Chapter 11: The Course of Evidence: Examination-in-chief, cross-examination and re-examination

(1) THE RIGHT TO BEGIN

In criminal cases the Crown has the right to begin. In civil cases the plaintiff has the right to begin unless the defendant has the burden of proof on every issue. In **Mercer v Whall**[1], an action for wrongful dismissal, the defendant admitted that he determined the plaintiff's contract of service prematurely but alleged that he was justified in doing so. It was held that the plaintiff ought to begin calling evidence because the damages claimed by him were not agreed. If damages had not been in issue the defendant would have had the right to begin.

(2) EXAMINATION-IN-CHIEF

(A) Introduction

The object of examination-in-chief is to adduce evidence in support of facts in issue. A party may call a witness who is hostile or adverse but the witness may not be asked leading questions.

(B) Leading questions

A leading question is one which suggests a desired answer or assumes the existence of a disputed fact or a state of affairs. For example, in a hit and run case: 'Did you see a car driving at top speed?' Or, where the issue was whether James was at Courage Pub burned down by an arsonist, the question: Was James at the Courage Pub on 27 August 2002? These questions are leading questions?

Leading questions are objectionable because of the danger of collusion between the examiner-in-chief and the witness and the impropriety of suggesting facts which are not in evidence. Nevertheless, leading questions may be asked at the beginning of the examination-in-chief, for example, 'Is your name Joseph? Are you a law student? Do you live at 1 Alpha Street, Erewhon?' These are

[1] (1845) 5 QB 447.

introductory and undisputed matters. It may also be allowed in-chief at the discretion of the judge[2] or put in cross-examination.[3]

(C) Refreshment of memory in court

(i) General rule

The general rule is that a witness is not allowed to read from a document prepared for litigation as this will destroy spontaneity but a witness is allowed to refresh his memory from a document or photofit made contemporaneously with the facts. The rationale for this is that human memory is probably not as good as we believe and that notes made by witnesses are likely to be fuller and more accurate and, if referred to, may help to stimulate the memory to recall the facts.[4]

(ii) Conditions

Refreshment of memory in court depends on the following conditions:

1. Contemporaneity

   A witness is not allowed to refresh his memory from a deposition made by him three months after the event[5] or from statements made a month after the relevant event.[6] In **R v Fotheringham**[7] a gap of twenty-two days was disregarded. However, in **R v Da Silva**[8] the trial judge held that a statement made a month after the events related therein was not contemporaneous. But it was held on appeal that the court was not saying in **Graham** that a statement made after 27 days could not be contemporaneous. It was a question of fact and degree in each case.

2. Documents read over or accepted as accurate by the witness

   It is not necessary for the document to have been made by the witness but it must be read over and accepted as accurate by the witness.

3. Production of the document

   It must be handed over to the opposite party or his advocate to enable him to inspect it and to cross-examine.

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[2] **Ex parte Bottomley** [1909] 2 KB 14.

[3] **Parkin v Moon** (1836) 7 C&P 408.

[4] M. Newark and A. Samuels, "Refreshing Memory" [1978] Crim LR 408.

[5] **R v Woodcock** [1963] Crim LR 273.

[6] **R v Graham** [1973] Crim LR 628.

[7] [1975] Crim LR 710.

[8] [1990] Crim LR 200. See also **R v South Ribble Stipendiary Magistrate, ex p. Cochrane** (1996) The Times, 24 June.

