The last 10 years of historical abuse allegations a wasted decade in restoring balance in our justice system

Mark Barlow and Mark Newby[1]

Allegations of past sexual abuse continue to create enormous challenges for the criminal justice system. With both domestic and care home cases presenting related but different difficulties to those accused of such emotive crimes. The natural desire to bringing to justice the perpetrators of such crimes continues to compromise the individual's right to a fair trial . The last 10 years have arguably marked a further decline in the prospect of those falsely accused being able to gain a fair hearing through the Criminal Justice System.

It was over ten years ago that we prepared a paper called 'The Challenges of Historic Allegations – The Way Ahead."[2] In that paper we identified key features that required urgent attention. Sadly, most of those features remain unanswered, concerns about the conduct of the police in their investigation of historic allegations, together with the underfunding of the CPS and the Defence, leaves us today with an even greater prospect of miscarriages of justice occurring than ten years ago.

The Historical Perspective – Why is this so?

It important to pause and reflect upon how society in modern Britain has changed. We share a society where gratification must be instant. Mobile phones, the internet and social media has altered the way that we, as individuals perceive ourselves. The increased use of social media feeds the instant need for new stories.

We have become a society where blaming others has become central. Allegations are fed by social media in a way in which control by the justice system has become extremely difficult if not impossible to manage. Repeated media stories over sexual abuse have created a febrile atmosphere which has had an impact on how cases are investigated, and justice is delivered.

[1] Mark Barlow is a Practising Barrister https://www.linkedin.com/in/mark-barlow-709b4a3b/ Mark Newby is a Solicitor HCA https://www.qualitysolicitors.com/jordans/our-people/mark-newby

[2] https://crimejottings.com/2011/01/27/the-challenges-of-past-historical-allegations-of-sexual-abuse/

Please do not get us wrong, abuse has happened, it is happening, and it will continue to happen. Our awareness of the dangers of such sexual abuse against young and vulnerable individuals is greater and as a society we now have in place 'safeguards' to detect and, hopefully to prevent those who prey on the vulnerable in our society. Unfortunately, we have let our natural revulsion against such abuse to damage the system that was designed to convict the guilty and protect the innocent.

We have allowed others who shout the loudest to alter what was a fair and just system (albeit imperfect), into a system that has become misdirected, is starved of investment, and lost sight of its overall purpose. This leaves in its wake, destroyed lives, resentment and lack of trust in justice.

Time and again we have failed to learn important lessons from the past. We have been side tracked by emotive arguments and knee jerk reactions.

The evolution of the position

It was in 2002 that the Home Affairs Select Committee recognised that the Care Home retrospective operations had created a new genre of miscarriage. Around that time, the successful appeals in Basil Rigby Williams and Mike Lawson began to add support to the campaign of groups such as FACT [Falsely Accused Carers and Teachers] and the interest in miscarriages resulting from over enthusiastic police operations into Care Homes. R v Mayberry [2002], R v Burke [2005], R v Anver Sheikh [2006] and R v Joynson [2008] heralded the start of judicial recognition of the real dangers that existed in historic cases and the lack of material to defend serious sexual abuse allegations. There were cases where the Court of Appeal refused to extend the principles in those earlier cases. We reached a situation where police forces were not conducting retrospective investigations into such institutions. The fight for justice for those who had been earlier convicted continued, meeting with patchy success.

Then, the whole situation surrounding allegations of past sexual abuse began to resurface. The political move to give victims of crimes more of a voice within the justice system began to change the way the law operated. As it gathered momentum,

the possibility that false allegations may also be made, was conveniently pushed to the back of the agenda.

The very lessons that we should have learnt back in 2002, were brushed under the carpet, together with those who had unfortunately been convicted of such historic cases and who were now firmly entrenched behind bars. The police, CPS and the Courts were slowly being conditioned that all complaints of sexual abuse were true. The police changed from investigators into mere recorders of such allegations, with no or little interest in challenging what was being said, let alone seeking evidence to support the accused. Inconvenient truths or facts were simply ignored in the rush to 'believe' the victims. The Courts generally fell into the same trap. They should have been the bastion of fairness and the protection of all, but joined the rush to endorse the fresh approach of 'believing'. Like a new religion, the desire to be seen to be supporting the 'victims' blinded those responsible for ensuring fairness and guarding against miscarriages.

