Postgraduate Diploma in IT Forensics

Week 4 of Module 5: Collecting Digital Evidence and Presentation in Court

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- Blue means `I am a link; please click me.`

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- Personal email
  - hayson.tse

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1.4 Disclaimer

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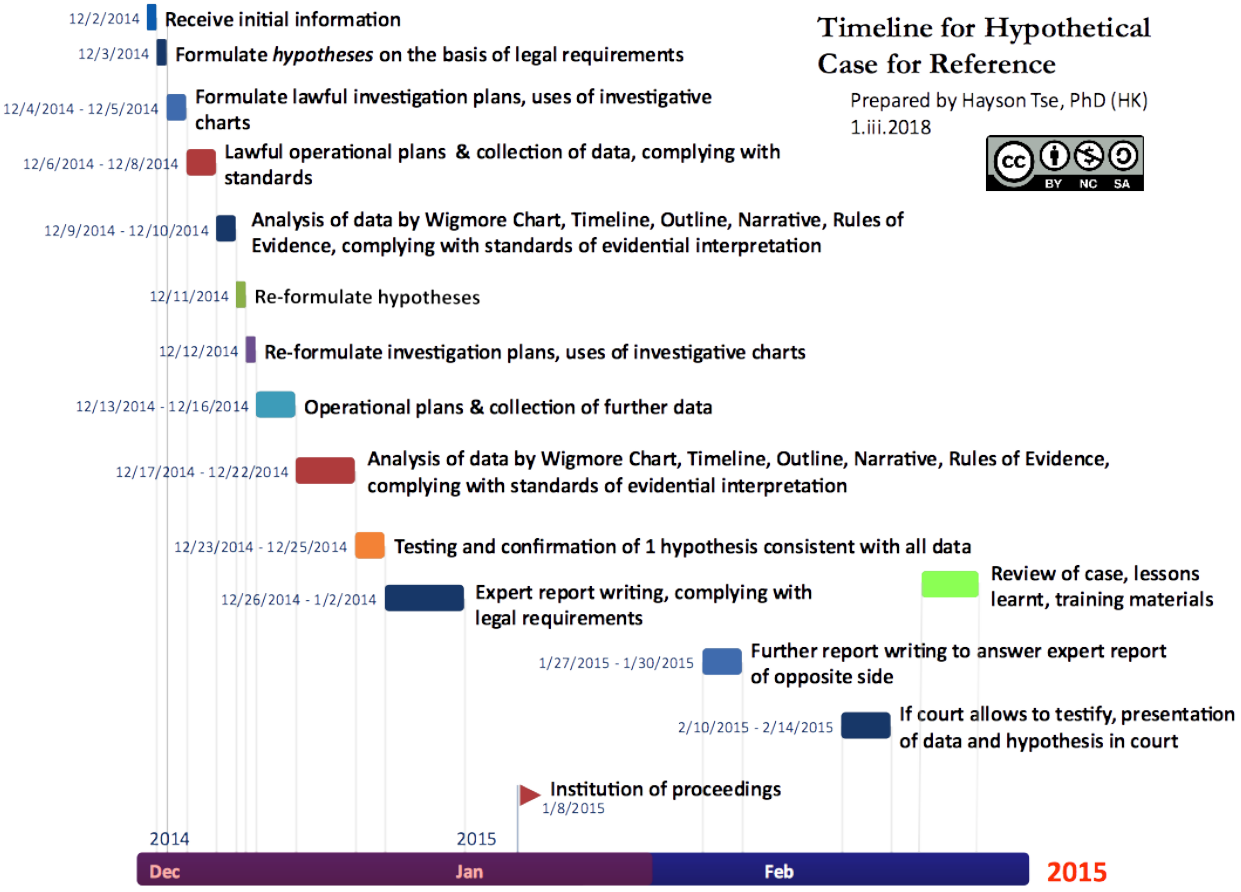
- HKU SPACE Handbook
- No reservation of seats.
- No eating or drinking.
- Turn off all mobile phones and pagers.
- No smoking at all HKU SPACE learning centres and the University campus.
- *No video / audio recording, unless with the permission of the Programme Director / Manager*
- The Programme Direction / Manager may impose any conditions when granting the permission.
- No unattended personal belongings.

1.6 Important dates

- Assignment: 2 May 2019
- EXAMINATION: 6 June 2019

1.7 Overview of your work cycle



2 A case on hearsay

2.1 Documentary hearsay

- HCMA 366/2013

3 Interpretation of expert evidence

3.1 General disputes between experts

- Michael Mansfield QC (representing Barry George at the trial):

  "forensic scientists rarely disagree on the facts, only on the interpretation of the facts. In other words, it is not that the traces were there - but how they got there?"

3.2 Operation Oxborough

- Jill Dando (9 November 1961 - 26 April 1999) was fatally shot (1 shot to the head) outside her home in Fulham, London.

  (graphical image removed!)

- Jill Dando was an English journalist, television presenter, and newsreader of the BBC. At the time of her death, she was the presenter of the BBC programme Crimewatch.

  (graphical image removed!)

3.3 Timeline

- On 26 April 1999, Jill Dando was shot dead outside her home.
- On 11 April 2000, police spoke to Barry Michael George (BG) as a witness.
- On 17 April 2000, as part of a wide investigation, the claimant's flat was searched. A coat found hanging on the kitchen door, which was admittedly that of the claimant, was taken for forensic examination. A senior forensic science officer discovered a single particle of FDR in the internal right pocket of the coat. This particle matched the constituent elements of FDR found in the cartridge case and on the victim's hair.
- On 25 May 2000 (before the FDR match had been established), police arrested BG for murder.
- On 29 May 2000, police charged BG for murder.
- On 2 July 2001, after deliberating for almost 32 hours, the equivalent of 5 days, Barry Michael George was convicted by a majority of 10 to 1 and sentenced to life imprisonment.

- On 29 July 2002, on the basis of a number of grounds including eyewitness testimony, scientific evidence, and the role of the trial judge, the Court of Appeal concluded that the verdict of the jury was not unsafe and that appeal was dismissed (see *R v. Barry Michael George* [2002] EWCA Crim 1923).
- (See the Table of Witnesses for the Crown in the first appeal comparing reliability of witnesses observation. Compare with the tools of analysis of evidence that we had learnt.)
- On 15 November 2007, following a Criminal Cases Review Commission review, the Court of Appeal quashed the conviction and ordered a re-trial (see *Barry George v. R* [2007] EWCA Crim 2722).
- On 1 August 2008, after an 8-week trial and deliberating for the jury of 8 women and 4 men acquitted BG. He had been in jail for 8 years.
- On 7 October 2009, BG applied to the Secretary of State for compensation.
- On 15 January 2010, the Secretary of State concluded that BG was not "clearly innocent in the sense that innocence is genuinely demonstrated beyond reasonable doubt by new or newly discovered facts".
- On 3 March 2010, the Secretary of State confirmed the decision.
- On 25 August 2010, the High Court granted judicial review by BG of the decision of the Secretary of State.
- On 28 June 2011, the Secretary of State refused the claim for compensation, having followed the decision of the Supreme Court in the *Adams* cases.
- RB and others, who had been acquitted, applied judicial reviews of the decision of the Secretary of State after *Adams*. On 18 May 2012, the High Court ordered the 5 cases to be heard together.
- On 25 January 2013, the High Court ruled that BR was "not innocent enough" to be eligible for a pay-off and the case was thrown out (see *Ali and others v. Secretary of State for Justice* [2013] 1 W.L.R. 3536, [2013] EWCA 72 (Admin)). (The Secretary of State's decision to refuse compensation in Mr Lawless's case is quashed and his entitlement to compensation must be reconsidered by him in the light of this judgment.)
- On 27 February 2014, the Court of Appeal dismissed the appeal of RB and 3 others. *Al & others v. Secretary of State for Justice* [2014] 1 W.L.R. 3202, [2014] EWCA Civ 194.
- GB took his claim to the European Court of Human Rights.
- *The murder of Jill Dando remains unsolved*.