4. Production of the original

The original must be produced.[9]

5. Direction as to the real status of the document

The judge must direct the jury as to the real status of the document. In **R v Vigo**[10] the appellant, the head of the Obscene Publications Squad, was charged with conspiracy and corruptly accepting bribes. At his trial, the judge granted permission to allow a leading prosecution witness – a self-confessed dealer in pornography and a very unsavoury character – to use his diaries to refresh his memory whilst giving evidence, and copies of the diaries were before the jury. In summing-up, the judge directed the jury that the diaries were the most important documents in the case against the appellant, that the entries were powerful evidence pointing to a corrupt relationship between him and the witness aforesaid and that although they did not amount to corroboration in law, they were very important in relation to the witness's evidence. The appellant was convicted and appealed on the grounds, inter alia, that the judge had misdirected the jury as to the corroborative nature of the diaries. It was held on appeal that the real status of the diaries was limited to helping witness to give accurate dates; that they did not constitute corroboration; and, accordingly, the jury had been misdirected. The appeal was allowed.

(D) Out-of-court refreshment of memory

R v Richardson[11] is authority for these propositions: (i) that a witness may read over in private a statement made to the police at an earlier date in order to refresh his memory; and (ii) that this may be done even in circumstances where he would not have been allowed to do so by reference to the statement in open court. In that case, the Crown witnesses were allowed to read over their statements so as to refresh their memories before the trial took place. This was not revealed in the course of testimony of these witnesses but emerged from that of a police officer who was called to give evidence subsequently. The chairman of the quarter session directed the jury to take into account the fact that the witnesses had seen their statements before the hearing for the purpose of evaluating their testimony. The jury convicted and the Court of Appeal dismissed the defendant's appeal.

[9] **Doe d. Church and Phillips v Perkins** (1790) 3 Term Rep 749.

[10] (1978) 67 Cr App R 323.

[11] [1971] 2 WLR 889. See also **Lan Pak Ngam v R** [1966] Crim LR 443, PC, and **A-G's Reference (No. 3 of 1979)** (1979) 69 Cr App R 44.

There are present dangers of collaboration, fabrication and imagination in out-of-court refreshment of memory. One possible solution has been suggested. The solution is that the choice lies between a rule of law whereby evidence of witnesses who have refreshed their memory out of court is excluded altogether and a rule of practice which allows them to do so subject to certain limitations. Howard supports the latter.[12]

(E) Use of documents to refresh memory under section 139 of the CJA 2003

Section 139 (1) of the Criminal Justice Act 2003 (CJA 2003) provides that a person giving oral evidence in criminal proceedings about a matter may, at any stage in the course of doing so refresh his memory of it from a document made or verified by him at an earlier time where –

"(a) a sound recording was made,

(b) his recollection of the matter is likely to have been better at the time of the previous account than at the time of his oral evidence, and

(c) a transcript of the sound recording has been made."[13]

Section 140 of the CJA 2003 defines a "document" as "anything in which information of any description is recorded, but not including any recording of sounds or moving images". "Video recording" is defined as "any recording, or any medium, from which a moving image may by any means be produced, and includes accompanying sound track".

(F) Previous consistent statement

The rule against narrative or self-corroboration

The general rule is that a witness may not be asked in-chief whether he has formerly made a statement consistent with his present testimony. The reason for the prohibition of the reception of such statement is that it infringed the rule against hearsay and evidence of this nature may be manufactured. The rule has been abrogated by section 99 (1) of the Criminal Justice Act 2003. Section 120 (1) of the CJA 2003 allows a previous consistent statement made out of court to be read in court and the witness to be asked in chief whether the statement is true (section 120 (4)).

[12] See M.N. Howard, "Refreshment of memory out of court" [1972] Crim LR 351. See also Newark and Samuel, supra n.4.

[13] Sections 139 to 141 of the CJA 2003 came into force on 5th April 2004. See the Criminal Justice Act 2003 (Commencement No. 3 and Transitional Provisions) Order 2004 (SI 2004/829 (C.35)).

(G) Discrediting one's own witness: unfavourable and hostile witnesses

(i) Common law

At common law one can impeach one's own witness if he is an unfavourable or hostile witness. An *unfavourable witness* is one who merely fails to prove what the party hopes for. A *hostile witness* is one who shows clearly that he is not desirous of telling the truth at the instance of the party calling him.