As this fresh approach was gathering considerable pace the Saville scandal hit. This led to an explosion of media activity which in turn was fed by political interference. This resulted in Operation Yewtree being set in 2012. Max Clifford, Rolf Harris, Gary Glitter and other media personalities began to fall. Then came the Dave Lee Travis and the Paul Gambaccini affairs. The lessons from the past, not learnt had once again come back to haunt the legal system.

It was this lack of faith in the integrity of the Police that finally exploded publicly in the wake of Operation Midland. Set up in 2014, the whole investigation focused upon the very top of society. It was now the turn of the politicians and pillars of society to be accused of serious sexual misconduct and murder upon the simple word of an individual called Nick. An individual who the Metropolitan police publicly stated was credible and true. Harvey Proctor, Granville Janner, Edward Heath, Leon Britten and Lord Field Marshal Bramall were each accused of being part of a ring that attended Dolphin Square, London and where involved in the abuse of boys and murder. The media frenzy was further stoked. At last clear evidence that even the top of society were misusing their power was an idea irresistible to the press, no matter how false it actually was.

Once again, lessons that should have been learnt, were not. Perhaps the height of it was the ill-judged episode that arose over the search of the home of Sir Cliff Richard in conjunction with BBC coverage. The fallout from that case is well known and demonstrates how we had fallen.

Back to Operation Midland. Nick was Carl Beech. In July 2019 he was tried, convicted and sent to prison for 18 years for perverting the course of public justice. His accounts provided to the police were all false. He had even claimed that he had been abused by Jimmy Saville and was awarded £22,000 from the Criminal Injuries Compensation Scheme. Yet, despite the seriousness of what he was saying, and ignoring the inconsistencies, the police ploughed on, wasting valuable resources, in order to be seen to be "believers". Sir Richard Henriques, a retired High Court Judge commented that numerous errors were committed by the police and that the presumption of innocence appeared to have been set aside. Again, the lessons from the past were ignored. The very foundation upon which our justice system is supposed to be based upon, the police investigation, was so distorted, no wonder that the confidence in the justice system, has been so damaged.

So, we now come full circle. The collapse of Yewtree and Midland, the focus of the police on believing "victims" without question together the fundamental failure to carry out a proper investigation, all demonstrate that the challenges that do exist in these difficult cases still need to be addressed. More importantly, it is time that we get back to the basics within the law. We need to examine what the purpose of the criminal law is and its very foundation. As Lord Woolf LCJ commented in R v Bell [2003],

"The heart of our criminal justice system is the principle that while it is important that justice is done to the Prosecution and justice is done to the victim, a finer analysis the fact remains that it is even more important that an injustice is not done to the Defendant. It is central to the way we administer justice in this country that although it may mean that some guilty people go unpunished, it is more important that the innocent are not wrongly convicted."

The balance between the rights of victims and those of the accused is never going to be an easy task. The competing demands and expectations on our justice system, resulting in an increasing cost to the public purse and the potential for undermining public confidence in our legal process justifies an extensive review of how we deal with these difficult cases.

Many lessons could have been learnt over the years concerning the conduct of retrospective investigations into care homes, not only by the police but also the legal establishment. Past criticisms from the media, lawyers and Parliament led to the acceptance that a new genre of miscarriages had been created [HASC Report 2002]. History has shown that abolishing the need for corroboration, together with the shift in the law of similar fact evidence, has paved the way for an explosion in the prosecution of historic sexual offences and the charging of significant numbers of care home staff with abuse. It has simply become a numbers game, where the greater the quantity of accusers or offences the more difficult it is to challenge and, ultimately, this seals the fate of the accused.

In the care home investigations, it is this numbers game which becomes an important feature in the prosecution. This is an issue which has recently been subject to research within the CCRC by *Hoyle and Sato [2019] Reasons to Doubt Oxford University Press* which reinforces our conclusions in our last paper that we are in danger of convicting simply due to the number of complainants on the indictment not on the quality of the evidence .

The numbers game supports the simple question as to why would so many individuals complain about the same person if they were not telling the truth i.e. *"There is no smoke without fire."* With no possibility of evidence of deliberate collusion between these former residents it provides strong supporting evidence that the accused is a sexual abuser.

This of course ignores the reality of the situation that contamination has already occurred via the media and the expectation by former residents that they will be seen by the police. That despite the best efforts of those investigating innocent contamination has tainted these allegations long before they come to trial. These are

complex issues which the law has largely ignored. Within the domestic setting multiple complaints can arise that cross between the generations or between the children of that family. Again, it is that numbers game which creates the nightmare for the defendant's legal representatives. The view that they all could not be lying disguises the complexities that exist in domestic relationships and the acceptance of the principle of similar fact evidence has taken away the objective review of those complainants.