3.4 Prosecution case about firearm discharge residue

- See second appeal: Barry George v. R [2007] EWCA Crim 2722, paragraphs 5 and 6 for original trial evidence and paragraphs 14 to 27 for fresh evidence.
- Summary prepared by Dr Robert N. Moles and Bibi Sangha for "Networked Knowledge - Law Report":

"At the trial the prosecution relied primarily on four categories of evidence:

(1) witnesses who had seen a man who looked like Barry George near the scene of the murder when it occurred and one witness who had

identified him as being there four hours earlier;

(2) repeated lies told by Barry George in interview;

(3) an alleged attempt to create a false alibi;

(4) a single particle of firearm discharge residue (FDR) found, about a year after the murder, in Barry George's overcoat.

The prosecution called expert witnesses at the trial whose evidence suggested that it was likely that the particle of FDR came from a gun fired by Barry George rather than from some other source.

Those witnesses and other witnesses from the Forensic Science Service told the Court of Appeal that this was not the right conclusion to draw from the discovery of the particle of FDR. It was, in fact, no more likely that the particle had come from a gun fired by Barry George than that it had come from some other source.

The Court of Appeal concluded that, if this evidence had been given to the jury at the trial, there is no certainty that they would have found Barry George guilty. For this reason his conviction had to be quashed."

3.5 Operation Oxborough

- 1,109 messages received by police.
- carried out 1,273 actions.
- 2-year investigation.
- 2,400 witness statements.
- some 14,000 e-mails.
- some 2,000 suspects.
- some 1,200 suspected cars.
- 3,700 exhibits.
- 47 detectives.
- How to analyse
- Chronology ?
- Wigmorean chart ?

3.6 Investigation re FDR

- News reported by Nick Dorman & Mark Williams-Thomas for the Mirror on 30 March 2015:

"Cops tried honeytrap to get Barry George to confess to her murder. The female officer, codenamed Sonia, chatted up the loner in the hope he would let slip something incriminating"

"The honeytrap had not thrown up any concrete leads. But the secretly recorded conversation gave weight to the picture of him as an oddball fantasist who was obsessed with celebrities."

". . . a record card on George, from Metropolitan police files . . ."Eyebrows meet . . . Teeth broken . . . Talks with a lisp. Simple.""

"George had an IQ of 75, well below average. By calling him"simple", police show they were aware of his vulnerablity, somebody who perhaps could be trapped into incriminating himself."

- *Barry George v. R* [2007] EWCA Crim 2722, paragraph 3

". . . On 17 April 2000, police searched the home of George Barry, neighbour of the deceased. Police found a coat was hanging on the kitchen door, which Barry George admitted was his. The coat was later subjected to forensic examination by a Senior Forensic Science Officer, Mr Robin Keeley, who discovered a single particle (11.5 microns or the equivalent of about one hundredth of a millimetre) of firearm discharge residue (FDR) in the *internal* right pocket of the coat. The particle matched the constituent elements of FDR found in the cartridge case and on the victim's hair."

- News reported by Nick Dorman & Mark Williams-Thomas for the Mirror on 30 March 2015:
  - Finding of a coat
  - On 9 May 2000, Barry George spoke to an attractive undercover policewoman.
  - On 25 May 2000, police arrested Barry George.
  - On 29 May 2000, police charged him for murder.
- Before the FDR match had been established, the claimant was arrested and then on 29 May 2000 charged with the murder of Jill Dando.
- *Barry George v. R* [2007] EWCA Crim 2722, paragraph 2

"Forensic examination showed that a firearm had been pressed to her head when her assailant discharged the weapon. The bullet which caused the fatal injury and a 9mm cartridge case were recovered from the crime scene. Among the other findings by forensic scientists was firearm discharge residue (FDR) in the cartridge case and in the victim's hair. The nature of the FDR was Percussion Primer Cap residue which does not degrade with time."

- On 26 February 2001, the trial commenced.
- On 27 June 2001, the jury retired.
- On 2 July 2001, the jury convicted Barry George of murder by a majority of 10 to 1. He was sentenced to life imprisonment.

3.7 Evidence at first trial

- See first appeal *R v. Barry Michael George* [2002] EWCA Crim 1923 and second appeal *Barry George v. R* [2007] EWCA Crim 2722.
- Summary of evidence adduced in the first trial

"George, who lived a few streets away from Miss Dando"

"had a history of complex medical problem"

"had a wholly exaggerated interest in well-known personalities and entertainment, with single women and particularly those living locally to him and also with the army and weaponry"

"hung around at the BBC's offices in White City, west London, had BBC cards and also had copies of the corporation's staff publication"

"had briefly worked as a messenger for the BBC in the 1970s, told another BBC employee he"did not like the way they [the BBC] had treated Freddie Mercury and his family"

"changed his name by deed poll, twice adopting the names of famous people"

"bought a number of items of military equipment two weeks before Miss Dando died"

"Over the course of many years the defendant, particularly but not exclusively in the area of Fulham, would approach women, engage them in conversation and then seek to discover where they lived and the vehicles they drove."

"observing these addresses and on occasions watching as the women arrived home"

"a man matching Mr George's description in the area at the time of Jill Dando's death"

"a particle of firearm discharge in George's coat"

"a fibre on the victim consistent with George's clothing"

"George's association with firearms"

"his obsession with the victim and other female television presenters"

"lies he had told in questioning"

"his flawed alibi statement"

3.8 Appeals

- First appeal, appeal dismissed: *Barry George v. R* [2002] EWCA Crim 1923 (29 July 2002)
- Following a review, the Criminal Cases Review Commission referred his conviction to the Court of Appeal under section 9 of the Criminal Appeal Act 1995;
- Second appeal, appeal allowed, re-tiral ordered: *Barry George v. R* [2007] EWCA Crim 2722 (15 November 2007)

3.9 Second appeal

- *Barry George v. R* [2007] EWCA Crim 2722 (15 November 2007)

3.10 *Barry George v. R* [2007] EWCA Crim 2722

- Reviewing the evidence in the first trial

"1. At about 11.30 am on 26 April 1999, Miss Jill Dando, the well-known television presenter, was shot and killed as she was about to enter her home at 29 Gowan Avenue, in Fulham. Her death was caused by a single shot to the head."

"2. Forensic examination showed that a firearm had been pressed to her head when her assailant discharged the weapon. The bullet which caused the fatal injury and a 9mm cartridge case were recovered from the crime scene. Among the other findings by forensic scientists was firearm discharge residue (FDR) in the cartridge case and in the victim's hair. The nature of the FDR was Percussion Primer Cap residue which does not degrade with time."