(i) Unfavourable witness

At common law an unfavourable witness cannot be cross-examined but the party may call another witness. In **Ewer v Ambrose**[14] someone whom the defendant called to prove a partnership proved the contrary. It was held that the defendant could rely on the testimony of another witness.

(ii) Hostile witness

The judge may allow the examination-in-chief of a hostile witness to be conducted in the manner of cross-examination. He may be asked leading questions. His character may be attacked and witnesses may be called to show that he is a liar.

The procedure recommended by the Court of Appeal in **R v Maw**[15] is that if a witness fails to give evidence expected of him, it is undesirable to proceed immediately to treating the witness as hostile unless he is displaying excessive degree of hostility or animus. The first thing that should be done is to invite the witness to refresh his memory from relevant notes. If he refuses, then he should be treated as hostile. But there was some doubt whether his previous consistent statements could be proved.

(iv) Statutory provisions

Section 3 of the Criminal Procedure Act 1865 re-enacting section 22 of the Criminal Procedure Act 1854 (which applies to civil and criminal proceedings) was passed to clear the doubt. In **Greenough v Eccles**[16] it was held that the effect of the section was that a hostile witness could, but an unfavourable witness could not, have his previous inconsistent statements proved against him.

[14] (1825) 3 B&C 746.

[15] [1994] Crim LR 841.

[16] (1859) 28 LJCP 160.

(3) CROSS-EXAMINATION

(A) Introduction

Cross-examination follows after examination-in-chief. A witness may be cross-examined by any party who did not call him.

(B) Previous inconsistent statements

Proof of previous inconsistent statements of a witness under cross-examination is governed by sections 4 and 5 of the Criminal Procedure Act 1865. Section 4 provides that if a witness at his cross-examination does not distinctly admit that he has made an inconsistent statement proof may be given that he did in fact make it. Section 5 provides that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing being shown to him but his attention must be called to those parts of the writing which are to be used for the purpose of contradicting him. Section 119 of the CJA 2003 changes the procedure: it is for the fact finders to determine whether a previous inconsistent statement is true if it became evidence of the matter notwithstanding the denial of the witness.

(C) Civil cases

In civil proceedings, previous consistent statements and previous inconsistent statements admissible by virtue of sections 3, 4 and 5 of the Criminal Procedure Act 1865 are rendered admissible by section 6 of the Civil Evidence Act 1995.

(D) Cross-examination as to credit

(i) Finality on collateral matters

Questions as to credit are limited to matters relevant to the issue. A cross-examining party cannot introduce a matter not relevant to the issue to contradict the witness's answer as this will open the floodgates of collateral issues. The *fons et origo* of this principle is **Harris v Tippett**[17] where in the Headnote the following proposition was stated:

> "Any question may be put to a witness in cross-examination, the answer to which may have a tendency to discredit him; but if such a matter be collateral to the matter in issue, the answer which the witness gives must be taken as conclusive, and other witnesses cannot be called to contradict him."

[17] (1811) 2 Camp 637; 170 ER 1277.

In that case, a witness for the defendant was asked in cross-examination whether he had attempted to dissuade a witness for the plaintiff, from attending the trial. He swore positively that he had not. Counsel for the plaintiff then proposed to call back the other to contradict him. Lawrence J held that this could not be done. The rule in **Harris v Tippett** has been abrogated by section 99 (1) of the CJA 2003.

