy it. ■

25 Bedford Row

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

Professionalism and Committment

CHAIRMAN'S COLUMN

Tony Cross QC

I suspect (but I do not know) that I am the first Chairman of the Criminal Bar Association who has ever been desirous of joining the 92 Club. This is no secret drinking den in any city or a private members club of any kind; it is as those who have not already switched off a club for those that have visited every football ground in England and Wales. I have but 16 left to complete. I have visited grounds in every corner of the kingdom and over the years have observed the differences and similarities between supporters of each club, but wherever I have been the passion for football has always been consistent.

In November, I joined a different Club. It is one that Mark Fenhalls and I have founded. It is now known as the 5 Circuit Club because in November Mark Fenhalls, Aaron Dolan and I visited each Circuit and met with representatives am now though in the six club because this month I have visited every circuit outside the SE. Myself, MF and Aaron met with Barristers and their clerks the length and breadth of the land. We were welcomed wherever we went by leaders, Heads of Chambers, CBA representatives, Clerks and Administrators who helped us better understand the difficulties faced nationwide by Counsel. We learned of the huge number of problems faced by Counsel practicing in crime in order just to get by and by the time we were finished my resolve had hardened to do whatever I can to fight for the independent Bar.

Our profession and our staff are committed to providing a service that has been undervalued by government after government. Yet everywhere we went we saw men and women of real talent doing their very best to see justice done – prosecuting and defending in the teeth of adversity.

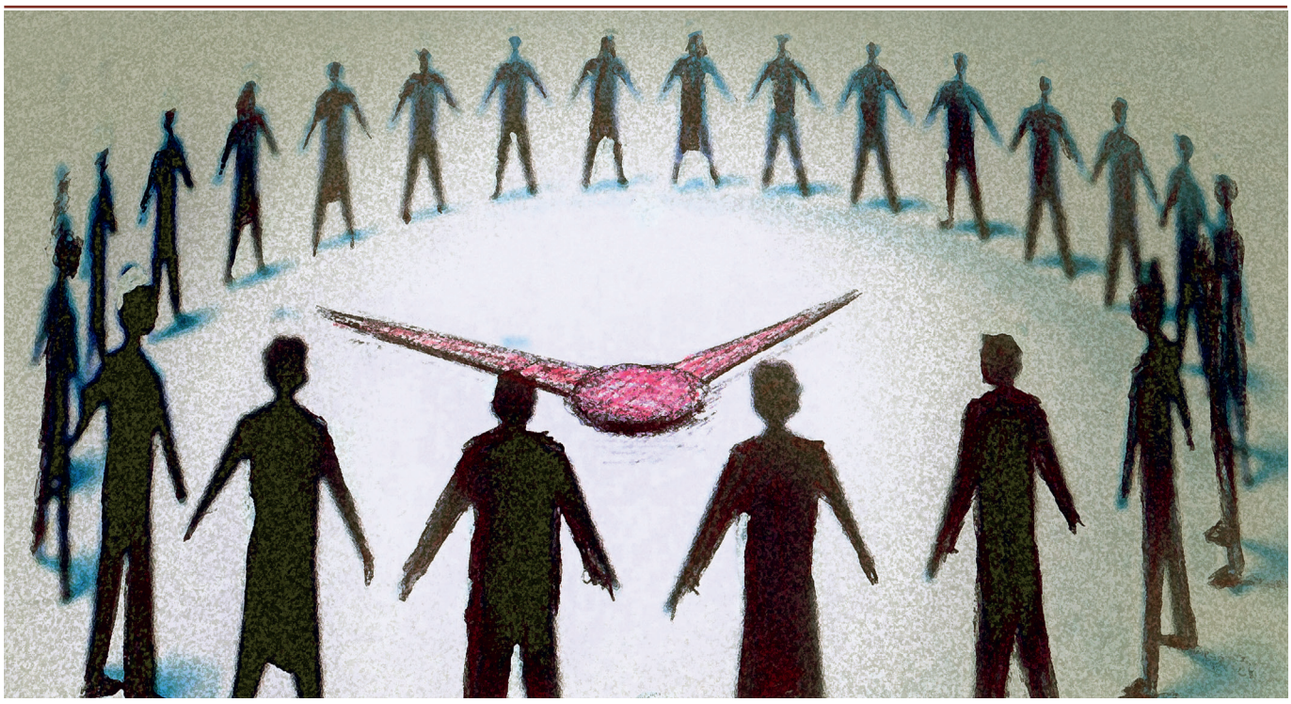
They like the followers of the football clubs in their region demonstrated a passion and commitment for the Bar. All they require is a fair day's pay, (paid promptly and in full) and the opportunity to develop their career and progress. They want to operate on a level playing field with their competitors and nothing more. Is that really too much to ask of a profession which has served this country for over five centuries? One thing though is certain about those members that we saw is that they now have a passion and commitment to fight their corner. By the time you read this I am certain that CBA membership will be at an all time high; our organization is better than ever before and we are able to respond quickly and effectively to any threat to our existence.

Wherever we went we found men and women of all seniority making a contribution; to Chambers, to circuit and to mess, to the Advocacy Council, to pupil training, to charity, to Kallisher, to the Bursary fund and to a myriad of other aspects of the profession. Men and women of real talent who are committed to ensure that the profession survives.

They and I refuse to accept that the profession is finished. We may be few in number but remember it is not the size of the dog but the size of the fight within it that is important. The Criminal Bar united together as a team will not be defeated.

