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THE JOURNAL OF HOMICIDE AND MAJOR INCIDENT INVESTIGATION

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THE JOURNAL OF HOMICIDE AND MAJOR INCIDENT INVESTIGATION

The aim of *The Journal of Homicide and Major Incident Investigation* is to encourage practitioners and policy makers to share their professional knowledge and practice. The journal will be published twice a year by the National Policing Improvement Agency (NPIA) on behalf of the Association of Chief Police Officers (ACPO) Homicide Working Group. It will contain papers on professional practice, procedure, legislation and developments which are relevant to those investigating homicide and major incidents.

All contributions have been approved by the Editorial Board of the ACPO Homicide Working Group. Articles represent the operational experience or research findings of individuals which may be of interest to Senior Investigating Officers. The views expressed in each article are those of the author and are not representative of the NPIA, nor of ACPO. Unless otherwise indicated they do not represent ACPO policy. Readers should refer to relevant policies and practice advice before implementing any advice contained within *The Journal of Homicide and Major Incident Investigation*.

The ACPO Homicide Working Group welcomes contributions from practitioners or policy makers for inclusion in future issues. These should be emailed to the address below. Submissions should be prepared in Microsoft Word™ or compatible format. If submitted articles are already published elsewhere they will be reproduced without amendment. Where articles are being published for the first time, NPIA will liaise with the author in relation to any editing that may be required.

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Major Crime Reviews

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Abstract

ACPO published guidance on *Major Crime Reviews* in 1998. This article provides updated guidance that reflects changes in working practices and updates to ACPO (2006) *Murder Investigation Manual* (MIM) and ACPO (2005) *Major Incident Room Standard Administration Procedures* (MIRSAP).

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Detective Chief Superintendent Matt Sawers, West Midlands Police, PO Box 52, Lloyd House, Colmore Circus Queensway, Birmingham. B4 6NQ.

1 Introduction

The importance of carrying out independent reviews of major crime investigations is recognised throughout the police service. The ACPO Crime Committee issued *Revised Guidance for Major Crime Reviews* in 1998. This 2007 version takes account of current working practice and recent updates that have been made to both the ACPO (2006) *Murder Investigation Manual* (MIM) and ACPO (2005) *Major Incident Room Standard Administration Procedures* (MIRSAP).

Where individual force policies have previously been published, consideration should be given to revising them in the light of these guidelines.

This document gives guidance in relation to the setting of policy and the issues concerning the review process.

2 Definition

The primary aim of the review process is to assist the SIO.

A review is an independent examination of material gathered by a current investigation, on behalf of ACPO. The aim is to ensure that the investigation:

- conforms to nationally approved standards;
- is thorough;
- has been conducted with integrity and objectivity;
- has not overlooked any investigative opportunities; and
- that good practice is identified.

This definition makes a clear distinction between the formal review process and routine management interventions by Chief Officers.

3 Role of ACPO

The role of ACPO in relation to major crime investigations is outlined in ACPO (2006) *Murder Investigation Manual,* section 3.

Chief Officers must ensure that clear policy exists to reflect their expectations in relation to the conduct of major crime reviews. The ownership of this policy should rest with a named ACPO officer.

In individual cases, this officer is responsible for commissioning and managing major crime reviews. This will involve setting the terms of reference, appointing a review officer, providing resources, management support and implementing the findings of the review.

4 Policy

Although there is a clear distinction between review process and routine management interventions, the latter are important quality control mechanisms and a review is not a substitute for them but should compliment them.

These types of interventions are outlined below, but may vary from force to force.

4.1 Initial Assessment

This assessment is usually carried out within 24 to 72 hours of the instigation of the investigation. It is carried out by senior CID management who will look at the categorisation of the incident in accordance with *MIRSAP* (2005) and assess strategic issues, logistics and the structure and resourcing of the investigation.

4.2 Mature Assessment

This assessment is carried out after the initial response phase of the incident when the facts of the incident are clear. This may involve the SIO completing a short pro forma document which can provide helpful prompts for actions, and as a mechanism to highlight emerging problems. A guide in relation to areas to be considered can be found in *MIRSAP* (2005).