- FDR found on Barry George (first trial)

"3. Barry George was one of a number of men who came to the attention of the police in the course of their subsequent investigation. On 17 April 2000 his flat was searched; and a Cecil Gee coat was found hanging on the kitchen door, which Barry George admitted was his. The coat was later subjected to forensic examination by a Senior Forensic Science Officer, Mr Robin Keeley, who discovered a single particle (11.5 microns or the equivalent of about one hundredth of a millimetre) of FDR in the internal right pocket of the coat. The particle matched the constituent elements of FDR found in the cartridge case and on the victim's hair."

"6. In his interview Barry George admitted owning the coat, and that only he used it. He could not recall whether or not he was wearing it on 26 April 1999."

- The prosecution experts' evidence (first trial)

"9. . . ."94. Mr Keeley's opinion was that the fact that only one particle of FDR was found was not significant. This was not an unusual situation. In Mr Keeley's experience CAP residue would more often that not be found on the firer of the gun, but would not be found on ordinary members of the public unless they had been associated with firearms. His evidence was that the [10.5] micron particle was consistent with having come from the cartridge used in the killing. Dr Renshaw, equally well-qualified, reviewed Mr Keeley's findings and agreed with them.""

"50. The judge dealt at length with Mr Keeley's evidence as to the various possibilities of innocent contamination. He then summarised Dr Lloyd's evidence on the same topics. Finally the judge directed the jury that they should consider the evidence in relation to the FDR on its own, and only have regard to it if they were sure that it showed that the particle did not derive from innocent contamination. He told them: . . ."

""What you have to do is to decide whether, on the evidence to which I have referred, the prosecution has made you sure that this particle was deposited on the coat other than innocently. If you are sure you can exclude innocent contamination, then you can take this matter into account, along with all the other evidence, when deciding whether the prosecution has proved its case. If you are not sure that the prosecution has proved its case on this issue, then discard this evidence altogether; it will not help you at all. In that event, you may think - as I have already said towards the start of my summing-up - this removes an important part of the Crown's case.""

- The defence expert evidence (first trial)

"9. . . . . The jury had also to consider Dr Lloyd's evidence . . . that the particle

was so small that to rely on it, one year after the killing, was 'incredible'. Its size 'cast doubts on where it came from' - it could be the result of casual contamination. However, the main part of his evidence was directed to the places where innocent contamination of [the coat] could have taken place. Dr Lloyd was of the view that the police procedures had been flawed and contamination could have occurred at any stage, even before the events surrounding the victim's death . . ."

"10. The Court concluded that the FDR evidence was capable of supporting the Prosecution case; and that its weight was a matter for the jury."

"12. The single ground of appeal advanced before us is that the evidence in relation to the discovery of the particle of FDR in the pocket of the appellant's overcoat, which was relied on by the prosecution at the trial as of great significance, was, in reality, of no probative value. We gave permission for fresh evidence to be adduced before us in support of this ground and for the Crown to adduce additional evidence in challenging it."

- The "fresh" expert evidence at the Criminal Cases Review Commission

"22. In response to a request from the Criminal Cases Review Commission the FSS reappraised the evidence in relation to FDR that was given at the appellant's trial. They expressed their conclusions in a report dated 4 September 2006, the authors of which were Dr Moynehan and Miss Shaw. They summarised their conclusions at the outset of their report:"

"We are satisfied that a particle found on the sample taken form the inside right pocket of Mr George's coat was characteristic of firearms discharge residue . . . In our opinion, it would be just as likely that a single particle of discharge residue would have been recovered from the pocket of Mr George's coat whether or not he was the person who shot Ms Dando nearly a year previously. Consequently, we consider that the FDR findings in this case would be reported as inconclusive with regard to the issue of whether or not Mr George shot Ms Dando."

"23. The authors elaborated on that conclusion at p. 7 of their report:"

"Conclusion"

"The significance of the FDR findings in this case can be put into context by considering two alternative propositions:"

"Mr George is the man who shot Ms Dando."

"Mr George had nothing to do with the incident."

"In our opinion the probability of finding a single particle of discharge residue in Mr George's coat pocket would have been the same, regardless of which of the above propositions was true."

"The FDR evidence is thus inconclusive. In our opinion it provides no assistance to anyone asked to judge which proposition is true."

"14. The most significant evidence that we have received owes its origin to the initiative of Dr Ian Evett, who from 1996 to 2002 worked for the Forensic Science Service ('FSS'). His role there included assisting scientists to present evidence to the court in a manner that was logical, transparent and robust. Part of the technique that he advocated involved analysing the evidence by reference to the extent to which it supported one or other of two rival propositions. Typically one proposition would be that an event that formed part of the prosecution case occurred and the rival proposition would be that this event did not occur."

"24. Dr Moynehan was called to give evidence before us on behalf of the appellant. He confirmed the views expressed in the report of 4 September 2006. Dealing with the FSS guidance he said that today the FSS would consider a single particle of FDR as inconclusive and say that it would be of no evidential value. He said that specific odds, such as those that Mr Keeley put forward in his discussion with Dr Evett, were a matter of subjective assessment based on experience."

"25. Dr Evett was also called to give evidence for the appellant. He confirmed the accuracy of the note of his discussion with Mr Keeley. He made it plain that he himself had no expertise in the analysis of FDR. Speaking of the specific odds given by Mr Keeley, he said that these were 'ball park figures'. It was not possible to be precise. What was significant was the relative magnitude of the figures."

"26. Mr Keeley was then called by the Crown to deal with these contentions. . . ."

"27. Mr Keeley said that he had intended to convey to the jury that it was no more likely that the single particle of FDR came from a gun fired at the time of Miss Dando's murder than that it came from some other source. With hindsight he agreed that he should have made that fact clearer in his evidence."

"Finally, the Crown called Dr Renshaw (who had also given evidence at the trial). His evidence accorded with that of Mr Keeley. While it was unlikely that the particle had resulted from secondary contamination of the coat it was equally unlikely

that it was the result of the appellant firing a gun a year before."

"51. It is clear from these extracts that the summing up that the jury were directed that the evidence of Mr Keeley and Dr Renshaw provided significant support for the prosecution's case that the appellant had fired the gun that killed Miss Dando. The judge did not consider that their evidence on this topic was 'neutral'. In this he was correct and his summary is a model reflection of the evidence that had been called. In reality, when considered objectively that evidence conveyed the impression that the Crown's scientists considered that Crown's scientists considered that innocent contamination was unlikely and that, effectively in consequence, it was likely that the source of the single particle was the gun that killed Miss Dando. In that respect their evidence at the trial was in marked conflict with the evidence that they have given to this court with the result that the jury did not have the benefit of a direction that the possibility that the FDR had come from the gun that killed Miss Dando was equally as remote as all other possibilities and thus, on its own, entirely inconclusive. In the light of the way in which Mr Keeley now puts the matter, we have no doubt that the jury were misled upon this issue"

"52. We can deal with this issue shortly. The FDR evidence was not the foundation of the prosecution's case against the appellant. Without pre-judging what might follow, in the absence of the FDR evidence there was circumstantial evidence capable of implicating the appellant; that much is clear from the detailed consideration given to the other aspects of the case by the Court of Appeal hearing the first appeal. . . ."

"54. It is impossible to know what weight, if any, the jury attached to the FDR evidence. It is equally impossible to know what verdict they would have reached had they been told as we were told, by the witnesses who gave evidence before us, that it was just as likely that the single particle of FDR came from some extraneous source as it was that it came from a gun fired by the appellant. The verdict is unsafe. The conviction will be quashed."