In both care home and domestic abuse cases, the need to question the quality of the complainant's evidence is lost under the sheer volume of complainants and the failure of the law to recognise the ease at which similar sexual complaints can be made by several individuals.

It also significantly ignores the significant impact of Social Media and the way people communicate now. This means that it has become exceptionally easy for people to discuss their evidence and share their accounts under the radar. In turn there has been the associated impact of digital evidence and its non – disclosure leading to the well reported fall out of cases such as Liam Allen and the recent attorney generals review along with the report by the CCRC on a sample of closed cases.

The Police Investigation

Since the initial police operations into care homes a lot has been learnt by all concerned in the legal process. The scrutiny of the Home Affairs Select Committee [3] highlighted several concerns arising from the conduct of such enquires and resulted in the issuing of guidelines to officers in charge of operations. Leaving aside the loss of important historic records one concern which has consistently arisen is the danger of contamination.

Given the reliance upon similar allegations as being supportive of the case against a care worker or teacher, contamination becomes an important feature at the trial and the subsequent appeal. As an investigative tool, the trawling and interviewing of

[3] Home Affairs Select Committee Fourth Report "The Conduct of Investigations into Past Cases of Abuse in Children's Home" 22/10/02

former residents and staff was essential in building up material upon which a case could be presented. But the trawling activity occurred in an environment where the very nature of the care home cases, and the publicity they attracted, meant that everyone who had ever been in care was aware that police operations were ongoing. The dangers inherent with this process was recognised by Latham LJ in R v Mayberry [2003] [4] when he observed

" the particular problems that were identified by the Home Affairs Committee, quite apart from the problems created by delay itself, relate to the fact that in many cases the evidence is produced by trawling for witnesses which caries with it the risk of instilling into those who are providing the information, in effect, the indication that certain answers may be expected by those who are making the inquires. The fact is it is not easy to be able to make a proper inquiry into the way in which the evidence has ultimately emerged in a way which enables a court to evaluate the quality of the evidence satisfactory. There are also problems that arise as a result of the fact that in many such cases a number of allegations are tried together with the inevitable consequence that there is the prejudice to a defendant of what may appear to be the coincidence of similar fact."

Of course, the approach by the Police has adapted and changed so no longer is a traditional trawl used, but what is commonplace is direct targeting of any former resident referred to by a complainant to bolster the original complainants account. This then invariably leads to further allegations by the new witness and so the pyramid is constructed. All contributed by the innocent contamination of investigating officers who invariably act as both investigator and welfare officer.

So, the dangers of innocent contamination should not be underestimated. It is essential that strong safeguards be put in place to ensure the safe collection of evidence, but also the means upon which they could be tested. Police Officers, often due to a lack of resources, were being asked to act as both Interviewer and Welfare Officer to complainants. Then, the same officer was responsible for interviewing several potential victims or witnesses. The result of such practices was the real risk of

[4] [2003] EWCA Crim 782

innocently contamination of the evidence in the case by that single officer. This has remained a common feature to date and in that regard few lessons have been learnt.

There is strong notional evidence that such contamination has occurred and has taken many forms. The most severe evidence has come from over enthusiastic police officers telling witnesses, before they gave their evidence, the name of the accused and the allegations made by other witnesses. The authors of this paper have seen examples of witnesses being allowed to give their evidence in the presence of each other, of witness statements being circulated amongst witnesses, or simply too much information being given to witnesses during the cross over role of witness support. However, due to the lack of any independent verification of what occurred, many such bad practices have not made it into the public domain.

The demand on resources and the management of complex investigations creates difficulties for the Senior Investigating Officer. Given the importance and potentional of innocent contamination occurring during the enquiry, procedures to ensure that cross contamination does not occur must be a priority to establish good practice in any Operation.

One vital way to move forward with this, building upon one of the recommendations of the earlier Home Affairs Select Committee is that complainants and significant witnesses should be subject to recording either by audio or video of all their evidence and that this should take place from the point of first disclosure. This would be a crucial and important step forward and in fact answers serious perceived concerns over evidence collection. Again, there has been little progress over the last 10 years and largely the reality is that the only video recording that takes place is during the actual complaint interview, by then the potential damage is often done.