4.3 Peer Assessment

This is an informal assessment which occurs around the 7 day mark of an investigation, and looks at the actions performed and decisions made to date. This type of assessment is

carried out by fellow SIOs and is a useful process for supporting the SIO during the vital initial stages of the investigation. A written record should be kept of this assessment.

4.4 28-Day Review

In general, if a case has not been detected after twenty-eight days from the outset of the investigation a review should be commenced at the earliest opportunity.

4.5 **Historic Assessment** (also known as Cold Case reviews)

These assessments are conducted in cases of long-term undetected homicide cases and stranger rapes, with a view to evaluating whether there are grounds for opening new lines of enquiry.

They should be carried out every two years or when there are significant changes in legislation or technology that may assist the investigation. These changes tend to be advances in forensic technology. Occasionally it may be appropriate to assess if previously unwilling witnesses can make new contributions to the investigation.

4.6 Retention

Force policy should also include guidance in relation to the retention and storage of case papers and exhibits. In the past reinvestigations of cases that are undetected have sometimes been frustrated by case papers and exhibits being lost, damaged or destroyed.

Guidelines are given under the Criminal Procedure and Investigations Act 1996 as to the length of time these items should be retained.

5 The Review Process

5.1 Terms of Reference

The reviewing officer should be given written terms of reference by the ACPO officer commissioning the review. Ideally, these should be drawn up following consultation with the SIO and Head of CID.

It is recommended that terms of reference provide for a full review to be carried out in accordance with the process map within the methodology section of this document. This is

because a full review is the only means by which forces can be satisfied that the objectives of a review have been achieved.

Where Chief Officers feel that a full review is not desirable or not possible, narrower terms of reference should be drawn up to look at relevant areas of the investigation. Priority should be given to key solvability factors, and to establishing the effectiveness of the investigation, particularly in respect of issues such as scene management, forensic strategy and major lines of enquiry.

In some cases the commissioning officer may just require the review officer to look at one specific critical issue that has been judged to have the potential to have a detrimental effect on the investigation and the force. These targeted terms of reference would amount to a thematic review.

The terms of reference should specify the purpose of the review and then specify which facets of the investigation should be looked at in order to achieve the specified purpose.

The Chair of the ACPO Homicide Working Group provides advice to Chief Officers formulating terms of reference in complex or difficult cases. Requests for such assistance should be made through the ACPO office.

5.2 Review Criteria

It is recommended that the following investigations are reviewed:

- all undetected offences of murder or stranger rape;
- offences of this nature that have been discontinued prior to trial;
- where the defendant has been acquitted;
- any offence where the verdict has been overturned on appeal to a higher court.

In cases where there has been an acquittal the circumstances and nature of that acquittal need to be assessed prior to any decision being made regarding whether the investigation is to be reviewed and to the extent of that review.

Consideration may also be given to reviewing other undetected serious offences, eg, attempted murder or sexual assault.

5.3 Timing

The timing of a review can be critical and consideration should be given as to when maximum benefit can be obtained from appointing a reviewing officer. Some forces take the view the 'earlier the better' and appoint the reviewing officer after seven days if the offence is undetected. In general, if the investigation remains undetected it is suggested that reviews take place after 28 days, 12 months and then bi-annually thereafter. In exceptional cases, there may be good reasons to delay a review, for example, to avoid disruption to a critical phase of the investigation, or when the identity of the offender is known but their arrest has been delayed because they cannot be located. Under these circumstances a written record of the reasons for delaying the review should be made.

Reviews should be an ongoing process, preferably using the same reviewing officer. The frequency with which subsequent review reports are prepared is a matter of judgement for the relevant ACPO officer. In any event, it is good practice to conduct an assessment immediately before every undetected murder or rape is 'closed down'.

5.4 Reviewing Officer and Team

The appointment of a reviewing officer requires careful consideration. In the past, some forces have seen this appointment as an opportunity to provide career development for the reviewing officer. This practice should be avoided.