(ii) Distinction between relevant and collateral matters

In case of rape where the issue is whether or not the complainant consented, she may be cross-examined about her previous connection with the accused or with other men.[18] If she denies having previous connection with the accused she may be rebutted by evidence but if she denies having connection with other men she cannot be rebutted. However, she may be asked and contradicted by evidence if she denies that she is a prostitute or widely promiscuous[19] and in the habit of having sex with first acquaintances.[20]

(E) Sexual history evidence

The Heilbron Committee recommended the banning of questions on the past history of the complainant except where the line of questioning leads to evidence relating to a behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion of the alleged offence or where the defendant had had sex with the woman or where it would be unfair to the defendant to allow it.[21] The Committee also added a rider: that the prosecution may adduce sexual history evidence to show that the complainant is a happily married woman or a virgin and that if such evidence were to be challenged the judge should have a discretion to allow cross-examination and the calling of evidence is rebutted.[22]

All the above recommendations except the "striking similarity" clause were enacted in section 2 of the Sexual Offences (Amendment) Act 1976.[23] Section 2 (4) of the 1876 Act, however, provides: "Nothing in this section authorises evidence to be adduced or asked apart from this section." This means that the section did not replace the common law restrictions such as the rule against narrative discussed above and the rule that evidence of recent complaint is

[18] **R v Riley** (1887) 18 QBD 481.

[19] **R v Bashir** [1969] 1 WLR 1303.

[20] **R v Krausz** (1973) 57 Cr App R 466.

[21] **The Report of the Advisory Group on the Law of Rape** (the Heilbron Report), Home Office, London, December, 1975, para. 137 (b).

[22] Ibid., para. 138.

[23] For a stimulating discussion of the statutory provision, see A. McColgan, "Common Law and the Relevance of Sexual History Evidence" (1996) 16 OJLS 275.

admissible only when the complainant is called to give evidence[24], but only complemented them. To its supporters, the section protects the right of the accused to fair trial which is now guaranteed by Article 6 (1) and 6 (3) (d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention); to its critics, there are three objections. The first is that it is a defendant-oriented legislation and sexist. The second is that the discretion to allow cross-examination should not be left in the hands of judges because "many judges, at both crown court and the court of appeal level … use their discretion to perpetuate sexism rather than implement the reforms of the Sexual Offences (Amendment) Act 1976."[25] The third is that lacking from the discourse in **R v Viola**[26] and later cases is any discussion of the degree of relevance needed to qualify matters relating to sexual history for admissibility.[27] We shall discuss these objections in reverse order and in the light of sections 34, 35 and 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) enacted to effectuate the recommendations of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System.[28]

The prohibition of cross-examination of complainants in proceedings for sexual offences by section 34 of the YJCEA 1999 and child complainants and others by section 35 of the same Act is problematic. In **R v Seaboyer, R v Gayme**[29]where the Supreme Court of Canada held that a rape-shield legislation was compatible with the Canadian Charter of Rights and Freedoms 1982, McLachlin J, whilst concurring, presciently noted that the legislation had the potential of excluding relevant material evidence. He considered the example proffered by Tanford and Bocchino[30] where a woman alleges that she was raped and the man claims she is a prostitute who agreed to sexual relations for a fee and afterwards threatened to accuse him of rape because he refuses to pay an additional fee. At the trial for rape, the defendant will not be allowed to cross-examine the woman on her sexual history. However, in the trial of the woman for extortion, the man will be entitled to cross-examine her. In other words, relevance depends on the crime charged and not the issue. The issue in both cases is whether the woman is a prostitute. And

[24] **R v Lillyman** [1986] 2 QB 167.

[25] See S. Lees, **Carnal Knowledge: Rape On Trial** (London: Penguin, 1997), at 130.

[26] (1982) 75 Cr App R 125, CA.

[27] See J. Temkin, "Sexual History Evidence – The Ravishment of Section 2" [1993] Crim LR 3 at 5-6.

[28] **Speaking Up For Justice** (London: Home Office, June 1998), paras. 9.37 and 9.38.

[29] (1991) 83 DLR (4th) 193.