The Government in its reply to the Home Affairs Select Committee Report [5] did not close the door to the recommendations for such an approach. “Although we feel that these recommendations are not fully justified, we are not closed to the possibility that there could be an argument for introducing audio or video tape recording, if it can be

[5] Governments Reply to the Fourth Report on the Conduct of Investigations into Past Cases of Abuse in Children’s Homes [2002]. [2003]

established that there is clear justification for the resources that would be necessary, and if it could be fairly defined which cases it should apply to. Improving the quality of witness evidence is clearly something that the Government supports, and recording could be of significant value in improving the quality of prosecution decisions."

In fact, the resource issue has in large part been answered by subsequent developments in the arrangements for special measures for victims of sexual or violent offences. The developments are now so far advanced down this line that it would be a relatively small step but an important one to expand this from all vulnerable witnesses to all civilian witnesses in such cases. Plans to implement body cam technology for officers to collect evidence on the ground are now well advanced and, in those circumstances, there are no resource limitations to this being undertaken.

The investigation must go further in that once evidence has been collected it should be have its reliability rigorously tested. Case investigators must ensure that they approach the case with an independent mind seeking, wherever possible, clarification of the assertions being made.

When investigators approach the task from only one party's perspective, no doubt under pressure from various sources including the media, the danger of miscarriage is heightened. There is again considerable notional evidence that when a complainant(s) has come forward investigators leap into the "perceived truth" of the allegations and undertake a "trawl" for further supporting evidence by obtaining more complainants without consideration of whether it could have happened in the first place.

Believing the Victim

Therefore, this places into context the overall issue of how a complainant should be approached. Learning the lessons of the errors that have been made it is possible to discern a very straight forward approach which ought to be applied in all cases

1. Any complaint of sexual abuse should be taken extremely seriously, and investigators should approach the complaint from the perspective that it may be true [as opposed to believing it is true]

2. This approach will be reinforced by always referring to the witness as a complainant and not a victim. They do not become a victim until such time as a jury reaches a guilty verdict. That is distinct from the recording of crime or victim support which should be fully afforded to them.

3. Before arranging to speak to a suspect the investigator shall fully test the veracity of the allegation. Once someone becomes a suspect their lives are blighted and there must be certainty that there is a genuine case for them to answer. Any suspect should be given anonymity pre- charge.

4. When it is necessary to speak to a suspect then that suspect will be treated in the same way that the witness who makes the allegation is, the police role should be to independently investigate the allegations not take one side or the other.

5. The Investigator will ensure full and fair disclosure is made and not withhold material which is averse to the complaint where that material is likely to undermine it. This requires an investigator to go further than their disclosure obligation under the Codes of Practice.

6. The investigator will use the material provided by any suspect as material to test the veracity of the allegation. With the outcome of all those investigations the officer can therefore ask the CPS to make an independent charging decision and in the meantime the investigator will keep a professional distance from all witnesses to not contaminate the evidence innocently.

<u>Recent Jurisprudence on Historic Allegations – What is the current approach to prejudice?</u>

There is now a collection of authorities on the issues arising from the care home investigations providing the foundation for challenging convictions. The principles have focussed upon the individual's right to a fair trial given the delay in bringing the matter to court. This usually focussed on the issue of missing records and have, in the main, ignored the concerns arising as to the process of the investigation and the inherent dangers arising from multiple complainants.

Given the delay the natural starting point for the Defence was to argue that any resulting trial would amount to an abuse of process and the traditional approach was to raise the issue of abuse of process before the trial judge. The leading authority for many years was AG Reference No 1 of 1990 [1992]. [6] This ensured that it was only in the most exceptional cases that the Court of Appeal would interfere with the discretion of the trial judge who allowed a case to go before the jury. Regardless of the prejudices created by the delay no consideration was made upon the actual effect upon the fairness of the proceedings. In the context of the care home cases, the loss of records or death of important witnesses very rarely stopped the prosecution and less still in a domestic case. The arguments did not concentrate upon the fundamental right to a fair hearing and ignored the consequences of the missing evidence upon that right. The accepted jurisprudence was that so long as an adequate delay direction was given the trial was considered fair. Following R v Smolinski [2004][7] any application for a stay because of the delay was made once all the evidence has been heard, thereby enabling the judge to be able to evaluate the prejudice caused. It was this refusal to properly analysis the prejudices caused by missing evidence which prompted a change in approach by defence lawyers in challenging the safety of the resulting convictions in care home cases.

The two significant cases which have reinstated first principles were R v Burke [2005] [8] and R v Anver Sheikh [2006][9]. Lord Justice Hooper's reasoned judgments provided a breath of fresh air and hope to many convicted care workers. In the opinion of the authors these two cases signalled an important benchmark in preserving

[6] [1992] 95 Cr App R 296
[7] [2004] EWCA Crim 1270
[8] [2005] EWCA Crim 29
[9] [2006] EWCA Crim 2625

the individuals right to a fair trial and acknowledges that in many cases no trial could be fair given the delay and the destruction of documents.