3.11 Re-trial

- On 9 June 2008, the re-trial commenced. Jonathan Laidlaw QC, prosecuting, said her death was the result of the actions of "a loner, a man acting alone with no rational motive to kill" see here.
- On 1 August 2008, a jury acquitted Barry George by a unanimous verdict.
- See summary by another related case, *Adams and 2 others v. Secretary of State for Justice* [2011] UKSC 18

"68. . . . The evidence of the firearms discharge was not admitted at the trial. On 1 August 2008 the jury by a unanimous verdict found Mr George not guilty. On

the day of the acquittal the Crown Prosecution Service issued a press statement in which it was stated that Mr George now had the right to be regarded as an innocent man."

3.12 Crown Prosecution Service

- The Crown Prosecution Service today defended its decision to bring the case against Barry George, saying it was "fit to be put before a jury".

"We would like to thank the jury for their consideration of our evidence and attention during this trial. We would also like to thank the witnesses who were obliged to give evidence for a second time and those new witnesses who came forward during the trial."

"Mr George now has the right be regarded as an innocent man but that does not mean it was wrong to bring the case. Our test is always whether there is sufficient evidence for a realistic prospect of conviction - it would be wholly wrong to only bring cases where we were guaranteed a conviction."

3.13 Commentary of Annabelle James

"This case does again raise the issue of the use of expert evidence in criminal trials. As has been seen before in numerous . . . juries clearly often attach much weight to the views of learned experts. . . . juries may be likely to follow the lead of the learned experts in the case - that is, after all, what they are there for. . . . . Barry George . . . was in fact convicted on the basis of the jury's misunderstanding of the forensic evidence, he has spent nearly of his life behind bars for a crime that he did not commit. The effects of this on any individual would be long-lasting; . . . ." Annabelle James, *Fresh Evidence, Probative Value of Firearms Discharge*, Journal of Criminal Law 2008, 72(3), pages 199 - 201.

3.14 Period of detention

- On 25 May 2000, police arrested Barry George.
- On 1 August 2008, a jury acquitted Barry George.

3.15 Compensation

- Compensation under Section 133 of the Criminal Justice Act 1988

"(1) . . . when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the

miscarriage of justice to the person who has suffered punishment as a result of such conviction . . .”

- What is “miscarriage of justice”?
- Ali, Lawless, George, Denni and Tunbridge applied judicial review of the decisions of the Secretary of State for Justice refusing them compensation. The judicial review was adjourned pending the decision of the Supreme Court on the interpretation of “miscarriage of justice”.
- As revealed in *Adams and 2 others v. Secretary of State for Justice* [2011] UKSC 18:

“69. Mr George applied for compensation under section 133 of the Criminal Justice Act 1988 (for 1.4 million). By letter dated the Secretary of State for Justice told Mr George that he was not prepared to authorise an award of compensation as the new forensic evidence did not prove beyond reasonable doubt that he was innocent. He referred to the fact that in its judgment of 15 November 2007 the Court of Appeal stated that in the absence of the evidence of the firearms discharge there was circumstantial evidence capable of implicating Mr George, and that it had ordered a retrial which defence counsel conceded should take place. . . . (brackets added)”

“70. Mr Glen QC for Mr George submitted that it was sufficient to entitle a person to an award of compensation under that section that his conviction had been reversed on the ground of a new or newly discovered fact and that, in the event of his being subjected to a retrial, he had been acquitted of the offence. As that was what had happened in his case it should be made clear by this Court in its judgment that, where a person had suffered punishment in such circumstances, compensation should be paid to him under the scheme that had been set up by the statute.”

3.16 Miscarriage of justice

- *Adams and 2 others v. Secretary of State for Justice* [2011] UKSC 18:

“X, Y and Z had each had his conviction quashed by the Court of Appeal . . . X, Y and Z each unsuccessfully claimed compensation under the Criminal Justice Act 1988 s.133. The issue arising in all three appeals was the meaning of the phrase”miscarriage of justice” in s.133.”

“. . . The mere quashing of a conviction did not prove innocence and could not be the trigger for compensation. . . . [Category] (i) where the fresh evidence clearly showed that the defendant was innocent; . . . Category (i) cases clearly fell within s.133 but did not provide the exclusive definition of”miscarriage of justice” for the purposes of that section. . . . ”

"Category (ii) . . . A new fact would show that a miscarriage of justice had occurred when it so undermined the evidence against the defendant that no conviction could possibly be based upon it. That was a matter to which the test of satisfaction beyond reasonable doubt could readily be applied. It would not guarantee that all those who were entitled to compensation were innocent, but it would ensure that innocent defendants convicted on evidence that was subsequently discredited were not precluded from obtaining compensation because they could not prove their innocence beyond reasonable doubt"

3.17 Judicial reviews failed

- On 25 January 2013, the High Court ruled that BR was "not innocent enough" to be eligible for a pay-off and the case was thrown out (see *Ali and others v. Secretary of State for Justice* [2013] 1 W.L.R. 3536, [2013] EWCA 72 (Admin)).

"159. . . . In our view, . . . [t]here was indeed a case upon which a reasonable jury, properly directed, could have convicted the claimant of murder."

"160. It follows that in our judgment the Secretary of State was entirely justified in the conclusion he reached. For those reasons the claimant's case fails."

- On 27 February 2014, the Court of Appeal dismissed the appeal of RB and 3 others. *Al & others v. Secretary of State for Justice* [2014] 1 W.L.R. 3202, [2014] EWCA Civ 194.

3.18 European Court of Human Rights

- Appeal of the judicial review failed. Where can he go?
- European Court of Human Rights, on the basis that there was a violation of Article 6 - presumption of innocence - of the European Convention of Human Rights.
- See example in *Allen v. The United Kingdom* (Application no. 25424/09**)

3.19 Damages elsewhere

- Barry George has accepted "substantial" damages from newspapers over claims he was stalking women and articles suggesting he murdered Jill Dando. See news here.

"He accepted the undisclosed amount at the High Court against News Group Newspapers - owner of The Sun and The News of the World."

3.20 Why the dots had not been properly joined

- Who killed Jill Dando? Did anything went wrong with the investigations? here, here and here

"Mark Williams-Thomas, TV investigator and former police detective . . . , concludes TV star died at orders of a Mr Big warning others off probing crime clan. . . . I unearthed an intelligence report naming two men . . . . It suggested Jill was being targeted for investigating crime on television. The report goes on to detail how after shooting her the men disposed of the murder weapon . . . . . it is my strong belief there is one key reason why they were allowed to slip through the net of the biggest police manhunt since the Yorkshire Ripper. The 47 detectives . . . had become too focused on nailing George, Jill's loner neighbour. . . ."

- Recall our homework?

3.21 Legacy

- University College London: Jill Dando Institute of Security and Crime Science
- Dando's co-presenter Nick Ross proposed the formation of an academic institute in her name and, together with her fiancé Alan Farthing, raised almost 1.5 million. The Jill Dando Institute of Crime Science was founded at University College London on 26 April 2001, the second anniversary of her murder.
- The UCL Jill Dando Institute of Security and Crime Science is the first Institute in the world devoted to Crime Science.
- Bursary award to study broadcast journalism at University College Falmouth
- The BBC set up a bursary award in Dando's memory, which enables one student each year to study broadcast journalism at University College Falmouth.