[30] Ibid., p.267. See J.A. Tanford and A.J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980) 128 U Pa L Rev 544 at 588.

relevance, whatever the degree of relevance, is not equal to admissibility.[31]

The relevance of evidence of sexual history is therefore a question of logic and experience; its admissibility depends on relevance and the satisfaction of auxiliary tests and extrinsic policies which include compatibility with Convention rights pursuant to section 3 of the Human Rights Act 1998. It is therefore submitted that the prohibition of cross-examination in sections 34 and 35 of the YJCEA 1999 violates Article 6 (3) (d) of the Convention as the only plank on which the defendant can establish his defence has been removed. True, there is a lee-way for the defendant in section 41 of the YJCEA 1999 which provides that no evidence may be allowed or questions asked about any sexual behaviour except with leave of court. Whilst the caselaw[32] on section 2 of the Sexual Offences (Amendment) Act 1976 which is superseded[33] does not fall into desuetude, the evidential principles in the pre-existing laws are purportedly whittled down by the exclusion of materials the main purpose of which is to impugn the credibility of the complainant as a witness and by limiting questions to specific instances of sexual behaviour; thus creating a blurred line of demarcation – a potential ground of appeal – between "sexual behaviour" and "sexual experience".[34] Fortunately, in deciding two recent cases, British judges adopted a purposive interpretation of liberty rights as their counterparts in Canada[35] and New Zealand[36] by which there is a reconciliation between the individual and the community and their respective rights. In **R v A (No. 2)**[37] the House of Lords held that a prior consensual sexual intercourse between the complainant and the defendant might in some circumstances be relevant to the issue of consent and that the absence of evidential material relevant to it might violate Article 6 of the Convention. Again, in **R v T, R v H**[38] the Court of Appeal held that questions or evidence about false statement in the past by a complainant in a sexual offence about sexual assault or about failure to complain about the instant offence, were not about the sexual behaviour of the complainant. They related not to her sexual behaviour, but to her statements in the

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[31] See Chapter 2 **ante**.

[32] See **R v Lawrence** [1977] Crim LR 492, **R v Brown** (1989) 89 Cr App R 97, **R v Funderburk** [1990] 2 All ER 482, **R v Said** [1992] Crim LR 433 and **R v C** [1996] Crim LR 37.

[33] See the YJCEA 1999, s.41 (4).

[34] See **R v Amado-Taylor** [2001] 8 Arch News 1.

[35] See **Law Society of Upper Canada v Skapinker** (1984) 9DLR (4th) 161 and **R v Big M Drug Mart Ltd.** (1985) 18 DLR 321 at 359-360 (*per* Dickson J).

[36] See **Palmer v Superintendent of Aukland Maximum Security Prison** [1991] 3 NZLR 315 at 321 (*per* Wylie J) and **Ministry of Transport v Noart** [1992] 3 NZLR 260 (Court of Appeal).

[37] [2001] 2 WLR 1546, HL.

[38] [2002] 1 All ER 683, CA. See also **R v S (Evidence: Sex Abuse)** (2004) The Times, 11 June.

past or failure to complain and were, therefore, not prohibited by section 41 of the YJCEA 1999. This decision was followed in **R v PB**[39] where the defendant was convicted of indecent assault. The trial judge refused to allow the defence counsel to cross-examine the complainant about allegations that the complainant had made against another man who was not prosecuted because of insufficiency of evidence, lack of opportunity for the commission of the alleged offence and lack of corroboration, along with the fact that the complainant would not talk about the alleged offence but would only write it down on a piece of paper. The defendant appealed. The Court of Appeal, allowing the appeal and ordering a retrial, held that, in the light of the authorities[40], the opportunity to cross-examine and put before the jury the fact of another complaint in respect of which the alleged abuser was not being charged was a valuable right and, therefore, the conviction was unsafe. It must be noted, however, that in **R v Stephenson**[41] the Court of Appeal held that the defence case statement that the complainant had accused every adult male with whom she had any significant sexual contact was not founded in fact and, therefore, there was nothing wrong in the trial judge's ruling in refusing cross-examination pursuant to s.41 of the YJCEA 1999.[42] More recently, in **R v F (Complainant's sexual history)**[43] it was held that once the criteria for the admissibility of evidence as to complainant's sexual history were established, then subject to section 41 (4) of the YJCEA 1999, the court lacked any discretion to refuse to admit it, or to limit relevant evidence which was properly admissible.