In the appeal of Burke, Tony Jennings QC concentrated his arguments upon the missing documents, records of when the appellant was on duty, and the resulting prejudice that it had caused. The complaint was that the former resident had been abused having returned to the establishment following a period of absence. It was the prosecution's case that the appellant had been on duty when the resident had been returned by the police during the early hours of the morning. However important staff rotas and day books that would have proven the appellants location had long since been destroyed. Lord Justice Hooper recognised that those crucial records, the absence of which made it impossible to confirmed whether the appellant had the opportunity to abuse the complainant in the circumstances alleged, prevented the accused from having a fair trial. This was an important step forward within the context of care home appeals.

Anver Sheikh was convicted in May 2002 of committing serious sexual assaults upon two residents of a care home in North Yorkshire. The conviction was quashed by the Court of Appeal in February 2004 and a retrial ordered, and during the retrial the judgement in Burke was handed down. Similarly, Anver Sheikh was accused of abusing a resident whilst he was on duty, however, the date identified covered a very narrow time period, during which it was not even possible to ascertain that Sheikh was employed at the home. No staff rotas or personal files could be found and only these could have established whether the opportunity to abuse arose. An application made by Paddy Cosgrove QC that no fair trial was possible due to the loss of crucial records was rejected and the jury convicted.

Lord Justice Hooper, in quashing the convictions from the retrial, highlighted that a trial judge had to carry out a very careful scrutiny of the evidence in order to establish whether a fair trial was possible. It was the resulting prejudice which had to be at the forefront of that analysis. Without those records, no trial, regardless of any directions to the jury could safeguard the Defendant. Significantly it did not matter how well the Defence case went or whether they had material upon which to undermine the former resident. The whole process had shifted to a careful analysis of the effect of the

missing records or witness upon the central issue as to whether the opportunity to abuse arose in the first place. This was a task for the trial judge.

The effect of these judgements can be summarised as: (a) where the missing records would settle the matter one way or the other, then no fair trial was possible; (b) where the missing records would merely have been further evidence in the case, their absence did not render the trial unfair, especially if the judge gave the jury a strong direction on the prejudice to the defendant within the delay direction. Thus, supporting the original judicial reasoning found in AG Reference No 1 of 1990 [1992].

In the appeals of R v Wake [2008] [10] and R v Gillam [2008] [11] the Court was reluctant to extend the Sheikh principle any further. They took the view that the missing records would not have resolved the central issues before the jury namely whether the offences were committed. This ignored that the fundamental issue before the jury was the credibility of the former residents against the former carer. If shown to be unreliable on one matter or even shown to have lied from the evidence of that independent record, it would have affected the credibility of the former resident in the eyes of a jury. This in turn would have an affect upon their specific complaints of abuse against the accused. This lost opportunity can only create additional unfairness to the accused. The Court in Wake also appeared to avoid the issue and the consequence of the Crowns reliance on similar fact.

The case of R v Joynson [2008] [12] heard before the LCJ Judge, Toulson LJ and Maddison J on the 26th November 2008 has recognised this important point highlighted above and has extended the principles that are found in Sheikh. It is a significant judgement. This was a historic care home case with five complainants, where the alleged abuse occurred between 25 to 38 years before the trial and the Crown relied upon reprehensible behaviour [similar fact evidence] to support their case. No records save for the register from the school existed nor any Social Services Department documents in respect of either of the complainants. Toulson LJ observed

[10] [2008] EWCA Crim 1329
[11] [2008] EWCA Crim 1744
[12] [2008] EWCA Crim 3049

at para 13 *"It follows that when considering prejudice it is necessary to consider the prejudicial effect of delay and the absence of documents not only in relation to any particular complainant, but also its secondary effect in relation to others whose evidence may have been bolstered by the evidence of another complainant. In short, it is necessary for us to consider the prejudice alleged in relation to the specific complainants and then to stand back and look at the matter in the round."*

What was important in this judgement is that the missing records did not go to the issue as to whether the opportunity to abuse arose, but rather to the credibility of the complainant or witness, making an important and welcome step forward in recognising the prejudice caused by missing records.

It is also important to note that the Court took the view that no general warning to the jury could be a substitute for the missing documents.