4 Admissibility HK

4.1 Opinion Evidence generally not admissible

- Undesirable to testify on issue for the court to decide (old rule);
- May not be qualified and thus mislead the court;
- Opinion may be based upon hearsay.

4.2 Common law exception

- Opinion evidence of properly qualified expert witnesses.

4.3 Statutory exception, example

- Section 20 of the Gambling Ordinance (Chapter 148)

"(3) If in any proceedings under this Ordinance a court is satisfied that by experience or otherwise a police officer has expert knowledge of any practice or device used in or for the purpose of the commission of any offence under the Ordinance,

the court may receive evidence from that police officer as to the nature, effect or purpose of the practice or device."

4.4 Function of an expert

- *R v. Chan Kam Tak* [1988] 2 HKLR 11, (CACC 204 of 1987)

"13. . . . The function of an expert is to give his opinion upon an issue in the case based on inferences which he draws from perceived facts as a result of his knowledge and experience; , to give evidence of fact which his training has equipped him to perceive but which would not be observed by a layman. :"to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of his conclusions, so as to enable the judge or jury to form their own judgment by the application of these criteria to the facts proved in evidence."" (underlines added; applying *Davie v. Edinburgh Magistrates* [1953] SC 34 at 40).

4.5 Implications:

- decision-making remains with the tribunal of fact;
- tribunal of fact must understand the opinion evidence;
- tribunal of fact be able to replicate the reasoning process;

"black box" approach would not be accepted.

4.6 A bird eye view

- 5-rule (A condition precedent to admissibility is "relevancy".)
- The Common knowledge rule (*R v. Turner* [1975] QB 834)
- The area of Expertise rule (A recognised area of expertise rule) (*R v. Turner*)
- The Expertise rule (qualifications) (*R v. Turner*)
- The Basis rule (factual basis of opinion) (*R v. Abadom (Steven)* [1983] 1 WLR 126)
- The Ultimate issue rule (*HKSAR v. Mo Sze Lung Thomson and another* CACC 152/2001)
- See Report of Law Reform Committee on Opinion Evidence, Singapore Academy of Law; J.J. Doyle Q.C. Admissibility of Opinion Evidence.

4.7 The common knowledge rule

". . . furnish the court with scientific information which is likely to to outside the experience or knowledge of a judge or jury." R v. Turner [1975] 1 QB 834, at 841.

"The area for consideration is one that the tribunal requires the assistance of an expert."

". . . if the subject-matter is one on which the average man is capable of forming an opinion unaided by expert evidence, then the expert evidence is inadmissible." J.J. Doyle Q.C.

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult." [*R v. Turner*]; applied in *HKSAR v. Nancy Kissel* CACC 414/2005; *HKSAR v. Cheung Yui Kong* [2007] 4 HKLRD 413, CACC 362/2005; this principles was laid down by Lord Mansfield in *Folkes v. Chad* (1782) 3 Doug.K.B. 157

4.8 Field of knowledge

". . . whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court." *The Queen v. Bonython* [1984] 38 SASR 45 at 47; applied in *HKSAR v. Yip Kim-po and five others* CACC 353/2010 at paragraph 38. See also *Kennedy v. Cordia (Services) LLP* [2016] 1 WLR 597 (SC), at 610 paragraph 43, applying *The Queen v. Bonython*.

4.9 The expertise rule

". . . whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court . . ." *The Queen v. Bonython* [1984] 38 SASR 45 at 47; applied in *HKSAR v. Yip Kim-po and five others* CACC 353/2010 at paragraph 38. See also *Kennedy v. Cordia (Services) LLP* [2016] 1 WLR 597 (SC), at 610 paragraph 43, applying *The Queen v Bonython*.

4.10 The basis rule

"Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based." *R v. Turner* [1975] QB 834, at 840;

- In *HKSAR v Tang Yuet Ming and Tang Yuet Luen* HCCC 237/2003, the judge refused to admit in evidence the report of the Government Treasury Accountant because the accountant passively relied upon on the material provided to him by the investigation

officer. See here.

"The fact which is basis to the question on which he is asked to express his opinion must be proved by admissible evidence. Where the existence or non-existence of some fact is in issue, a report made by an expert who is not called as a witness is not admissible as evidence of that fact merely by the production of the report, even though it was made by an expert. But once the primary facts on which their opinion is based have been proved by admissible evidence, they are entitled to draw on the works of others as part of the process of arriving their conclusions. They should refer to the material in their evidence so that the cogency and the probative value of their conclusion can be tested and evaluated by reference to it." *R v Abadom (Steven)* [1983] 1 WLR 126 CA.

4.11 The ultimate issue rule

"24. . . . there is no longer a bar to the admission of expert evidence on what has been called the ultimate issue. . . ."

"25. . . . Whatever sea change there may have been in recent years to the admission of expert evidence on the ultimate question, that change does not amount to a proposition, which we rather think was the tenor of the submissions made to us, that expert evidence is always admissible on the ultimate question. Whether or not it is depends on the facts of the case; upon the expertise, whether that expertise is relevant to the ultimate question; whether the expert's opinion on 'the ultimate question' is a conclusion which depends upon his expertise or is proffered in some other capacity; and whether the court requires the assistance of an expert upon the ultimate question." *HKSAR v. Mo Sze Lung Thomson and another* CACC 152/2001

4.12 Admissibility of expert evidence

- Connection of methods used by witness with the area of expertise rule and the expertise rule

"An in investigation of the methods used by the witness in arriving at his opinion may be pertinent, in certain circumstances, to the answers to both the above questions (Area of expertise rule and expertise rule). An investigation of the methods used by the witness in arriving at his opinion may be pertinent, in certain circumstances, to the answers to both the above questions. If the witness has made use of new or unfamiliar techniques or technology, the court may require to be satisfied that such techniques or technology have a sufficient scientific basis to render results arrived at by that means part of a field of knowledge which is a proper subject of expert evidence. . . ." (brackets added) *The Queen v. Bonython* [1984] 38 SASR 45 at 47; applied in *HKSAR v. Yip Kim-po and five others* CACC 353/2010 at paragraph 38.

4.13 *Wang Din Shin v. Nina Kung*

- Requirements for acceptance of a specific scientific theory, novel or not (see *Wang Din Shin v. Nina Kung*, HCAP 8A/1999)
- Chinese translation

> "The person propounding the scientific theory must have the necessary qualifications, expertise, experience and integrity to ensure that the Court can have confidence that his testimony is worthy of consideration."
>
> "The theory must have a sound scientific basis, comprehensible to the Court."

- Requirements for acceptance of a specific scientific theory, novel or not (see *Wang Din Shin v. Nina Kung*, HCAP 8A/1999)

> "The theory should have gained widespread support amongst that sector of the scientific community which would be likely to utilise it or its results."
>
> "The methods used to carry out the scientific test should be safe and reliable, and follow an established protocol, i.e. one that has been published, disseminated and acknowledged to be reproducible."

4.14 Notice of expert evidence in criminal trials

- Section 65DA of the Criminal Procedure Ordinance (Chapter 221)

> ". . . any party to the proceedings proposes to adduce expert evidence . . . shall as soon as practicable furnish the other party or parties with a statement in writing of any finding or opinion which he proposes to adduce by way of such evidence . . . provide the record of any observation, test, calculation or other procedure on which such finding or opinion is based and any document or other thing or substance in respect of which any such procedure had been carried out."