It has been recognised recently that one of the reasons for miscarriages of justice in the trial of sex offenders is the "false-memory" syndrome and to this we now turn.

(F) False-memory

Repressed-memory, recovered-memory and false-memory are often used interchangeably. They are but different phases of reproduction. Whilst the concept of "repressed-memory" is the notion that personal histories of the most awful childhood can be hidden from consciousness for decades, "recovered-memory" denotes the recovery episodes when repressed feelings are released by unlocking the

[39] [2001] EWCA Crim 3042.

[40] **R v Funderburk** [1990] 2All ER 482; **R v Nagrecha** (1997) 2 Cr App R 401; and **R v T, R v H** (supra, note 38).

[41] [2006] EWCA Crim 2325. Cf. **R v C** [2008] 1WLR 966 where the trial judge permitted cross-examination of the complainant to the effect that she had on three occasions made false allegations but refused her to be cross-examined about an alleged affair she had with a 16-year-old boy.

[42] For an evaluation of s.41 of the YJCEA, see Liz Kelly, Jennifer Temkin and Sue Griffiths, **Section 41: an evaluation of the new legislation limiting sexual history evidence in rape trials**, Home Office Online Report 20/06.

[43] (2005) The Times, 16 March, CA.

memory cage.[44] Allegations of sexual abuse based on recovered memory are treated by the criminal justice system as delayed reports and there is no time limit for prosecuting the alleged sexual abuse. False-memory, a riposte to an alleged "repressed-memory syndrome", has been defined as "the recollection of an event which did not occur but in which the individual strongly believes."[45]

Historically, the widespread use of memory recovery techniques was triggered by a self-help book co-authored by Bass and Davis in the United States of America in 1988,[46] recovered memory narratives, television documentaries, films and chat shows. In the United Kingdom, the widespread use of recovered-memory technique began in 1990 and the British False Memory Association was formed in 1993 following reports that well-educated adult daughters in their late thirties were making allegations of childhood sexual abuse after undergoing therapy.[47]

Matters came to a head recently in the prosecution for child abuse allegedly committed by care workers in the 1970s and 1980s after a full scale investigation in 34 of the 44 police forces in England, Wales and Northern Ireland.[48] Most of the investigations are continuing but some have been completed amid a mounting concern about flawed prosecutions and possible miscarriages of justice. In some cases, in the absence of witness evidence and forensic materials, trawling of evidence produced what was colloquially (but inaccurately) described by the media as "'corroboration' by volume".

Whilst some retrospective allegations of sexual abuse are proved beyond reasonable doubt, evidence of recovered-memory are problematic for three reasons. First, scientific evidence pointing to the unreliability of recovery techniques used by therapists is overwhelming: disturbing number of cases are not investigated and the fact that the cases are based on such technique is either concealed or emerges when the accused is committed for trial. Dangerously suggestive techniques can lead to arguments for exclusion under section 32A (3) (c) of the Criminal Justice Act 1988 or sections 78 (1) and 82 (3) of the Police and Criminal Evidence Act 1984 as exemplified by relatively recent cases. In **R v H**[49], a brother

[44] For an overview, see R. Scotford, "False memories – a peripheral issue?" In C. Feltham (ed.), **Controversies in Psychotherapy and Counselling** (London: Sage, 1999), at 48.

[45] I. Glen, "True lies and false memories" [1999] 3 Arch News 5.

[46] See E. Bass and L. Davis, **The Courage to Heal** (New York: Harper & Row, 1988).

[47] For the history of repressed-memory, recovered-memory and false-memory, see M. Jervis, **Submission to the Lord Nolan Review on Child Protection in the Catholic Church in England and Wales**, British False Memory Society (Bradford-on-Avon, 2001).