As we indicate there was then a shift and we started to see a pattern of cases taking a different approach to these cases.

In R v F [2011] [13]The Court reviewed past cases where stays had been considered and gave comprehensive guidance. It concluded that an application to stay for abuse of process on the ground of delay, and a submission of "no case to answer" were two distinct matters and had to receive separate consideration. A submission of no case to answer had to be determined in accordance with R. v Galbraith (George Charles) [1981] 1 W.L.R. 1039, [1981] 5 WLUK 173. The question was whether the prosecution's evidence, viewed overall, was such that no jury, properly directed, could convict. If it was, then the judge had to direct the jury that there was no case to answer. In doing so, however, he had to be careful not to usurp the jury's function. Although the question remained the same even where the case involved historic unreported sexual crimes, special care had to be taken in such cases, and it was best to avoid expressions such as "safe to convict" or "safely left to the jury". The test in Galbraith was clear, and if the jury convicted in circumstances where there was a

[13] EWCA Crim 1844

possibility that the conviction was unsafe, the matter had to be dealt with by the Court of Appeal

On the other hand, an application to stay for abuse of process on the grounds of delay had to be determined in accordance with the decision in Attorney General's Reference (No.1 of 1990) [1992] Q.B. 630, [1992] 4 WLUK 187, and there was nothing in either R. v B (Brian S) [2003] EWCA Crim 319, [2003] 2 Cr. App. R. 13, [2003] 2 WLUK 281 or R. v Smolinski (Mark Paul) [2004] EWCA Crim 1270, [2004] 2 Cr. App. R. 40, [2004] 5 WLUK 2 that altered that, Attorney-General's Reference, R v B, Smolinski, R. v S (Stephen Paul) [2006] EWCA Crim 756, [2006] 2 Cr. App. R. 23, [2006] 3 WLUK 127, R. v MacKreth (Kenneth Tom) [2009] EWCA Crim 1849, [2010] Crim. L.R. 226, [2009] 9 WLUK 95 . It was only in exceptional cases that a stay would be justified on the ground of delay, even when serious prejudice might have occurred. The best safeguard against unfairness was the trial process itself (paras 43-46). (4) In abuse of process applications on the ground of delay, it was unnecessary to refer to any authorities other than the instant case, Galbraith, Attorney General's Reference and R v S, and the application of the principles in those cases was to be regarded as a fact-specific matter.

In R v D [2013][14] the Court concluded that although the delay in the appellant's prosecution for historic sexual offences was extreme, the resulting missing evidence was not of a degree of cogency that could amount to a finding of serious prejudice in its absence. The trial judge had given the jury appropriate directions regarding the effect of the delay and the appellant's convictions were safe. It should be noted here apart from one specific event none of the events forming the subject matter of the abuse application were date specific.

In R. v Allan (Christopher Mero) [2017][15] permission to appeal was denied where significant investigation records were lost in breach of the CPIA in a case where the Crown relied on DNA evidence linking the appellant to the offence. The Court was of the view that the trial process could deal with the prejudice of the loss of records.

[14] EWCA Crim 1592
[15] EWCA Crim 2396

R v PR [2019] [16] In 2002, following a police investigation into allegations made by his six-year-old niece, a decision was made not to prosecute the defendant for offences of indecency with a child on the basis that there was insufficient evidence. The police file relating to the investigation was subsequently destroyed by accidental water damage. Some other material survived. Some years later, following a renewed investigation into the allegations, the defendant was charged with four counts of indecency with a child contrary to section 1(1) of the Indecency with Children Act 1960. At trial, submitting that the missing material contained information relating to the complainant's accuracy and credibility, the defendant applied for the case to be stayed as an abuse of the process of the court. The judge dismissed the application and the defendant was subsequently convicted. He appealed on the ground that the judge had been wrong to refuse to stay the proceedings.

The Court of Appeal declined to intervene quoting the comment of Treacy Lj in R v D Para 69:

"In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant."

The Court however reminded itself that the general proposition against a stay would not always be the case:

[16] EWCA Crim 1225

"Para 66 ……. This general statement is not meant to preclude the possibility that a fair trial may sometimes be unachievable when relevant material cannot be deployed (see, for instance, R v Sheikh [2006] EWCA Crim 2625). But we stress that the strength and the utility of the judge's direction is that it focuses the jury's attention on the critical issues that they need to have in mind"

It seems therefore that the Court has very recently taken the opportunity to reinforce that where the loss material answers a very specific allegation then the principle established in Sheikh remains and a stay can be the result.