4.15 Examples

4.15.1 DNA expert

(graphical image removed!)

4.15.2 Seat belt expert

(graphical image removed!)

4.15.3 Voice expert

(graphical image removed!)

4.15.4 Expert on battery by husband

(graphical image removed!)

4.15.5 Tooth marks expert

(graphical image removed!)

4.15.6 Exoert on polygraph

(graphical image removed!)

4.15.7 Traffic accident expert

(graphical image removed!)

4.15.8 Fingerprints expert

(graphical image removed!)

4.15.9 Lip reading expert

(graphical image removed!)

4.16 Cases not discussed in class

1. DCCC 11/2013
2. DCCC 695/2013
3. DCCC 980/2014
4. DCCC 643/2015
5. DCCC 520/2015
6. CACC 347/2016
7. DCCC 466/2016
8. DCCC 782/2016
9. CACC 18/2014

5 Admissibility USA

5.1 Timeline

- Common law
- *Frye* (1923)
- Federal Rules of Evidence Rule 702 (1975)

- *Daubert* (1993)
- *Kumho Tire* (1999)
- FRE 702 (current)

5.2 Timeline

"market place" test

"general acceptance" test: *Frye v. United States* 293 F. 1013 (D.C., Cir 1923) (3 December 1923)

- Federal Rules of Evidence Rule 702 (2 January 1975)
- *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579 (28 June 1993)
- *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 526 U.S. 137 (23 March 1999)
- Federal Rules of Evidence Rule 702 (1 December 2000)

5.3 Maket place test

- Edward J. Imwinkelried. The Epistemological Trend in the Evolution of the Law of Expert Testimony: A Scrutiny at once Broader, Narrower, and Deeper. Georgia Law Review, 2013, Volume 47, Issue 3, page 863 - 887. See here too.

  "The test was general acceptance in the marketplace. If sensible laypersons were willing to pay for the services of doctors and accountants, common sense suggested that doctors and accountants possessed knowledge that could be helpful in court."

  "Under the earlier marketplace test, the required acceptors were consumers in the market who signified acceptance by parting with their"hard earned dollars" to purchase services."

- Nancy S. Farrell. Congressional Action to Amend Federal Rule of Evidence 702: A Mischievous Attempt to Codify *Daubert v. Merrle Dow Pharmaceuticals, Inc.*. Journal of Contemporary Health Law & Policy, Volume 13, Issue 2, page 523 - 551

  "Before Frye, the admission of scientific evidence focused on the assumption that the superior experience and training of the expert would permit a presentation to the court and jury of the significance of scientific tests that laymen could not be expected to comprehend. Expertise was implied from the individual's superior qualifications and, in many cases, was based on the degree of professional success the expert enjoyed."

5.4 *Frye*

- 3 December 1923
- Court of Appeals of District of Columbia

The defendant, James Alphonzo Frye, was charged with murder. He wished to call William Marston to testify about the novel systolic blood pressure test. The theory was that when a person attempted to deceive, his systolic blood pressure will change. An expert who has carefully monitored a suspect's blood pressure during an interrogation could tell whether the suspect was being truthful. Marston was prepared to testify that when Frye denied committing the murder during the test, Frye's blood pressure did not change. Therefore, Frye's denial was truthful. The trial judge excluded the testimony of Marston. The appellate court affirmed the ruling.

"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. . . . We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition . . . ."

5.5 Rule 702 of the Federal Rules of Evidence (1975)

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

5.6 Who won?

- Frye (1923); or
- Rule 702 (1975)?

5.7 *Daubert*

- 28 June 1993
- United States Supreme Court

". . . claiming that the drug Bendectin had caused the birth defects. Daubert and Schuller's evidence, however, was based on in-vitro and in-vivo animal studies, pharmacological studies, and re-analysis of other published studies, and these

methodologies had not yet gained acceptance within the general scientific community."

"The US Supreme Court first held that Rule 702 should have been applied. And under 702, the testimony met the standard of"assisting the trier of fact to understand the evidence or to determine a fact in issue.""

"The Court explicitly refused to adopt any"definitive checklist or test" for determining the reliability of expert scientific testimony, and emphasized the need for flexibility. They did, however, establish several factors that the Court thought would commonly be pertinent to "scientific knowledge.""

5.8 *Daubert* (1993) factors relevant to "scientific knowledge":

- Whether the methods upon which the testimony is based are centered upon a testable hypothesis
- The known or potential rate of error associated with the method
- Whether the method has been subject to peer review
- Whether the method is generally accepted in the relevant scientific community

5.9 *Kumho Tire Co. v. Carmichael*

- 23 March 1999
- United States Supreme Court

5.10 Issue in *Kumho Tire Co.*

"Patrick Carmichael was driving his minivan on July 6, 1993, when the right rear tire blew out. One of the passengers in the vehicle died, and others were severely injured. Three months later, the Carmichaels sued the manufacturer of the tire, claiming that the tire was defective and the defect caused the accident. The Carmichaels' case rested largely on testimony from a tire failure expert (skill or experience-based observation). This is technical knowledge not scientific knowledge."

"But Rule 702 applies to"scientific, technical, or other specialized knowledge."" "This language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge" True, Daubert only dealt with scientific knowledge. The Court observed that the line between "scientific" and "technical" knowledge is not always clear." "Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases."

"The Court held that the gatekeeping function described in Daubert applied to all expert testimony proffered under Rule 702."

5.11 FRE 702 (current)(1 December 2000)

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

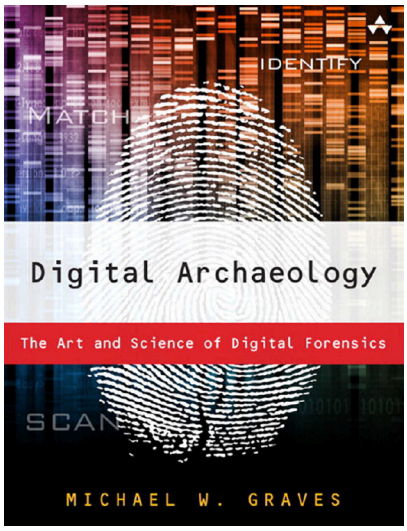
(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case. "

6 Science of investigation

6.1 Digital Archaeology: the Art and Science of Digital Investigation



6.2 Chapter 1: Anatomy of a Digital Investigation: Casey (2001) 6-step model

- Identification/assessment
- Collection/acquisition
- Preservation

- Examination
- Analysis
- Reporting
- (Crime scene management Module 2 (see chapter 5 of Guide to Computer Forensics and Investigations))