As one of the principal objectives of the review is to support and assist the investigation, the reviewing officer should have a career profile which includes recent and relevant investigative experience in the area of major crime investigation and an understanding of the role of the SIO at PIP level 3. Only by appointing an officer with such experience will the SIO and others have confidence in the opinions of the reviewing officer and whether that person will bring true added value to the process.

The reviewing officer should be at least of equivalent rank to the SIO, when this is not possible, the overall determining factors in selecting a reviewing officer should be based on relevant and credible experience.

Consideration must be given to appointing a reviewing officer from another force in all undetected cases:

- categorised as A+; or
- where there are complex or sensitive issues affecting the investigation.

As part of that decision making process forces should take into consideration the availability of a suitably experienced and independent review officer within their force, the issues surrounding the investigation and the impact of the investigation on the police service.

In most cases, it will be necessary to appoint a team of officers to work with the reviewing officer. The team should comprise officers of different ranks and skills with wide practical experience including someone with a detailed knowledge of HOLMES2.

Other specialist assistance such as an analyst, an experienced scenes of crime officer or other forensic science support may be required depending on the terms of reference and the nature of the investigation to be reviewed. Any specialist assistance must be independent of the ongoing investigation. NPIA Crime Operations Support can provide advice and support in relation to this area.

5.5 Methodology

Where possible, reviews should be based away from the operational incident room. Inclusion of a HOLMES 2 operator in the team makes this possible as it enables the system to be accessed from an independent location, thereby removing the need to visit the incident room (except where, for example, documents need to be checked against the computer record or some other important aspect requires discussion).

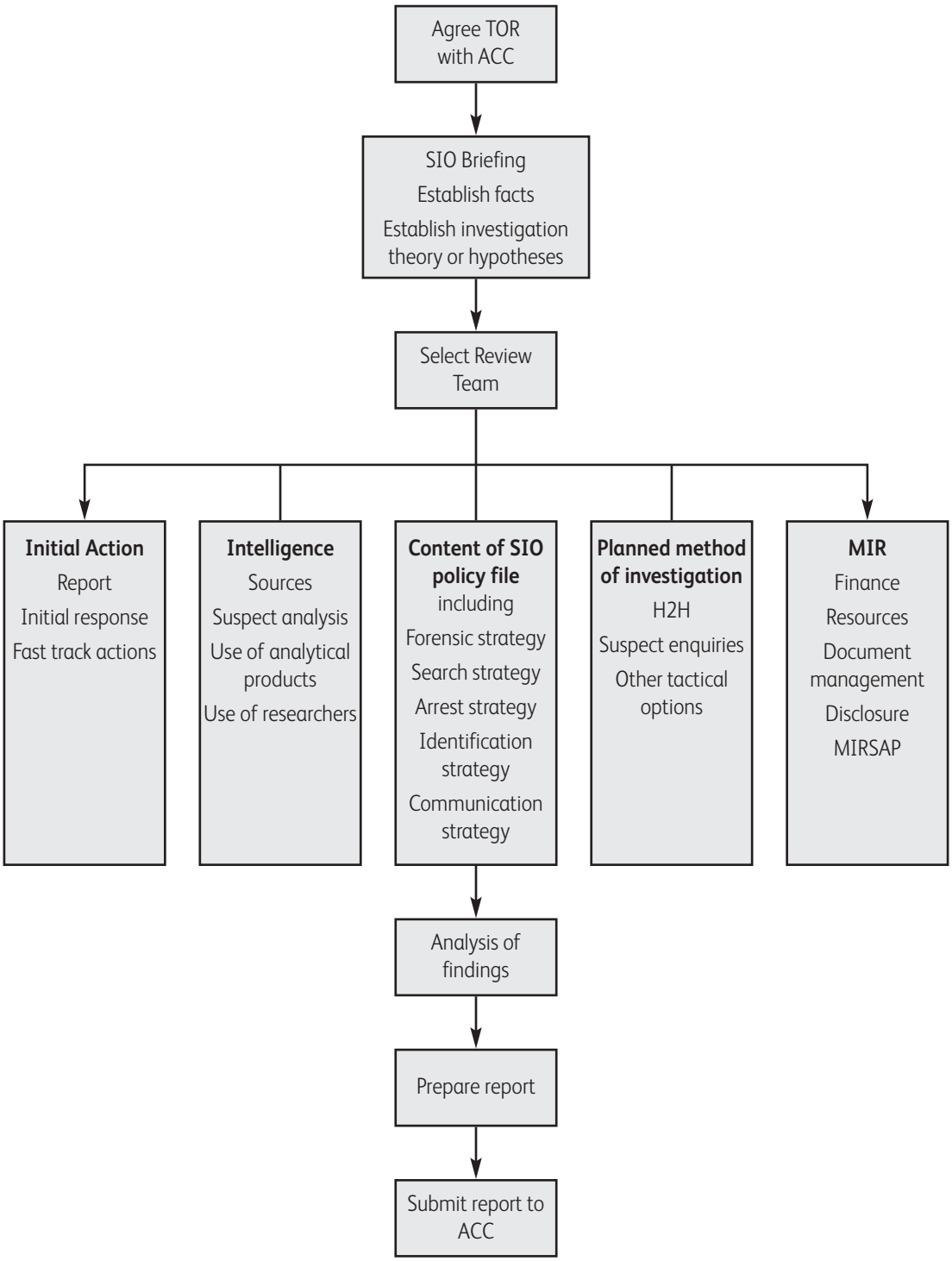
The reviewing officer must be supplied with copies of the Policy File, sequence of events, statements, exhibits schedules, log of events and the current situation reports. This enables officers involved in the review to be fully informed before commencing the review.