I cannot end this note without adding my thanks to Nick Lavender QC. There have been good Bar Chairman and bad. It is often said that there have been those in it for their own good. Nick Lavender is not one. We, the CBA, owe him a debt of gratitude. It has been a privilege to work with him these past 12 months. If I were a Government Minister I would move very quickly and appoint him to the House of Lords and make him Lord Chancellor – we soon would have a cost effective and fully functioning Legal system, which once again would be the envy of the world. ■

Historic Sexual Offences and Stay Proceedings



Preface

Effect of delays

Contributor

Genevieve Reed

Assessing the effect of delay on criminal proceedings is an increasingly obdurate problem. Proceedings will be stayed as an abuse of process if, and only if, the delay means it would be unfair to try the defendant and the unfairness cannot be rectified through the trial process. This is by no means a new phenomenon but, in the wake of Operation Yewtree, it is an issue the courts are dealing with increasingly frequently. Accordingly, there has been a significant increase in applications for a stay founded purely on the basis of delay. The vast majority have been, unsurprisingly, unsuccessful. Against that background, it follows that many of these disgruntled defendants look to the Court of Appeal for justice. More surprising still that, despite the surge of cases in this area, there appears to be no clear, let alone consistent, guidance on the subject.

The courts have been eager to emphasize that any application to stay proceedings on the grounds of abuse of process will be dealt with in the same way regardless of the type of offence; historic sexual offences do not form a separate category for these purposes (*R. v. F*, see below). It is difficult to imagine, however, other categories of offence where a case would proceed following a 63-year delay (*R. v. D*, see below). There are, of course, many reasons why an allegation of burglary, for example, would not proceed after 63 years, not least because it is difficult to imagine any reason for the justification for the delay. But it is because of this that it is naive for the courts to suggest that historic sexual allegations are treated the same way as other types of historic allegation.

In this jurisdiction because the test for an application to stay is, arguably, too high, accordingly, it is only very rarely that applications, in any offence category, succeed. The added obstacle for sexual offences is that there is a particular reticence in staying proceedings on the basis of delay. It is frequently argued, with substantial merit, that a complainant in this type of case often has good reasons for a delay in reporting the offence to the authorities. But the fact the delay in reporting may be justified should not be conflated with the issue of whether the defendant can have a fair trial.

The Court of Appeal have become increasingly willing to find convictions unsafe on the basis of delay. This, however, does not necessarily assist the defence: first, the Court of Appeal has the benefit of having reviewed all the evidence; the Judge at first instance will have only heard the prosecution case. Secondly, the test applied in relation to whether a conviction is unsafe requires different considerations to that of an application to stay. In any event, as has been said by the Court of Appeal, these cases are so fact specific that any resulting guidance is bound to be difficult to apply in other cases. Defendants in these cases and those who represent them need more certainty about when their applications will succeed at first instance. These cases are imbued with emotion and points political. Strip

this away and it is difficult to see the justification in allowing some of these cases to proceed. The simple question is surely: can a defendant ever have a fair trial following a substantial delay?

The meaning of "fair trial" was reviewed in *R. v. J.A.K.* [1992] Crim LR 30, K, was alleged to have raped his sister 20 years prior to the complaint. Ognall J held that the period of delay combined with the absence of any evidence capable of corroborating the complaint meant that it was impossible for K to have a fair trial. Accordingly, a stay was granted. This decision was inconsistent with previous decisions and it was noted by commentators at the time that it was likely that experienced Judges would frequently reach different decisions in these cases. In fact, the reasoning usually applied and applied since this case is that the less consistent the complainant's account, the more likely it is that the defendant can have a fair trial.

The courts have, on the whole, accepted that delay will cause unfairness to the defendant. But it is apparent that courts are unwilling to allow a stay on this basis alone, sometimes speculating as to the effect of lost evidence (see the recent case of *R. v. Halahan* [2014] EWCA Crim 2079). This is surely a wholly unfair assessment. The courts ought not to speculate over what evidence *may* have shown, the court ought to make an assessment on the basis of what is before them and what effect this has on the defendant; if the courts are unable to make an assessment of what effect the lack of evidence has on the defendant, then surely the benefit of any doubt belongs to the defendant.

The court in *R. v. F* [2011] EWCA Crim 726, set out a number of propositions designed to deal with delay in these types of case. The appellant in this case had been convicted of committing sexual offences against his step-daughter and daughter. The delay in reporting the allegations was between 30 and 40 years. There were four broad periods of alleged offending set out in the indictment. A number of propositions emerged, one of which was that the court should stay proceedings if satisfied on the balance of probabilities that as a consequence of the delay in the case that a fair trial is not possible. This is an obvious proposition and lends no assistance to the defence.

Of more substance was the following: *In assessing what prejudice has been caused to the defendant on any particular count by reason of delay, the court should consider what evidence directly relevant to the defence case has been lost through the passage of time. Vague speculation that lost documents of deceased witnesses might have assisted the defendant is not helpful.*

The court should also consider what evidence has survived the passage of time. The court should then examine critically how important the missing evidence is in the context of the case as a whole [at para.37].

In this case F cited as unfair the unusual delay and the resulting loss of documents to corroborate his whereabouts and the death of the grandmother who could have provided useful evidence. His appeal was allowed on the basis that the court were satisfied that this was not mere speculation but could point towards dates provided by the complainants.

In *R. v. D* [2013] EWCA Crim 1592, D, who was 79, appealed against his conviction for a number of sexual offences against his three nieces and the sexual abuse and rape of his daughter. The offences spanned a period of 39-63 years prior to the trial. D stated that after leaving school he had worked in a colliery away from home until he served in the army for four years. He conceded that he returned to his parents' home whilst on leave. There were no existing work or army records to confirm D's account and no witnesses to corroborate his employment. School records that might have confirmed the dates of the complainants' summer holidays had been lost. There were also no other living relatives who could give evidence on his behalf.

D applied for a stay on the basis of delay submitting to the court that the absence of witnesses and documents had the cumulative effect of fatally prejudicing his defence and depriving him of a fair trial. His application was rejected, although the trial Judge accepted there was prejudice, he found the trial process would remedy any unfairness.