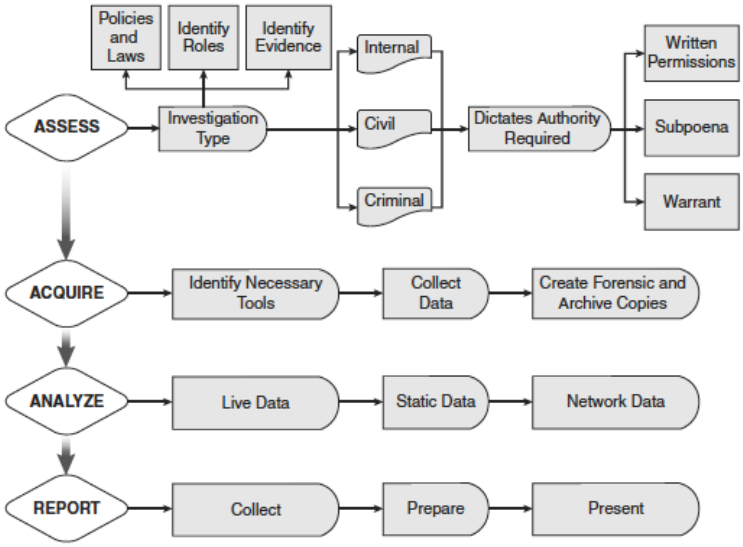


Figure 1.1 The steps of a digital investigation

- From a management standpoint, each of these steps must be carefully monitored by documentation. Legal and internal regulations regarding privacy must be followed at all times
- Private organisation: executive-level decision to accept a case. Decision based on a set of predefined guidelines
- List all legal documentation required. Live v statics acquisition. Storage of copies fulfil personal data. Check employee handbook, companies policies.
- Signed agreement outlining scope of investigations - then identify potential sources.
- Sufficiency of evidence - incriminating and exculpatory to support or negate hypothesis.
- Steps taken by investigation must be documented.
- General case documentation, procedural documentation, case timeline, evidence chain of custody

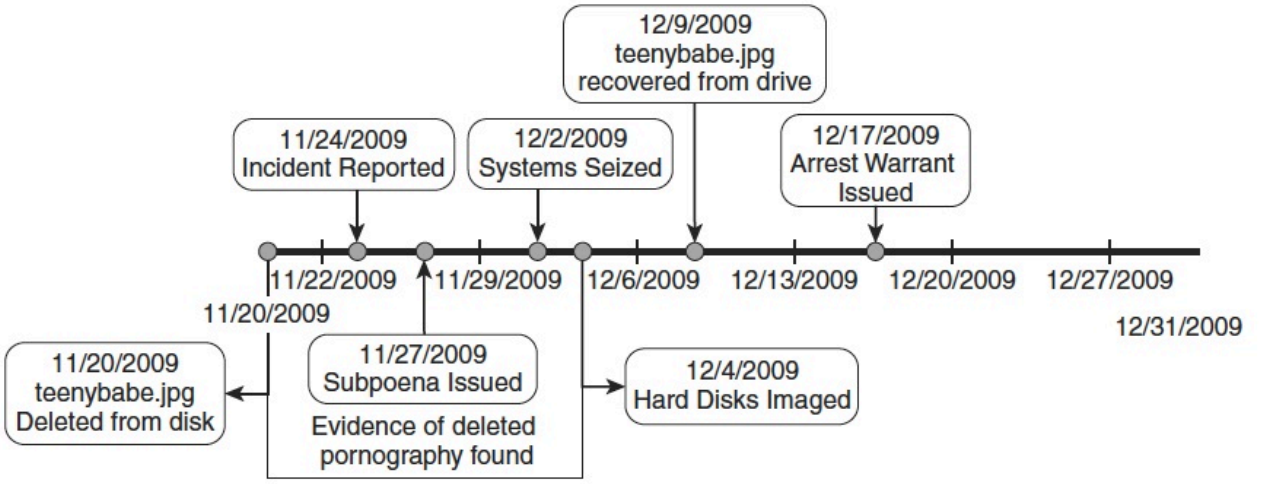


Figure 1.2 A good timeline is essential in communicating the order of events to outside parties of interest.

7 Crime scene reconstruction

7.1 Seeks answers to certain fundamental questions:

- What happened?
- Where did it happen?
- How did it happen?
- When did it happen?
- Who was involved?
- Why did it happen?

7.2 Case A (real case)

- Liu and Shang, Online Tactics for Criminal Investigations, Criminal Investigation and Legal System 48(2), page 2 - 4
- In the small hours of 18.iv.2009, victims (V) was robbed by 3 men. One of them also raped her. She shouted for help. The rapist (A) was arrested. The other two ran away. (A) admitted that he had come to know the other unknown persons via an online forum. (A) gave his user name.
- How to investigate?
- Police checked the activities of the discussion forum. During the month preceding the offences, (A) had surfed the internet at 6 internet cafe for a total of 15 times. On four of those occasions, (A) went to the same internet cafe. On those four occasions, a person (B) logged in and logged out a terminal almost at the same time with (A) at another terminal. The two terminals were adjacent to each other. According to the customers records of the internet cafe, police arrested (B). V identified (B).
- Police checked (B)'s internet activities. (B) used a QQ number. On the day immediately after the offence, (B) obtained access to the internet via an internet cafe which did not

keep customers records. Police discovered that another QQ number was used to log in and log out a terminal of the internet cafe almost at the same time of (B)'s QQ number.
- Police interrogated (B). B confessed the offence and gave the real name and address of the third person.

7.3 Case B (real case)

- In the afternoon of 6.iv.2009, at Y district of X city, a robbery took place. An exhibit left at scene was related to the names of a number of persons. Police checked internet activities of one of them (A). (A) obtained access to the internet at regular times and places at X city. But there were no internet activities on the 6th and 7th. On the 8th and 9th, (A) obtained access to the internet at his home town at Y city. Since the 10th, (A) obtained access to the internet at regular times and places at X city again.

- How to investigate?

- Police waited at one of the internet cafe and arrested (A).

- (A) confessed.

8 Biases

8.1 Who opened the Facebook account?

- Information revealed:–
  - Login name: TomSawyer
  - Registered Name: Tom Soong
  - Mobile phone: 2345 1234
- Further information revealed:–
  - Phone registered by: Tony So
  - Who opened the account?
- Additional information to change your view:–
  - Account opening date: 1.1.1999
  - Phone subscription date: 1.1.2003
  - Phone input into Facebook record: 1.1.2005

8.2 How many of each animal did Moses put on the ark?

(graphical image removed!)

8.3 How do biases come about?

- media

- own experience
- experience of people around us
- observations
- assumptions

8.4 Questions shape our answers

- Loftus, Leading Questions and the Eyewitness Report, Cognitive Psychology 7, page 560 - 572

- How tall was the basketball player? on average: 79 in.

- How short was the basketball player? on average: 69 in.

- Do you get headaches frequently, and, if so, how often? on average: 2.2 headaches per week.

- Do you get headaches occasionally, and, if so, how often? on average: 0.7 headaches per week.

- Experiment 1: 150 students watched a movie.

- Movie depicted a car, after failing to stop at a stop sign, made a right-hand turn into the main stream of traffic. In order to avoid a collision with this car, other cars stop suddenly in the main stream and the other cars collided together. The movie lasted for less than 1 minute. The accident occurred with a 4-second period.

- 150 students divided into two groups (1) and (2).
  - (1) How fast was the car going when it ran the stop sign?
  - (2) How fast was the car going when it turned right?

- There was a second question to the first question for each group

- Did you see a stop sign?

- Group (1): 53% responded yes.

- Group (2): 35% responded yes.