It is essential that the SIO provides a briefing to the reviewing officer and the review team. At the start of the review, a visit to the scene of the crime by the reviewing officer and supporting team is desirable.

Once it has been decided which lines of enquiry are to be examined, they should be prioritised accordingly. Reviewers should not set or accept unrealistic deadlines.

The SIO and their senior management team should be informed of anything requiring immediate attention. Regular meetings during the review process can assist in achieving this.

Overleaf is a flow chart outlining the suggested methodology to be followed when carrying out a review.


Agree TOR with ACC
SIO Briefing
Establish facts
Establish investigation theory or hypotheses
Select Review Team
Initial Action
Report
Initial response
Fast track actions
Intelligence
Sources
Suspect analysis
Use of analytical products
Use of researchers
Content of SIO policy file
including
Forensic strategy
Search strategy
Arrest strategy
Identification strategy
Communication strategy
Planned method of investigation
H2H
Suspect enquiries
Other tactical options
MIR
Finance
Resources
Document management
Disclosure
MIRSAP
Analysis of findings
Prepare report
Submit report to ACC

5.6 Reports and Subsequent Action

The reviewing officer should prepare a report for the ACPO officer who commissioned the review. It is good practice to allow the SIO to read the report prior to submission to check for factual accuracy and make an initial response, should they wish to do so. Any responses should be forwarded to the ACPO officer, together with the report.

Care should be taken in the wording of the report. It should remain objective and sensitive to the needs of the SIO whilst achieving the objectives set out in the terms of reference.

A useful approach to reporting review findings focuses on three forms of observations made during the investigation. These will cover individual decision making as well as system level findings. The areas focused on are as follows:

- observations about the adequacy of the methods used to gather and record material;
- observations concerning the adequacy of the various sub-processes used in the investigation; and
- observations on the interpretation of the material and how it shaped decisions made during the investigation.

The findings of a review, particularly the recommendations, lessons learned and suggested good practice, should be formally considered for adoption by the ACPO officer. These findings would generally fall into three categories:

- case specific recommendations;
- force recommendations; and
- national recommendations.

In which category the recommendation is placed will depend on the action to be taken and the method of dissemination of the finding.

