

Book Review of “Witness Testimony in Sexual Cases” by Radcliffe et al by Catarina Sjölin

A lot of tired old clichés get dusted off for sexual cases: it’s just one person’s word against another’s; a truthful witness is a consistent witness; you’d remember every detail if it happened to you. Instead of falling back on these old “common sense” assertions, we should be asking questions: what other evidence might there be? does consistency indicate truth and inconsistency indicate lying? how do people lay down memories? what can a medical examination tell us about what happened? The starting points for answering these and other salient questions are provided in this illuminating book.

Although there is nothing ground-breaking in each chapter, that is rather the point; it is the bringing together of all these perspectives which is new and is to be wholeheartedly welcomed by the sensible practitioner who will have a niggling feeling that this is the book which they have needed for some time. This is not a criticism of busy practitioners (having been one specialising in this area) but a recognition that the demands of the work preclude time spent researching many of the important areas covered by this book.

The editors have sought out specialists in diverse but related fields to author the separate, stand alone chapters which have been sorted into evidential and investigative and scientific perspectives. The stand alone aspect of the chapters is important as this is a book which can and should be used as a reference point for checking the proper approach or current understanding in a particular area. Further reading suggestions are given at the end of each chapter.

The evidential half of the book starts by covering the basic ground of the context and issues in sexual cases (chapter 1) as well as prosecuting (chapter 2) and defending (chapter 8). Although disclosure, abuse of process, s.41 and bad character evidence are all covered in practitioner texts, the insights and

focused approach of these chapters (3 to 6) mean that even those familiar with this area will still benefit. What is particularly welcome is that the evidential section does not stop at these topics, which might be considered straightforward court matters, but goes on to provide guides to expert evidence, sexual allegations against medical professionals and sexual allegations and evidence gathering in the family court together with chapters on international case studies and institutional abuse inquiries. For seasoned criminal practitioners in sexual cases there are both, in Rumsfeldian terms, known unknowns and unknown unknowns which are tackled by these chapters.

In the former category fall probabilities in scientific (often DNA) evidence, which many practitioners rarely (if they are honest) understand properly. Reading pages 122 to 124 (and then rereading and marking them up) should immeasurably improve the understanding of investigators, CPS decision makers, advocates and judges, particularly when it comes to avoiding the “prosecutor’s fallacy” of confusing the probability of the defendant’s DNA profile “matching” the sample if he is not the donor with the probability that a person is not the donor if his DNA “matches” the profile. As the authors of this chapter point out, “‘matching’ characteristics do not uniquely identify a particular individual, but rather specify a pool of potential suspects” (p123).

The proceedings of the family courts are, for many criminal practitioners, unknown unknowns, as memories from the dim and distant days of early practice, or anecdotes about how the family courts work provide much used but unreliable guides. Such practitioners would do well to spend some time reading about the practice and procedure of the family court (chapter 10). The mechanics of involving the accused person in the process may surprise criminal practitioners: the court has to decide whether or not to give the person (if not already a party) leave to intervene and even if leave is given, as legal aid cuts have affected the family courts perhaps even more than the

criminal courts, that person might have to represent themselves (p166). The criminal defendant may thus have been unrepresented in family proceedings when findings were made against him or her. Propensity evidence, now so common in criminal cases, is rarely seen in family proceedings whereas some family judges are receptive to expert evidence on whether a child complainant is telling the truth (p175). Expert reports in family proceedings are prepared to assist a single, judicial fact finder, not a criminal jury. Using decisions and reports from family proceedings, whether at trial, when considering whether to prosecute or when speaking with experts used to family rather than criminal proceedings, requires an understanding which this chapter provides.

Although the immediate audience for this book is investigators and justice professionals, those assisting witnesses, particularly complainants, will find the first half of the book very helpful to understand what can appear curious and opaque practices in (and out of) court. To gain an understanding of how witnesses, and particularly complainants, are left feeling by the way that cases progress through the system, that immediate audience should turn to chapter 15 and be reminded that “[m]any of the things that may enable witnesses to give good testimony may seem relatively minor to the court process but are significant for the individuals”: a pregnant woman being allowed to sip milk to sustain her, a child being allowed to have a dog in the live link room to provide comfort or simply keeping a witness informed of what is happening (so far as possible) when there are delays in the case (pp248-9).

The part of this book which, for lawyers and judges, is likely to be most interesting is the second half which deals with investigative and scientific perspectives. The “Achieving Best Evidence” protocol is given timely review in chapter 13 and the importance of interview preparation and strategy is discussed in chapter 14; both useful background to practitioners.

Chapters 16 to 24 though, alone justify the (very reasonable) purchase price. There are vital chapters dealing with understanding what forensic science and medicine can (and cannot) provide in sexual cases (chapters 17 to 19). It is so easy when presented with an medical report to assume that the findings listed therein can strongly support, or indeed undermine, an allegation of sexual assault, particularly penetrative abuse. Having an explanation of the clinical meaning of certain findings outside of the context of an expert report in a particular case is invaluable and this section in chapter 18 (pp284-290) is one which is likely to get a post-it note attached in many copies, together with chapter 17 and 19's explanation of how examination and sample taking should be done.

The chapters which should be read by each and every advocate and judge, whether they work in sexual cases or not, are chapters 16 and 20 to 24 which provide succinct and user-friendly explanations of how to understand and interpret witness testimony. Children's evidence is now often heard in sexual cases, but it is so easily misinterpreted and misunderstood. The child who answers "yes" to the question "did your father touch you?" may be giving a factually accurate answer, but is not necessarily alleging sexual abuse as case example 5 on p257 vividly illustrates. To continue to enable children to have their experiences heard, we must learn to listen to what they are saying, not what we as adults *believe* they are saying. Chapter 23 gently but thoroughly takes apart common misconceptions about memory (for instance, that memories record like view cameras and that memories, once formed, cannot be changed). Not only is an inconsistent witness not necessarily inaccurate overall (whether the inconsistency is a changing fact or a fact only reported later), but a consistent, detailed account is not necessarily accurate (we remember the gist more than details and those details can be, inaccurately, filled in later from other sources).

The only criticism is really a request for more, made in the hope that this book will run to second and later editions. Chapters on consciousness and sleep walking would be extremely welcome, appearing as they often do as issues in sexual cases. The book is aimed primarily at criminal justice professionals with the hope that it will also assist decision-makers evaluate witness testimony, but the ultimate decision-makers in criminal cases – the jury members – are unfortunately those least likely to read it. The emergence of the direction on the dangers of making assumptions in sexual cases shows that judicial direction can and does evolve to deal with the “common sense” assumptions which can lead juries astray. It is to be hoped that similar directions can develop to help juries to answer the vital question of guilt based on the evidence properly interpreted, instead of those dusty old clichés.