The Rise of Domestic Historic Cases

These principles are applicable not only in care home cases but also in domestic cases of abuse. The fundamental right to a fair hearing cannot be ignored simply because the abuse is within a domestic setting. The complex legal issues that arise during domestic historic cases are no different to the care home cases. However, the one distinction is the Court's willingness to allow domestic historic abuse cases to be left to the jury.

It has long been recognised that children abused within a family do not complain until many years after reaching adulthood. Whilst attitudes and awareness to sexual abuse has significantly changed over the last decade, the 'conspiracy of silence' of family sexual abuse has been a longstanding feature within the law, with many abusers maintaining dominance over their victims for years, 'secrets' being taken to the grave. But this position should not be used as a vehicle to deny those accused the fundamental right to a fair hearing. This is a difficult issue and the law struggles to maintain these two important but conflicting needs of protecting the accused whilst bringing justice for the abused.

The increase in the number of domestic allegations could be explained by several different factors. A greater understanding and willingness to 'speak out' by the victim is a major contributor and the willingness of the police to investigate and the CPS to prosecute has contributed to more cases coming to trial. Whilst each case is fact sensitive the domestic abuse cases vary from single to multiple accusers from within a

family grouping. The difficulties faced by a suspect is that unlike care home cases, there is always the opportunity to commit the abuse and, in many instances, the allegations are specimen ones over a period of years. All that can be done is to assert that the opportunity was never taken in the first place. The ease, at which allegations can be made, can only increase the risk that false or unreliable complaints are made.

How can the system separate the false allegations from the genuine? Without a review of the credibility of the complaint by the Prosecuting Authorities the danger is that the decision-making process is left with the jury. This highlights again, the very difficult nature of the subject matter and the expectations of the public, together with the quality of the evidence obtained during the investigation. In many cases the determination of truth simply rests on one word against another for there is no forensic or corroborating evidence to support the abuse. The outcome of the trial rests upon so many differing factors it is almost akin to playing russian roulette.

The Future Direction of these Cases, the CACD and the CCRC

Past authorities in the care home cases previously highlighted the unease surrounding the safety of convictions. Yet clearly from 2009 onwards that had started to diminish, and the position was wholly reversed in the aftermath of Saville.

Experience is that the history of sexual abuse scandals usually operates in cycles with large amounts of allegations made, many convictions and then a slow dawning that something is not quite right.

Are there signs that there could now be the start of a changed approach by the CACD under the new Lord Chief Justice?

It is far too early to tell and whilst it is noted that in the case of R v PR [2019] the Court has recognised that the principle established in Sheikh survives we are a considerable distance away from a point when we can say that the Court is starting to place a more critical eye on some of the convictions that have been obtained in the current spate of convictions post Saville .

Equally all the evidence seems to suggest that the CCRC has had grave difficulties in grappling with historical sexual offence cases and there remains an exceptionally low rate of referral for these cases. When they have raised concerns before the Court often in the context of non-disclosure they have not fared particularly well.

The further difficulties of the Commission's approach to these cases is amplified by the research of Hoyle and Sato in Reasons to Doubt OUP. This for example emphasises the mixed approach previously to credibility checks.

Concerningly the research reflects the way in which the commission has moved as a response to the changed background that grew out of the Saville Scandal with the commission changing its credibility checks policy to now treat that not as a requirement but as one of a number of investigation tools that might be used where appropriate [2017 Policy] .

This is simply wrong. The Commission must stand above any political or social pressures and it must apply scrutiny to each case. It must be able to not be swayed by multiple complainants who are garnered by a trawling or quasi trawling exercise.

The Current Atmosphere

The position in fact is now much worse than it was during the last spate of prosecutions that arose in the late 1990's and early 2000's which the HASC review in 2002 described as a "new genre of miscarriage ". We now have social media which is out of control and it is very easy to disseminate details of allegations made under the radar. What may appear therefore as persuasive multiple complainants all saying the same thing, in fact may be something entirely different.

The current approach is worrying when we are confronted with a spate of cases across the country, particularly when many of these are not fresh cases but simply former complainants using a dumbing down in the test and scrutiny to secure convictions.

This taken in turn with a number of those being convicted being targeted with significant financial claims does not leave an impression that those whom decades ago

we charged with dealing and looking after the most difficult children are being given a fair chance at justice.

If the outcome of Saville had been to enable genuine victims to obtain justice whilst ensuring those accused got a fair hearing, then we would all be applauding this chain of events. Undoubtedly some genuine victims who couldn't get justice before have got it now, but there is also a depressing side to this story which suggests that many decent people may be on the wrong side of justice.