Many forces have found it beneficial for the report to be formally considered by a review panel. This usually comprises an ACC Chair, Head of Crime, Force Solicitor, Divisional Commander and Scientific Support Manager and any other member who the Chair feels would be capable of contributing to the process. Any such meeting should also be attended

by the reviewing officer who should present the findings of the review, and the SIO who should be invited to respond.

Reviews should be a dynamic process. They should not only be used to assist the SIO in the investigation of a crime, particularly identifying lines of enquiry which need to be pursued, but also to increase the effectiveness and efficiency of major crime investigations. At the end of each review process, lessons learned and identified good practice should be circulated within each force. Where appropriate, relevant force policies and working practices should be revised in the light of review findings.

5.7 Role of National Policing Improvement Agency

The National Policing Improvement Agency (NPIA) has an important role to play in the dissemination of nationally recognised good practice and lessons learned from major crime investigations.

It is recommended that Chief Officers include in their force policies the need for the lessons learned and suggested good practice to be forwarded to NPIA so these issues can be disseminated to forces countrywide and inform the needs of future training.

NPIA Crime Operations Support have representatives on all regional review groups and publish on the Genesis website ' Investigative Suggestions' which capture good practice investigations, they are also able to collate review documents and highlight recurring problems to the Homicide Working Group so appropriate action can be identified to remedy this problem nationally.

5.8 Disclosure

In the event of a person or persons being charged in connection with a major crime investigation where a review has been conducted, the report should be revealed to the CPS in accordance with CPIA.

The review report will almost invariably be 'relevant material' and therefore needs to be considered in relation to disclosure. The prosecutor, in consultation with the SIO, will then determine whether the whole or any part of the review report undermines the prosecution case or assists the defence case and should, therefore, be disclosed to the defence.

There may be circumstances when the prosecution may feel it appropriate to claim Public Interest Immunity (PII) status in respect of part or all of the review report.

Chief Officers should consider policy in relation to the access to review reports under the Freedom of Information Act 2000 but in general no disclosure under this act should take place until all legal proceedings or subsequent enquiries have taken place.

References

ACPO (1998) *Major Crime Reviews.* Available on CD-ROM of supplementary reading in MIM 2006.

ACPO (2005) *Major Incident Room Standardised Administrative Procedures* (MIRSAP). Wyboston: NCPE.

ACPO (2006) *Murder Investigation Manual.* Wyboston: NCPE.

National Ballistics Intelligence Service: Every gun tells a different story

DCS Paul James
West Midlands Police

Abstract

At the time of going to print, the National Ballistics Intelligence Service (NaBIS) is due to launch this April, and will provide forces in England and Wales with a world class firearms intelligence system. The team behind the programme is keen to stress the part every investigating officer at every force can play in recovering ballistic evidence to build a national picture of gun crime.

All 43 forces and law enforcement agencies have made a commitment to work together to combat gun crime, as this is the only way a complete national picture can be captured. To achieve this, the NaBIS programme team have developed a comprehensive gun crime database located at three regional firearms forensic hubs.

The new regional facilities will be hosted by West Midlands Police (WMP), Greater Manchester Police (GMP) and the Metropolitan Police Service (Met). Using state of the art technology, these facilities will provide officers with quick-time forensic services to identify firearms and linked shootings.

These new 'forensic hubs' will be able to provide leads during the crucial first 24 hours of enquiries – what are often known as the 'golden hours' – using the NaBIS database.

This will provide a registry of all ballistics material recovered, including firearms, bullets and cartridges, forensic examination results and vital information on weapons controlled and used by criminals.

This article aims to introduce the NaBIS, its objectives and how it may be of benefit both nationally and to individual enquiries.

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1 History

The driving force behind the development of NaBIS was the ACPO Criminal Use of Firearms (CUF) Group, who responded to investigators' need for joined-up intelligence and strategic analysis around ballistics to help break the supply chain and tackle organised criminality.

Assistant Chief Constable Nick Tofiluk, as intelligence lead for the CUF team, was tasked with moving the programme forward in 2005.