- Experiment 2: 150 students divided into two groups (1) and (2).
- Movie of a white sports car accident.
- (1) How fast was the white sports car going when it passed the barn while travelling along the country road?
- (2) How fast was the white sports car going when travelling along the country road?
- After answering the question, a week later, they were asked, "Did you see a barn?"
- Group (1): 17.3% yes; Group (2): 2.7% yes.
- In fact there was no barn in the movie.
- What speeds were the cars going when they (contacted / hit / bumped / collided / smashed) each other?
- contacted: 31.8 miles per hour
- hit: 34 miles per hour
- bumped : 38.1 miles per hour
- collided : 39.3 miles per hour
- smashed: 40.8 miles per hour

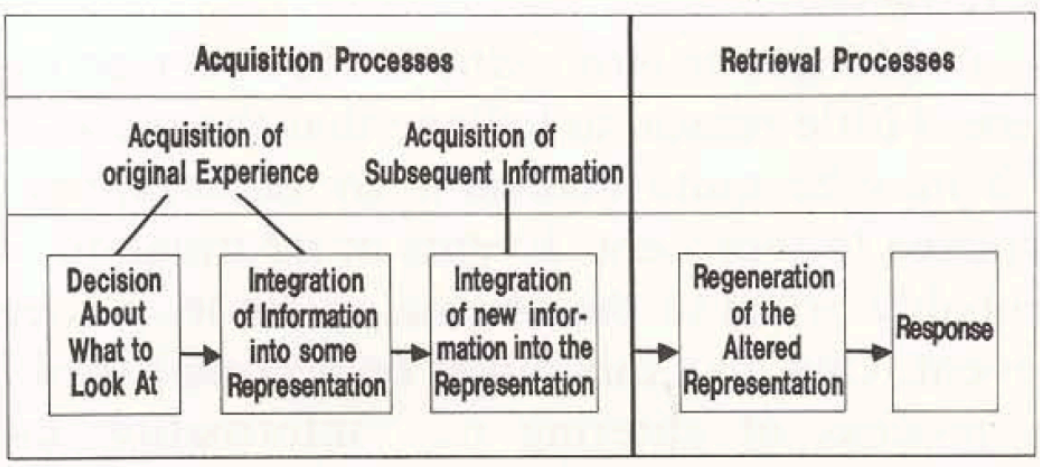


FIG. 1. Schematic diagram of the memorial processes.

8.5 Confirmation biases

- Seymour Kety, Biochemical Theories of Schizophrenia (Part I), 129 Science 1528 at 1529

"Selective attention to evidence is based in an individual's expectation of a situation or a hypothesis. There is a tendency to bolster a hypothesis by seeking consistent evidence while minimising inconsistence evidence."

"It is difficult to avoid the subconscious tendency to reject for good reason data which weaken a hypothesis while uncritically accepting those data which strengthen it."

8.6 Supportive biases

- Seymour Kety, Biochemical Theories of Schizophrenia (Part I), 129 Science 1528 at 1529

(graphical image removed!)

8.7 Confirmation biases

- Dror, Charlton and Person, Contextual Information Renders Experts Vulnerable to making Erroneous Identifications, Forensic Science International 156 (2006) 74 - 78

"Fingerprint experts were less likely to find a match when facts provided about the case made a match seem less probable."

- The survey
- fingerprint experts have an average of 17 years experience;

- 5 participants from USA, UK, Israel, The Netherlandsand Australia;
- they were given cases and additionally facts about the case
- they did not know which were tests for the survey or actual work.
- In fact, five years ago, they had found matched.
- Survey result . . .
- LPE is latent print examiner. "They were told that the pair of prints was the one that was erroneously matched by the FBI as the Madrid bomber, thus creating an extraneous context that the prints were a non-match. The fingerprint experts were asked to decide whether there was sufficient information available in the pair of prints to make a definite and sound decision, and if so, what that judgement was (a match or non-match). The fingerprint experts were further instructed to ignore the context and background information, and to just focus solely on the actual print in their evaluation and decision making. Only one participant (20%) judged the prints to be a match, thus making a consistent identification regardless of the extraneous context. The other four participants (80%) changed their identification decision from the original decision they themselves had made five years earlier."
- Dror, Charlton and Person, Contextual Information Renders Experts Vulnerable to making Erroneous Identifications, Forensic Science International 156 (2006) 74 - 78

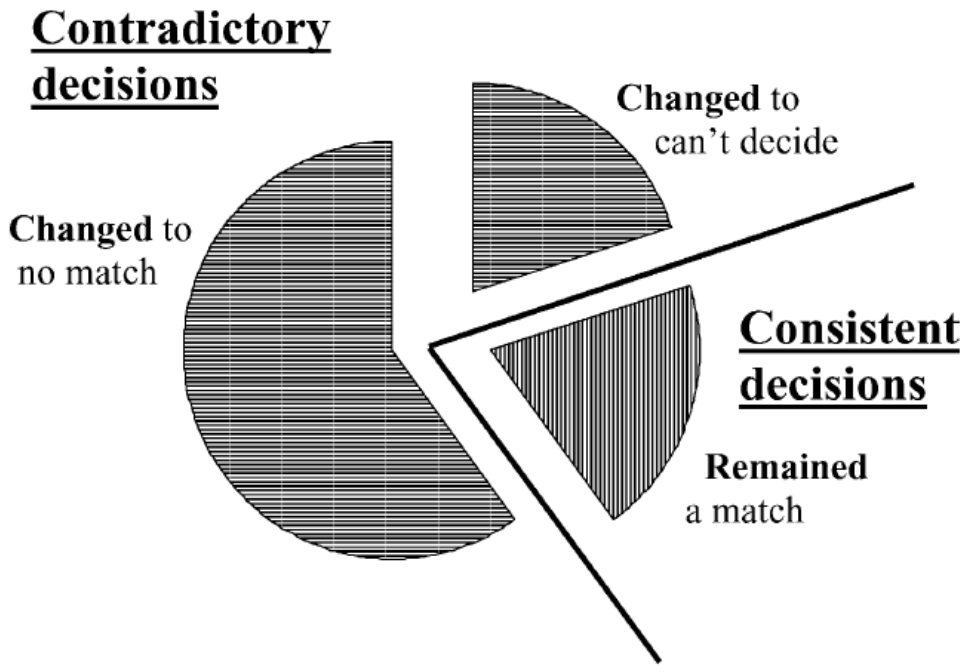


Fig. 2. The covert empirical data showing that most of the expert LPE changed their decisions when the same pair of fingerprints were presented in a different context.

8.8 Purpose of recording witness statement in UK

- Wolchover and Heaton-Armstrong, Recording Witness Statements, 1992 Crim LR 160
- (witness statements are also taken for civil cases)
  - governing the direction of the inquiry;
  - the selection of suspects;
  - the choice of offence to be charged; the cause of action to be taken;
  - furnish a narrative which witness can refresh memory;
  - provide a text against which consistency can be checked against witness statement or other witness during or before trial;
  - provide a documentary narrative which can be read at trial in place of live evidence.
- See also Heaton-Armstrong, Shepherd & Wolchover, Analysing Witness Testimony: a Guide for Legal Practitioners and other, Chapter 15.

8.9 References

- UK Humberside Police, Practice Direction for Witness Statement Taking (15 December 2005)
- Ministry of Justice, Achieving Best Evidence in Criminal Proceedings, Guidance on Interviewing Victims & Witnesses, and Guidance on Using Special Measures (March 2011)
- UK Home Office, Witness Statement (29 October 2013)

8.10 Where you can get some ideas:

- Operation procedures
- Enforcement guide

9 Epilogue

9.1 Summary

- Barry George and expert evidence
- Admissibility of expert evidence in HK
- Admissibility of expert evidence in US
- Investigation models and examples
- Investigative biases