[48] S. O'Neil, "Police face major overhaul of child abuse inquiries" (2000) The Daily Telegraph, 19 December.

[49] Unreported, December 1998 (Bristol Crown Court) discussed in I. Glen, supra n.45.

and sister undergoing psychiatric treatment began to attribute their illness to sexual abuse within the family during the period of introspection and by means of "flashbacks" and "new memories" to others outside the family circle. Fortunately, a psychiatrist quickly recognised this as a false-memory syndrome. Again in **G v DPP**[50], a recovery technique called Thematic Emergence of Anomaly was held inadmissible but in **R v Clarke**[51] facial mapping by video superimposition was held admissible. There is also the real danger that therapists, agencies and complainants espousing recovery memory beliefs will be sued successfully for negligence as is the case in the USA. In **State of New Hampshire v Joel Hungerford**[52] (1997) the Supreme Court of New Hampshire ruled that recovered memory thesis did not satisfy the standard of evidential reliability sufficient to form a delayed recovery presentation. Even under English law where time does not run against the Crown, it is a moot point whether evidence of recovered memory satisfied the standard of proof and is compatible with Article 6 (2) of the Convention. On the other side of the Atlantic in **R v Smolinski**[53] the conviction of S for the indecent assault of two females aged six and seven reported to the police twenty years after the alleged commission of the offence was quashed by the Court of Appeal. The Court held that when a long time had elapsed, the Court would expect that careful consideration would be given by the prosecution as to whether it was right to bring the prosecution at all.

Two recent cases on false memory are worthy of note. In **R v H, R v G (decd)**[54], H was convicted of indecent assault upon his daughter when she was aged four or five. Her witness statement given when she was aged 19, gave a detailed description of the incident including her own emotional reactions. G was convicted of offences of indecent assault and rape on the same complainant.

Following an unsuccessful appeal against conviction, the Criminal Cases Review Commission referred the two cases to the Court of Appeal. Under s.23 of the Criminal Appeal Act 1968 the Court of Appeal agreed to hear expert evidence on memory formation and development. The gist of the expert evidence given by Professor Martin Conway, Professor of Cognitive Psychology at Leeds University, as stated by the Court of Appeal was as follows:

> "[M]emories of early childhood are qualitatively different from memories of later events. Adults cannot usually remember events of early childhood so as to be able to give a coherent narrative account. They may remember an

[50] [1997] 2 All ER 755.

[51] [1995] 2 Cr App R 45.

[52] See http://www.state.nh.us/court/supreme.htm

[53] [2004] 2 Cr App R 40.

[54] [2005] EWCA Crim 1828; [2006] 1 Cr App R 10.

> event, and sometimes a visual image, but the recall will be fragmentary, disjointed and idiosyncratic. This period in early childhood of which the adult will have an impoverished memory is called "the period of childhood amnesia". Usually childhood amnesia extends to the age of about seven. Adult memory of events relating to later childhood becomes gradually richer, more detailed and more organised."[55]

Professor Conway opined:

> "[I]f evidence of an event said to have occurred at an early age was very detailed and contained a number of extraneous facts, it might be unreliable."[56]

The Court of Appeal held that Professor Conway's evidence was true expert evidence – representing facts beyond the knowledge and experience of the judge and jury – suitable for admission in a criminal trial. H's appeal was allowed and a retrial ordered. G's appeal was postponed. In **R v S, R v W**[57] the Court of Appeal noted the dangers inherent in admitting expert evidence on memory formation: that the expert evidence may be read as evidence of the accuracy and truthfulness or otherwise of the allegations made. The Court added that whether the complainant's statements were based on experience of events is a critical issue for the jury. The Court stressed that unless the jury believes that the complainant is actually describing an actual experience the defendant is to be acquitted.