He developed a business case, which was put forward to CUF and ACPO, and with their agreement the National Ballistics Intelligence Programme (NaBIP) was commissioned with support from the Home Office. Initial funding was provided for two years.

In this next stage of the programme, NaBIS will go live and become NaBIS, the National Ballistics Intelligence Service on a phased implementation basis during the next 6 months.

When fully developed, the service will be funded through contributions from each of the 43 forces, who will each pay a banded annual subscription based on their recorded levels of gun crime. This will ensure there is no individual cost for forensic submissions of guns and ammunition and the programme team hopes this will increase the proportion of ballistic material being analysed from the current level of 40 per cent to 100 per cent.

The Home Office has also funded the National Firearms Intelligence Cell (NFIC) at the same time, which will work alongside NaBIS.

2 The Team

The team responsible for delivering NaBIS brings a wealth of hands-on investigative experience, and know first-hand the challenges facing SIOs when dealing with gun crime.

Detective Chief Superintendent Paul James is the Programme Manager and Business Change Manager for NaBIS and is seconded to the team from Avon and Somerset Constabulary.

Throughout his career, Chief Supt James has built up extensive experience in the field of gun crime investigation, and is also the chair of the ACPO CUF Practitioners Forum.

Among the cases he has worked on are the murder of Evon Berry, the contract shooting of

Steven Henry, a cross-force investigation into an assassination and Operation Aragon, the complex investigation into the shooting of two girls which involved joint work between the Met and Avon and Somerset Police.

As part of his Business Change remit, Mr James acts as the main point of contact between forces and is the interface for introducing NaBIS doctrine and procedures across the board.

Matt Lewis is the programme's Business Operations Manager. He has been seconded from West Midlands Police, where he worked in the Force Communications and Intelligence Bureau. His role is to run the Programme Management Office along with financial management and business continuity responsibilities.

Lead scientist Martin Parker was formerly Scientific Support Manager at Cumbria Police Service. Martin is highly experienced in the field of ballistic examination, having previously worked both nationally and for Interpol. His role is to maintain forensic standards across the three hubs, ensuring consistency and a high quality of work.

Detective Chief Inspector Richard Moore is in charge of Doctrine Development. Seconded from West Midlands Police, his role is to look at what forces should do to ensure NaBIS is used effectively. DCI Moore has developed a series of practical guidelines giving advice on how NaBIS can most assist investigations.

He says: *"The database will ensure we pursue every opportunity to prevent and detect gun crime by targeting active weapons and the criminals who use them. This database is an excellent example of how the service has responded to the recommendations of the Soham Enquiry and the need to share intelligence."*

Superintendent Gary Herrington leads on database development. He was also seconded from West Midlands Police and has designed the NaBIS database in conjunction with NPIA and Anite, an independent computer software company. All police forces will have access to the database, being able to add information as well as extract intelligence.

Overall responsibility for NaBIS and ensuring the programme is delivered on time lies with West Midlands Police **Assistant Chief Constable David Shaw**, the Senior Responsible Officer. Mr Shaw is responsible for the strategic overview and future of the programme and is accountable to ACPO.

3 Every Gun Tells a Different Story

Firearms are moved between the major cities in the UK and each weapon could have been involved in a number of serious incidents. They each have a story to tell, not just about the crimes they were involved in but also where they came from, who has handled them and how they entered the country. NaBIS can help tell that story on a national and even international level.

Chief Supt James explains how the NaBIS system works: *"When a cartridge or other piece of ballistic material arrives it will be put through the integrated ballistic intelligence system (IBIS) to computer-check the markings and compare it with all the other ones we have on the database."*

"If there is a match, the system will tell you about the other incidents that cartridge has been involved in and will link in any important intelligence, such as the names of individuals or locations associated with it – around this and other shootings."

"As a Senior Investigating Officer, involved in many investigations around many shootings, I know that investigations into gun crime are all based around finding the evidence. Once you have established who committed the crime – who fired the weapon – the main focus of the SIO is getting the case through the courts so as far as they're concerned, that's the end of it."