On appeal it was acknowledged by Treacy LJ that the delay in the case was "extreme even by the standards of courts in this jurisdiction which are used to trying allegations of historic sexual abuse." Treacy LJ added that "The length of the period of itself proves nothing beyond that historical fact. What is of crucial importance is the effect of such delay on the fairness of the trial and the safety of any resultant convictions". It was held, however, following *R. v. F* that "a stay on the basis of delay would be exceptional and granted only where a fair trial was impossible and any prejudice caused could not be remedied by the trial process". It was suggested that the missing documents would not assist the jury on the central issue: did D avail himself of the opportunity to abuse the complainants? His appeal was dismissed.

Where does that leave us? Success appears to rest on how vague the complainant is. So in circumstances where the complainant is unable to be specific about dates then an assertion that witnesses or documents may have assisted you becomes irrelevant as it is mere speculation. The issue before the jury is then, did the defendant avail himself of the acknowledged opportunities to sexually abuse the complainant at any stage. This produces a potentially perverse situation: could it be in the interests of the complainant to be as vague as possible to ensure that a case goes ahead? In reality, the defendant is unable to mount any form of defence: there are no documents on which to cross-examine the complainant, it may be impossible to expose any inconsistencies, particularly when faced with an extremely vague account.

When all is said and done we are left with precious little guidance, over and above that which was already well-established: if the delay means a defendant can no longer have a fair trial, which cannot be remedied through the trial process, then the case will be stayed. However, the inconsistent approach of the courts to this question is a source of puzzlement and concern. These cases are incredibly serious and, more often that not, there is good reason for the delay in reporting. There is a need, however, for clear guidance from the Court of Appeal to ensure that fairness is being assessed consistently. ■

Red Lion Chambers

Radical Changes in DNA Analysis

Preface

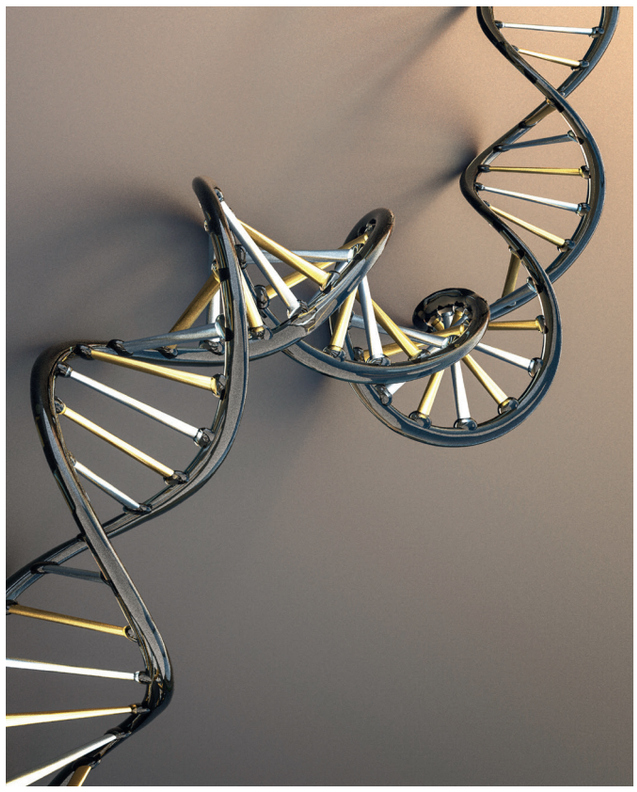
Emerging technologies in forensic genetics

Contributors

Kristiina Reed and Denise Syndercombe Court

Forensic DNA analysis is the scientific hero of our age. Its role as an invaluable investigative weapon and its ability to provide intelligence leads and crucial evidence has led profiling to be considered the "holy grail" or "gold standard" for forensic identification evidence. Whilst other forms of identification evidence can be problematic, and thus more readily undermined in court, DNA analysis in contrast can offer the most compelling and probative of evidence.

The European Forensic Genetics Network of Excellence (EUROFORGEN-NoE) project is a collaborative venture led by a consortium of 12 participating forensic genetic research institutions based in eight different member states. The aim of the project is to develop a European-based forum for research and development in forensic genetic analysis and to push forward with emergent innovations in forensic DNA analysis. To appreciate the innovations being driven by Euroforgen, it is useful to take a brief historical glance backwards to the previous three decades and set the current scientific technologies in context.



The Historical Context: the 1980's to Today

The DNA sequence of two unrelated people of the same sex is virtually identical. There is a about a 0.01 *per cent* element of DNA that is entirely unique and it is this minute section of the genome that determines many aspects of ourselves from eye colour to height, predisposition to disease, and possibly even behavioural traits. DNA profiling for forensic purposes was introduced in 1984 by English scientists led by Professor Sir Alec Jeffreys.

Jeffreys and his team identified a region within a particular gene, made up of a sequence, repeated within a cluster, known as a "tandem repeat". It was further discovered that there were a series of these tandem repeats within an individual's DNA and that the extent of the repeats is unique to the holder; effectively a "DNA fingerprint". Collaboration between Jeffreys and Peter Gill of the now closed Forensic Science Service established that it was possible to extract DNA from biological fluid and tissue such as blood, semen, saliva, skin; all common stains recoverable from crime scenes. This, together with the ability to profile the unique sectors of DNA was a seismic forensic innovation which would have far reaching consequences for criminal investigations and the wider justice system. The first use of DNA evidence in a criminal prosecution was the conviction of Colin Pitchfork in 1988. Gill had developed a technique, still used today, to assist in the separation of semen and female cells from a rape victim, which was to prove vital in this case. Serological tests had revealed a link between the rape and murder of Dawn Ashworth in 1986 and the rape and murder of Lynda Mann three years earlier. Blood typing of semen recovered from the bodies of both women showed the suspect to have blood group A and an unusual enzyme profile shared by only 10 *per cent* of the adult male population. A local man, Richard Buckland, was arrested on suspicion of the murder of Dawn Ashworth. During police interview he confessed to the crime related to Dawn Ashworth but denied any involvement in the rape and murder of Lynda Mann. Furthermore, Buckland was not blood group A. The police turned to DNA fingerprinting to assist with this contradiction in the evidence.