This has been significantly contributed to by the power of the media driven by political interest. In recent years sexual abuse has become a "political football" which has been kicked around for political advantage, this has led to a rise in the power of various support groups who have gained considerable traction and the continued rise of the compensation lawyer.

This has been particularly evident with the progress of the ill-fated Independent Inquiry into Child Sexual Abuse which had an extremely difficult route to inception, and which is criticised in some quarters for its lengthy one-sided outcomes over several years now.

Arguably it is not independent at all, it effectively is no more than a truth and reconciliation tribunal for the large number of anonymous witnesses who have been able to tell their accounts. It is notable that its restrictions of core participant status are to the extent that it has provided extremely difficult for anyone who is picked out by the tribunal as a case example to have their voice heard. There have been one or two notable exceptions for example the Family of Lord Janner and the recent evidence session when Daniel Janner challenged the Inquiry published on the 24th September makes illuminating reading for anyone who has concerns over this inquiry.

There was an opportunity to hold a wholly independent public inquiry into historical cases and once and for all design a new approach for the Criminal Justice System, to aid the access for justice of victims but also ensure that appropriate safeguards were in place for the accused. It could have helped restore real balance to the criminal justice system, it is an opportunity which has now been fundamentally lost.

Conclusion

The return to retrospective investigations into care home by the police is well documented. Operation Pallial in the wake of Operation's Yewtree and Midland, was set up in 2012.

However, this is not the only police operations that has been looking at care homes. There are ongoing operations in Humberside, Nottinghamshire, Liverpool and Manchester to name but a few.

The safety and fairness of the law, to ensure fairness to the accused is no longer guaranteed. The lessons that should have been learnt from the past have been ignored. This is further exacerbated by the malaise in our Criminal Justice System where every aspect of it is underfunded and in disarray. In was hard enough for those wrongfully accused in the past to secure justice but the current state of the system, disclosure failures, rise of digital evidence and the decline in public funding make accessing justice almost impossible.

Further many of those accused have built up reasonable assets and find themselves ineligible for legal aid or with extensive contributions. The ultimate insult for the wrongfully accused is even if they prove their innocence where they have funded their case, they will only get back a percentage of their legal costs.

And if they were wrongfully convicted and against all the odds persuade the Court of Appeal to quash their conviction then there is almost no hope they will be compensated by the state. [23]

It is worth noting that the state of the disclosure crisis is amplified by the recent disclosure report by the CCRC on a sample of past cases[24] which identifies a number of disclosure failings and recommendations. This included varying inconsistency in

[23] https://www.supremecourt.uk/cases/docs/uksc-2016-0227-press-summary.pdf Now on appeal to Strasbourg

[24] https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2019/07/CCRC-2242989-v1-CCRC-2232838-v3-JH_formatted_draft_disclosure_report.pdf

operating the disclosure regime, regular inconsistency in completing disclosure schedules and a failure of the CPS to challenge inadequate disclosure schedules. Concerningly there was a lack of understanding by officers as what amounted to third party records and police forces were found to lack consistent retention policy for records.

So, we are now arguably not only back in that same position as 10 years ago but in a far worse position. The failure of Yewtree and Midland, the ease at which police are blinded by the pressure to believe leading to a fundamental failure to carry out a proper investigation, all demonstrate that the challenges that do exist in these difficult cases need to recognise and resolved.

The Court needs to consider with care its approach to these cases, it must stand independent of the febrile atmosphere it has been placed into just like the Supreme Court has done over Brexit. Where genuine prejudice has been caused to an appellant it must find a way to quash the conviction not reinforce it.

The CCRC must be resolute in pursuing every case where a miscarriage may have occurred and where it considers that to be the case it should have the courage of its conviction by making referrals and sticking to its convictions. Ultimately though the 2014 Justice Committee was right in calling for the miscarriage of justice test to be reviewed and it is to be hoped that the work of the Westminster Commission who are looking at the CCRC may also conclude that enough is enough and that we have to look to implement change .

When a law abiding middle aged citizen gets a knock on the door and is accused of committing offences 30 , 40 or 50 years ago they are entitled to the justice you or I would expect , a fair hearing with full disclosure and no unfair prejudice , isn't it time that we did a lot better .

We must do it in a way in which the route of genuine victims to get justice is preserved, but where the rights of the falsely accused are protected.

Until that it done, miscarriages will continue unabated and the falsely accused will continue to be denied the justice they ought to receive.