The second reason for regarding recovered-memory as being problematic is that there is no provision in the YJCEA 1999 making mandatory to video-tape interviews of adults making retrospective allegations of sexual abuse as in the case of children. Finally, complainants making retrospective sexual abuse allegations are adept at circumventing contradictory evidence when cross-examined because they have been trained by victim support specialists to get round tricky questions by saying 'I can't remember' or 'Could I clarify my answer?' in order to revise their testimony.[58] This can be prevented by playing the video-tape of the interview in court. It is therefore necessary for the Government to set up a Royal Commission to consider:

- the enactment of a statutory provision making it mandatory to video-tape the interviews of adults making retrospective allegations of sexual abuse

[55] Ibid, para 29.

[56] Ibid, para 32.

[57] [2006] EWCA Crim 1404; [2007] 2 All ER 974.

[58] See, for example, **R v Traynor**, unreported, Case Nos T951411 and T960912 (Liverpool Crown Court, July 1996).

- a review of the laws relating to similar fact evidence[59], corroboration and the doctrine of double jeopardy in their entire ramifications
- the feasibility or desirability of a statute of limitation for criminal proceedings and the review of evidential problems associated with recovered-memory or false-memory.

(G) Exceptions to the rule on finality

The five exceptions to the rule that evidence may not be called to contradict a witness on collateral matters are as follows:

1. **Previous convictions.** Section 6 of the Criminal Procedure Act 1865 provides:

> "A witness may be questioned as to whether he has been convicted of any misdemeanour, and upon being so questioned, if either he denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such a conviction."

However, section 4 (1) of the Rehabilitation of Offenders Act 1974 (as to spent conviction) forbids the questioning of a 'rehabilitated person' about spent conviction unless the court is satisfied that justice cannot be done in the case except by reference thereto (section 7(3)). A person becomes rehabilitated in respect of a conviction which is spent when he has completed a period of rehabilitation which depends on the seriousness of the offence. Sentences of imprisonment for life and for more than30 months are excluded from rehabilitation. Two cases neatly illustrate this exception. In **R v Paraskeva**[60] the appellant was charged, inter alia, with assault occasioning bodily harm. Unknown to the defence the complainant had a spent conviction in 1975 for theft. The appellant was convicted and appealed on the ground that there was a clear duty on the prosecution to inform the defence of a conviction thereby enabling the defence counsel to put it to the complainant. It was held that if the court of first instance had known of the spent conviction, the judge would have given his consent. The appeal was allowed. Again, in **R v Prince**[61] the defendant was tried for robbery. His counsel led evidence that he had previous convictions for a number of offences; his defence was a complete denial that he was involved. In his summing-up the trial judge directed that a previous record, even a conviction for robbery, did not signify guilt, but that the jury should put in the

[59] See Chapter 12 **post.**

[60] (1982) 76 Cr App R 162.

[61] [1990] Crim LR 49. See also **R v Hacker** (1994) The Times, 21 November.

balance with his previous conviction. The judge declined to accede to a prosecution request to reconsider this direction. The jury convicted the defendant who appealed. It was held, allowing the appeal and quashing the conviction, that the omission of the crucial matter of the defendant's credibility was a misdirection.

2. **Bias or partiality.** The fact that a witness is biased is relevant to his credit.

3. **Reputation for untruthfulness.** Independent evidence may be given of an adversary's witness (not a party's own witness) that he is unworthy to be believed on oath.

4. **Medical evidence affecting the validity of a witness's evidence.** Lord Pearce in **Toohey v Metropolitan Police Commissioner** said:

> "... when a witness through physical ... disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowed for medical science to reveal this vital hidden fact to them."[62]

(4) Re-Examination

The object of re-examination is to rehabilitate the evidence of the witness. He may not be asked leading questions but previous consistent statements may be put by leave of court. It must be restricted to those matters which arise from the cross-examination.[63]

[62] [1965] AC 595 at 608.

[63] **Prince v Samo** (1838) 7 Ad & EL 627.