Jeffreys and Gill compared Buckland's DNA profile with semen recovered from the bodies of both women. The scientists determined that the crime scene samples matched each other but did not match the suspect sample. Buckland was released. Police investigators subsequently undertook a mass DNA screening exercise of all local men. This yielded no positive match, however eight months later it was learnt that Colin Pitchfork, one of the individuals required to participate in the exercise, had induced a friend, Ian Kelly, to falsely submit a sample on his behalf. Both Kelly and Pitchfork were arrested and the DNA fingerprints revealed a match between the crime scene profiles and that of Colin Pitchfork. Pitchfork was convicted and sentenced for the double murder in January 1988. It is significant that the very first conviction using DNA enabled both the conviction of a guilty offender and the exoneration of an innocent man who, for whatever reason, had falsely confessed. The introduction of forensic DNA fingerprinting was thus a hugely significant

event for the criminal justice system, fundamentally altering the landscape of investigative policing. At this stage however the technology was hampered by a number of limitations and challenges, not least that a reliable analysis depended upon the recovery of large quantities of good quality DNA. In crime scenes where only limited material was recoverable, or which had degraded due to exposure to the elements or attempts at elimination, the technology produced limited results. The laboratory process was also laborious and time-consuming, taking several weeks to complete, which could represent a crucial loss of time in the early stages of a police investigation. In the early 1990's a number of developments acted to consolidate the "DNA revolution" and DNA analysis advanced from being used on a case-by-case basis to routine deployment by forensic investigators. First, forensic scientists utilised the polymerase chain reaction (PCR) to target and amplify up small amounts of DNA, much like DNA copies itself in a cell. This led to the development of an enhanced technique, called DNA profiling, using very small repeated sequences of DNA, known as short tandem repeats (STRs). STR analysis examines how many repeats are found in specific unique locations on a DNA strand. The merging of these two techniques offered significant advantages: the ability to analyse far smaller traces of DNA and to readily identify mixtures of DNA. The ability of police investigators to recover and interpret DNA profiles from a far greater proportion of crime scenes therefore increased significantly. Alongside these scientific innovations, public interest and awareness in the opportunities offered by DNA profiling grew. This took the form of increased government investment for scientific study, greater support for the Forensic Science Service and the creation of a national forensic DNA database. While forensic science had developed a reliable method of profiling DNA samples deposited at crime scenes, this information was of value only if there was an identifiable suspect against whose profile comparisons could be undertaken. There was little that could be done to advance the investigation even with a profile, if the police had no suspect. The only option in such situations was mass screening exercises which were expensive, time-consuming and in any event not always an effective method of identifying an offender as the Pitchfork case had shown. It was recognized that a bank of offender and suspect DNA profiles with which to compare crime scene profiles would be of enormous value and would complement DNA profiling technology significantly.

The UK National DNA Database (NDNAD) was established on April 10, 1995 and was the first ever forensic national DNA database of its kind worldwide. As at March 31, 2013, the database held 6,737, 973 DNA profiles from individuals and 428,634 DNA profiles from crime scenes (*National DNA Database Strategy Board, Annual Report 2012-13*, Home Office). The value of the forensic DNA database is such that it is now the case that in 2013 over 60 *per cent* of crimes in which a speculative search is undertaken of the database for comparison with a crime scene sample, the police are provided with the identity of an individual for use as a potential investigative lead (National DNA Database Strategy Board, Annual Report 2012-13, Home Office). Not only does this give the police a huge time advantage in the detection of crime but it also allows for the early elimination of innocent people.

In June 2014, the Home Office introduced the new DNA17 profiling system which adds six markers to those currently used within the NDNAD. In addition, the new system is much more sensitive, increasing the value of profiles obtained from crime scenes.

Current Methods of DNA Analysis and Database Searching

DNA17, the profiling system used in England and Wales since July 2014, analyses 16 STR markers and provides an indication of sex. The benefits of DNA17 are that analysis of additional markers provides improved discriminating power.

The process is more sensitive enabling more usable profiles to be obtained from samples that are degraded or consist of only a handful of cells. Profiles may be complete, partial, or mixed, the latter comprising DNA from more than one person. Section 63AA PACE (as inserted by the Protection of Freedoms Act 2012) provides that where there is a power to retain a DNA profile, the profile must be recorded on the National DNA Database. Further, even where there is no power to retain the profile, the police may, nonetheless, enter the profile temporarily on to the database for the purposes of a speculative search (s.63D(5), PACE). The outcomes that a DNA database search may produce are:

1. Individual suspect profile to crime scene profile; in this scenario the individual is arrested, his profile is loaded on to the database and there is a match with another separate, perhaps historic, crime scene.
2. Crime scene profile to individual suspect profile; in this scenario, a biological sample is recovered from a crime scene, a profile is extracted and loaded on to the database which matches a previously, or subsequently, entered profile of an offender.
3. Crime scene profile to crime scene profile; this can provide intelligence as to serial offending behaviour.
4. Individual suspect profile to individual suspect profile; indicating the use of an alias by the suspect.

Full profile matches are the optimum result sought by investigators. Mixtures of DNA from two or more individuals may provide a considerable interpretative challenge to the scientist and the courts have not been assisted in a recent judgment ([2013] EWCA Crim2 Case no: 2011/04122/C2, 2012/03728/B1, 2012/02955/D4); this has allowed, in particular circumstances, for evaluative opinions to be presented to the court although there may be no scientific support for the opinions being expressed. The increased sensitivity provided with DNA 17 will mean that the courts will see more complex mixtures being interpreted; several statistical solutions have recently been developed so that more objective interpretations can be provided in the future.

When there is no match on the database, other techniques can be used. Familial searching works on the premise that DNA is inherited in equal parts from each of our parents. Thus, DNA profiles of a parent and child, and their siblings, may have much in common. A familial search can be used to produce a list of persons on the database who

may be relatives of the offender. The police may then use additional information, such as age and geography, to further narrow the investigation. Craig Harman was the first man to be convicted in Britain following the use of a link between DNA retrieved at the scene of a crime and the DNA profile of a relative.

In March 2003, Harman dropped a brick from a footbridge above the M3, which smashed through the windscreen of a passing lorry. The driver, Mr Little, suffered a heart attack and died after the brick hit him in the chest. DNA evidence was obtained from fingerprints left on the brick. A subsequent search of the NDNAD did not produce a match, but did identify a number of people with similar profiles, including a relative of Mr Harman. This intelligence enabled the police to identify Mr Harman as a potential suspect and an independent test of Harman's DNA and the brick confirmed the match, used as part of the evidence in court. Familial searches are only undertaken in the most serious of cases, they require prior authorization from the DNA Strategy Board and are subject to specific detailed guidance issued by the Association of Chief Police Officers. In 2012-13, a total of 33 familial searches were approved (National DNA Strategy Board Annual Report 2012-13). Familial searches are restricted because they represent a higher degree of intrusion into the private life of an offender and his relatives. It potentially involves police scrutiny and surveillance of innocent individuals and also has the potential to reveal family relationships that suspects and others may be unaware of. It is argued by civil liberties and privacy campaigners that this represents an unacceptable degree of state intrusion for the police to know more about our personal sensitive information than perhaps even we do about ourselves.

STR profiling is undertaken on DNA located within the nucleus of the cell. This is called nuclear DNA. A different form of DNA is also found in mitochondria, which are organelles within the cell but outside the nucleus – mitochondrial DNA (mtDNA).

MtDNA is passed solely through the maternal line of the family from mother to child.

The advantage of testing mtDNA is that it is present in many more copies than nuclear DNA and thus more likely to be available under conditions of degradation due to the lapse of time or exposure to adverse environmental conditions. Mitochondrial DNA analysis may therefore be harnessed to identify very old biological samples such as bone, teeth or hair or decomposed remains in which nuclear DNA is lacking, or when the number of cells are limited. MtDNA analysis was used in 1992 to confirm the bones exhumed from a grave in Ekaterinburg were the remains of the murdered Czar Nicholas II and the Russian Royal Family. It was also used in the successful prosecution of David Norris and Gary Dobson for the murder of Stephen Lawrence.

Two tiny hairs were among debris recovered from the Norris jeans. One hair was 1mm long and appeared to be bloodstained at one end but it was too small to send for DNA analysis. The other was 2mm long and was sent for mtDNA analysis and matched the profile for the maternal line of Mr Lawrence's family. Analysis of DNA on the Y-chromosome, present only in males and inherited from father to son, can be used to successfully identify the male DNA from a mixture of male and female material. It is particularly useful to investigators in sexual assault cases where semen has not been deposited, or where there could be multiple male contributors to a DNA mixture. Y-chromosome analysis is less discriminating than nuclear DNA analysis, as it is essentially identical in all individuals within the same paternal line, so it is largely used to include or exclude suspects rather than to provide evidence of positive identification.

Low template DNA analysis (a variety of proprietary names are utilized by different forensic providers to describe the particular technique that they employ) is a technique used to extract profiles from samples containing only a few cells, as might be associated with a fingerprint. Since its invention as "low copy number" (LCN) testing, which increased the sensitivity by increasing the number of PCR cycles to copy the DNA. Other processes are also used by analysts today to add sensitivity such as, for example, by introducing more DNA into the process or by removing chemical inhibitors that may be present. These enhanced techniques have had a number of successes, particularly in "cold cases" where samples were previously deemed too small to yield any viable result. Low template analysis gives rise to a number of evidential difficulties. In the process of increased sensitivity there is a corresponding increased risk of detecting environmental "contamination", which affects the accuracy of the results. Furthermore, the use of such microscopic sample size, sometimes involving only a handful of cells, makes replication and thorough peer review almost impossible.

The Future of DNA Analysis

Forensic DNA analysis introduced a step change in the ability to provide extremely strong evidence in criminal trials. What of the future however? What scientific innovations are unfolding now that the whole human genome has been sequenced and the new sequencing technologies become available to all? The ability to delve into actual sequence that comprises the repeat of an STR, or interrogate the whole of the mtDNA genome, means that we will be able to uncover differences that were not apparent before. Of huge significance for the criminal justice system is the emergence of cutting edge technologies which present a hitherto unexplored world of valuable forensic intelligence and investigative clues. Identification of phenotypic characteristics from DNA samples is one example of the new technologies being expanded through the Euroforgen project. A phenotype is the physical expression of information contained within the gene. There are genes responsible for hair colour, eye colour, height, stature, skin type, even shoe size. A phenotypic trait is thus the physical manifestation of differences in our physical appearance. The significance is that it can enable investigators to obtain phenotypic predictions from DNA analysis of biological samples recovered from crime scenes. For example, the HIrisplex Test, developed by Manfred Kayser and his colleagues at Erasmus University can predict the hair and iris colour of a suspect from DNA analysis.

There are similar tests, each in different stages of development and validation, which offer information about hair type (ie, curly or straight), skin tone and pigmentation,

body height and stature and also facial shape and structure. Some of these tests are reasonably well advanced and can provide predictions with significant certainty.

Others, such as height and facial modelling tests, are still in their infancy and are some way yet from being operational in police work. While analysis of the human genome could also be used to interrogate areas of the genome involved in disease, scientists working within Euroforgen work only with phenotypes that are public (visible to all) rather than using methods that might reveal private and sensitive information about an individual.

Geographical ancestry clues can also be derived from DNA analysis so it is possible to infer from a crime scene sample whether the donor is from a particular geographical area. Dr David Ballard who is involved with Euroforgen with the team of scientists at King's College, London, says "the research we are conducting at the moment is allowing us to predict with a high degree of accuracy (and increasing precision) the geographic ancestry of an unknown DNA profile, eg, does the person who left this sample have East Asian (for example, Chinese) roots or do they have ancestry deriving from Western Europe?" This analysis looks at small changes in the DNA sequence (single nucleotide polymorphisms - SNPs) that are deep rooted within populations from different areas of the world.

As an individual ages, regions of our chromosomes degrade over time and this process is being investigated for use as a forensic marker for identifying the biological age of an individual. Scientists have revealed that epigenetic methylation mapping of the genome at particular areas of the DNA can provide an accurate and cost effective measurement of tissue age and presents the possibility of a technique which offers police information within a five-year bracket about the age of the donor of a stain left at a crime stain which is extremely valuable intelligence for investigators. Euroforgen scientist Athina Vidaki says, "DNA modifications change over time according to environmental exposure, ageing, medication, smoking, weight and so on however more and more studies are demonstrating the usefulness of DNA modifications and a new field of Forensic Epigenetics has emerged. Our current research at Kings College, London, focuses on identifying a bloodstain donor's biological age. These processes are very complex and further research is needed to validate suitable tests so that it can be applied in a forensic setting however it is agreed that we are in an exponential phase of the number of 'clues' we can derive from a DNA sample."

Information regarding the tissue source of a crime scene sample is highly useful information. For example, determining whether the source of the DNA is semen or saliva can help police reconstruct how a sexual assault transpired, especially in cases where there are no sperm found. It also might provide information of value to the defence in sexual offences where the defendant asserts consent. While the DNA in each tissue is the same, gene expression patterns are tissue specific, enabling police to reliably identify the bodily source of a crime scene stain even where it is not immediately apparent to the eye. The process, known as messenger RNA (mRNA) profiling, has advantages over conventional methods involving presumptive chemical tests. RNA can be recovered alongside DNA extraction from the same sample, thereby reducing sample consumption, an important factor where only very tiny samples have been recovered. Standard tests are not able to differentiate some of the typically encountered tissues such as menstrual blood and vaginal secretions but this is now possible using molecular techniques like mRNA profiling. At present, a system has been developed which can identify blood, saliva, semen, vaginal secretion, skin and menstrual blood, either in individual stains or in mixtures, offering another step forward for forensic science. Euroforgen scientist Titia Sijen of the Netherlands Forensic Institute says: "This test is regularly updated with markers of improved specificity or sensitivity. In addition research is looking to be able to identify other cell types, such as nasal secretions, which can be put forward as an alternative scenario to explain the presence of DNA, or internal organs that may be encountered in violent crimes. Showing the presence of certain organ tissues assists in the reconstruction of the course of events."

The benefits of these scientific advances are immediately apparent. Currently, DNA profiling allows for the identification of a person who is known to investigators, either through being identified as a possible suspect from other forms of intelligence or via a speculative search of the DNA database. The new technologies being progressed and expanded by forensic scientists within the Euroforgen network raise the possibility that in future we won't need an actual eyewitness to a crime in order to produce a picture of how the suspect looks. Instead, investigators will be able to generate a "DNA photo" detailing a suspect's phenotypical characteristics, biological age, and geographical ancestry. The potential value is enormous. It enables investigators at a very early stage in the investigation to narrow the pool of suspects, to prioritise police resources and to confirm or refute potentially unreliable eyewitness evidence. Of equal importance, it can help eliminate innocent people from investigation and avoid unwarranted and intrusive police scrutiny of their private lives.

DNA profiling has evolved at an accelerating pace and is now embedded within the criminal justice framework. The power of DNA profiling to provide both highly valuable investigative intelligence and subsequently crucial evidence is beyond doubt as the convictions of the Stephen Lawrence killers attest. We are now in the moment of glimpsing a brilliant new future of DNA analysis ahead. Cutting edge technologies are advancing rapidly through the collaborative efforts of scientists such as those within the Euroforgen project and they promise to change the landscape of forensic DNA profiling in a similar manner to their forebearers some 30 years earlier. ■

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Great Criminal Advocates and their Legacy

Preface

Bar Conference 2014

Contributor

Nigel Pascoe QC

Advocacy matters and great advocates are worth remembering. That was the theme of the Criminal Bar Association's well attended set piece, which was a mixture of reminiscence, analysis, advice and very good stories. Tony Cross QC as Chairman set the scene with spot on deadpan humour and John Bromley Davenport QC told most of the stories, as well as giving pithy introductions to the other circuit speakers. He tells them very well indeed, many from Northern heroes of another age.

That allowed the legendary F E Smith to take the stage again, Advocate, politician and Lord Chancellor, he was outspoken, quick witted and utterly fearless with "ebulliance and charm." A leap then to a modern hero: George Carman QC, the ultimate jury advocate, both a great trial lawyer and a deadly cross examiner. Other heroes included Sanderson Temple QC, supremely eloquent and spellbinding with a wonderful command of language and the much loved Rodney Klevan QC, who had achieved astounding jury successes.

Elwen Evans QC of the Welsh Circuit said that she would leave stories to the others and chose instead a sparkling and spirited analysis of principles. We watched a highly intelligent and persuasive presentation of advocacy in action, which I thoroughly enjoyed. One snippet: Advocacy without goals or reflection is nothing. As an advocate, Gareth Williams QC was supreme as a master of plain unadorned persuasion. Just think by contrast of the box ticking form-filling approach to dealing with Sentencing Guidelines. At this point, your correspondent just stopped himself

from cheering aloud. Gareth Williams was capable of "as consummate a piece of craftsmanship" as you can imagine.

In a very impressive performance, Peter Joyce QC managed to isolate key principles with stories of fearless advocates and friends from the Midland Circuit. He stressed and illustrated the need for simple language. Clarity is everything and usually there is only one really good point in a case. Great advocates have the unerring ability to spot it and unerringly jettison the irrelevant. Stories also from the North Eastern Circuit, of course, of Gilly Gray and Wilf Steer, for this session would have been bereft without recognition of those truly great silks. He paid a warm tribute to a close friend, the late and irrepressible Sir James Hunt. He also picked out a modern advocate, David Crigman QC as the best advocate he knew: using simple language, his course is clear, "unfazed by any judicial intervention." Praise indeed.

Finally your correspondent tried to capture a little of five great Western Circuit advocates: Joe Moloney QC, Peter Rawlinson QC, Patrick Back QC, Sir Neil Butterfield and Michael Hubbard QC, lost recently before his time. Jeremy Hutchinson QC also stands in that company and happily is still with us. I mentioned the value of distance in cross-examination, illustrated supremely by Joe, but also particularly by John Spokes QC in my generation. Then a short roll call of circuit silks: the humanity of Hamden Inskip and the ferocity, in the right case, of David Owen Thomas. The charm of Alan Rawley and David Webster and the undoubted eloquence of David Elfer. And a final word about Florrie O'Donaghue, even more entertaining outside court until late into the small hours.

So nostalgia was part of the backcloth, but all speakers were united on the value of an art, difficult to describe but plain when practised well.

Its fascination is why we keep on keeping on … ■

This article first appeared in the December issue of *Counsel*; a full report of the Annual Bar Conference can be found in that issue and on Counsel Online.

Testing Testing…

Preface

What is in the public interest?

Contributor

Richard Gibbs

In one of the earlier episodes of the seminal 1970's TV show *Yes Minister* there is a scene where the Minister for Administrative Affairs, The Rt Hon. Jim Hacker MP is becoming increasingly concerned about a government lead board of inquiry and the report that it has produced which has as its title a damning reference to the Departments' incompetence. Understandably, Hacker is worried by the title but in a characteristic flair, Sir Humphrey responds; "Ah, but minister, this is excellent news! Whenever a civil service report refers to something in the title it means that the body of the text has no reference to it whatsoever; its in the title so everyone can forget about it."

Whether that is true of government reports or not, I shall leave to the avid authors of that sort of literature but there is arguably a touch of the Sir Humphries in evidence around the deployment of certain legal tests currently in operation, particularly the Full Code Test for Crown Prosecutors. Practitioners will be familiar with its two stage application; the evidential stage and then the public interest test. It is the second of those two that this article will focus on and whilst I don't seek to propose a specific solution, a degree of recognition of the need to address the status quo would be a good starting point.

The Test

The evidential limb of the test is not a straightforward one and there are many cases which founder on an assessment of the evidence, whether that be its admissibility, reliability or credibility. There are a great many cases which alter as they progress once these issues are examined and whilst there will always be points of divergence between defence and prosecution – occasionally between CPS and instructed counsel too – the essence of the evidential test is relatively objective in its employment. Whilst questions of credibility and admissibility are often opinion driven and the outcome is to some extent based upon the assessment of an individual, the overall rubric of this limb of the test is clear; it comes down to a question of the veracity and employability of the evidence in the case.

Arguably more nebulous is what happens when that limb is satisfied and we move on to consider the public interest test. The CPS set out clearly what that test should encompass and what prosecutors should have in mind when making assessments as to whether the test is passed or not. However, are the seven points of

consideration which it is proposed collectively make up the public interest test right? Are they actually a genuine assessment of what is in the *public interest?* The thrust of this article is that they are not; that what forms the public interest is both a nebulous and objective question whilst the application of the test in the way it has come to be accepted is a subjective and delineated question. Are we, rather like the *Yes Minister* plot, dealing with the "public interest" in the title and then ignoring its mechanics in the body of the test? I believe we are.

What Is The Public Interest?

According to the *2014 Random House* dictionary "public interest" is;

"1. The welfare or well being of the general public; commonwealth.
2. Appeal or relevance to the general populace."

Avoiding any torturous definitions where possible, it appears that the question of what is or what is not in the public interest requires a wider view than that needed for the evidential test; that is a question of what the evidence provides and how it can be applied. It is narrow in its focus on the case at hand and subjective in every sense. However, the public interest test surely requires a broader perspective – at base, it calls upon the prosecutor to ask what is more widely the right thing to do; the right thing by the *public.* But is that what the mechanics of the test suggest?

The full test, together with the questions prosecutors are required to ask is set out clearly at: http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html and begins with, "How serious is the offence committed?" Superficially, that appears to be an objective question and it is not hard to see how there could be a direct application from the answer to that question to issues of the public interest. However, the test requires the prosecutor to include amongst the factors for consideration, the suspects culpability and the harm to the victim by asking themselves, broadly, what is the level of culpability of the suspect and what are the circumstances of and the harm caused to the victim?

Again, at first blush, there appears to be something of an objective hue to these questions but on second reading, they are rooted firmly in a subjective approach; this is a series of questions about the case specific facts and do not have a clear application to wider questions as to what is in the public interest.

But it is not just these questions that apparently provide the answers to whether something is in the public interest; the remainder are variously:

d. Was the suspect under the age of 18 at the time of the offence?
e. What is the impact on the community?
f. Is prosecution a proportionate response?
g. Do sources of information require protecting?

I don't think it would be very hard to cut away at each of these and argue that they are, again, specific to the facts of the case though both e and g appear to make more broadly based assessments of the circumstances and appear to be geared to what would be a more genuinely objective public interest appreciation.

Its In The Title But Where Else?

If, for one moment, we concede that there must be an assessment of both the subjective and objective facts in determining whether a prosecution should go ahead – as surely there should – then where is the essence of the public interest analysis in the current test? Anecdotally, it is clear that both the CPS and individual prosecutors employ a genuine desire to do right by relatively vaguely defined concepts of "the public" but it is quite clear that someone could apply the current second limb of the test fully and with clear reference to each of the heads of consideration and the seven questions required by the Full Code Test and state that a prosecution was certainly in the public interest whilst actually having never seriously considered anything other than the fact specific, subjective questions relating to the case in hand. In other words, the satisfaction of the test is pyrrhic.

Overwhelmingly in my experience, the prosecutions brought before the Crown Court are matters which are deserving of the time and consideration of the court and a jury. That many matters do not come before the courts is more a result of the existence of alternative tribunals or circumstances, but we should not shy away from the fact that whilst we say full throatedly that the test applied is comprised 50 *per cent* of a public interest test, that is intellectually dishonest.

All of us who practice in the criminal courts have encountered situations where a prosecution is made out evidentially but the facts militate against a prosecution because of the wider issues; perhaps it is overwhelmingly obvious that witnesses will not attend, or if summonsed will not give usable evidence; a voluntary statement may have been made by a complainant which, whilst falling short of a retraction, makes question of whether there should now be a use of court time one subject to a massive question mark. However currently, the application of the public interest test allows these questions to be answered wrongly. It is all well and good focusing on the questions which the second limb of the test poses, but let us be honest; these do not form an adequate assessment of the public interest. Objective and subjective tests and questions should not exist in isolation here but it is easy to use the subjective and partial questions which make up the current test to conclude that something is in the public interest when it is actually not.

We can all win the wordplay arguments this allows us to fight when called upon to do so but perhaps it is time that we were a little more intellectually honest and less conceptually lazy; prosecutions are not in the public interest if the interest of the public are a secondary consideration to the specific details of the case. What we have is an evidential test and an evidential applicability test. As Sir Humphrey knew and as Jim Hacker should have realized, just because its in the title doesn't mean it's actually anywhere else. ■

Barrister, No 5 Chambers Birmingham

Secret Trials

Preface
Open Justice

Contributor
Dan Bunting

A year ago, whilst it was accepted that, on occasion, some aspects of a criminal trial should be heard *in camera* and some witnesses should be anonymized, it is unlikely that anyone would have thought that a whole trial could ever be heard behind closed doors. Even more so if you add in the fact of there even being such a trial would be withheld.

And then, earlier this year, the news broke: this is exactly what was planned. The case was (perhaps inevitably) terrorism related.

We only found out about this when the case was taken to the Court of Appeal by the media. The original order of Nicol J was that the entirety of the trial would be in private, along with the names of the defendants who were anonymized as AB and CD.

The appeal was heard on June 4, and was allowed in part. The Court of Appeal held that the vast majority of the proceedings would be private. However, the swearing of the jury, the reading of the indictment and the taking of the verdicts could all be done in public. Additionally, part of the Judge's introductory remarks to the jury, the prosecution opening and (if applicable) sentence would also be. So, whilst we know that one man is saying that he had a reasonable excuse for possession of material on a memory stick, we don't know why he is saying that.

As an additional safeguard, a new procedure was set out that allowed certain accredited journalists would attend most of the trial, but the notes that they made would be kept locked in court under strict conditions.

In a victory for "open justice" the Court of Appeal (in a decision given in writing, with an overview of the reasons – effectively a mini-judgment with a full one to follow, another first) concluded that the defendants should be named, and so we know the two defendants are Erol Incedal and Mounir Rarmoul-Bohadjar. Both were charged with an offence under s.58 of the Terrorism Act 2000, with Mr Incedal facing a further count under s.5 of the Terrorism Act 2006 and Mr Rarmoul-Bohadjar one of possession of false ID documents with intent. When the trial started, Mr Rarmoul-Bohadjar pleaded guilty and, after a four week trial, Mr Incedal was convicted of possession of a bomb making manual, but the jury could not agree on the other charge. He faces a re-trial next year. The newspapers managed to report enough of the case to give an overview of the allegations, even if we do not have a full picture of what criminality was alleged.

Then, in October, we have the Lord Chief Justice going on the record at his annual press conference as saying that:

"I really passionately believe in open justice and justice that is not open is not good justice. There may be wholly exceptional reasons why you can't say very much more than what someone is charged with but I think anonymity and the nature of the charge, it is difficult, as the Court of Appeal said, to conceive of circumstances in which that could ever arise".

A year later, whilst we cannot say for sure that we will never have a secret trial in this country, it would seem that the events of 2014 seems to have stalled that experiment. It is likely that any attempt to have a full framework for secret trials will have to come from Parliament.

The concern will be that what is exceptional, will swiftly become routine. As with Special Advocates, after a brief period of anxious consideration, it became part and parcel of the judicial furniture. We have to always keep a sense of proportion – we are nowhere near the realms of Kafka, or the closed trials of the former Soviet Union, but open justice is important.

Most days in court I play to an empty gallery as, I suspect, do most courtrooms in the land. But the knowledge that there is a recording that can be made public, or that at any moment the door could open and someone can come in to watch from the public gallery, is an excellent way of keeping everyone involved in the system honest. The price of freedom being eternal vigilance, the *Guardian* should be applauded for having brought this case. ■

Barrister, 2 Dr Johnson's Buildings

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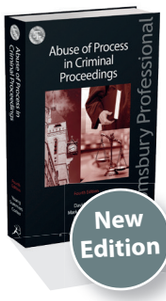

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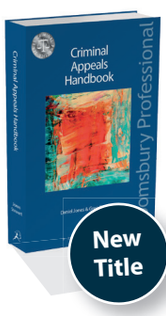

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