"But where did that gun come from? At the moment, any wider intelligence falls outside the investigation's prime focus, with SIOs generally under pressure to avoid 'mission creep'."

"The SIO is tasked with solving a murder or a gun crime. Every investigation tends to be working in silos – with very few investigators looking to see where the weapon came from in the first place."

"NaBIS would argue that mission creep is not necessarily unhealthy. The system will start asking questions to find out the history of the gun – where did it come from? Where has it be used before? How did it get into the country? NaBIS aims to take each gun right back to where it was manufactured, reactivated or converted, and discover the individuals involved."

"We will be looking to understand how guns are coming into the market place – and then seeking opportunities to tackle and dismantle supply chains."

"NaBIS will expand on the work that is already being done nationally, developing a better working knowledge around the criminal use of firearms in England and Wales. To this end we have made sure we have all the relevant agencies on board, so that everyone with information on the criminal use of firearms is able to contribute to this information tool."

"The database, all working practices and business processes have been developed in conjunction with CPS to work in tandem with the evidential chain. NaBIS will allow a joint law enforcement approach, involving Customs, HMP, SOCA, the security services and the military."

4 Building a National Picture

This system is genuinely national. It will benefit all 43 forces in England and Wales – and indeed it is their full participation that will make the system work. It has not just been designed for those cities with higher incidences of gun crime, such as the Met, GMP and WMP, although their greater record of firearms incidents meant that locating the three hubs in these locations made sense.

The intelligence and ballistic information held on the database could make or break an investigation, just as a failure to submit information to the database could make or break the effectiveness of NaBIS as an investigative tool.

Forces in areas where there are fewer incidences of the criminal use of firearms have just as much capacity to tackle gun crime and contribute to the NaBIS database as larger forces. Gun crime in these areas can have a far greater impact on communities, potentially leading to a much quicker identification and prosecution of offenders, so their recording of intelligence and submission of ballistic material is just as crucial.

Borders and Immigration will also be involved in looking at individuals rather than ballistics materials, identifying who is involved in smuggling, their nationality and where they are coming from and where they are going to.

If used effectively, the database should significantly improve timescales for results being available to SIOs, as Chief Supt James explains: *"In the past, as an SIO it could have taken me anything up to six weeks to identify links between shootings but with NaBIS we can now do this in a little as 24 hours. This is important as firearms residue on clothes for example disappears very quickly."*

In order to capture as much relevant information as possible, the Outstanding Crime File from the last five years will be backdated onto the NaBIS database.

5 How Does it Work?

The NaBIS database has been developed in conjunction with the National Intelligence Model. The capability to examine ballistic material immediately means that forces will be notified straight away should there be any information that may be relevant to their enquiry.

As soon as a crime happens, SIOs can use the database to check the locations involved and any suspects to see if there are any hits. They can also search for any organised crime groups to see if there are links to any of the members.

When ballistic material is submitted, it will be scanned using IBIS which will bring up the 10 closest matches. These will then be examined manually by the ballistic scientists to find best possible match. Any positive links will be communicated to all interested forces and relevant OICs.

Links will also be analysed by the National Firearms Intelligence Cell (NFIC), which will look for any common factors to carry out strategic analysis.

The NFIC will not only examine the database when matches are flagged, but will also continually interrogate the system to look for trends and intelligence that could help identify suppliers or manufacturers. Who is involved, where or why? Intelligence will be sought to identify individuals involved in the process.

They can also help to build links between different forces, brokering meetings between different SIOs to get as much as possible out of the intelligence by bringing investigations together, leading to a greater understanding of the supply chain.

There should be no barriers to submitting ballistics materials to NaBIS, as the team wants everything to be sent in as soon as possible. To this end a transportation service will collect all items free of charge from individual forces and deliver it to the hubs. The service will collect anything from a single item upwards, so forces shouldn't feel they have to stockpile materials. The secure service will assure the continuity of the evidential chain.

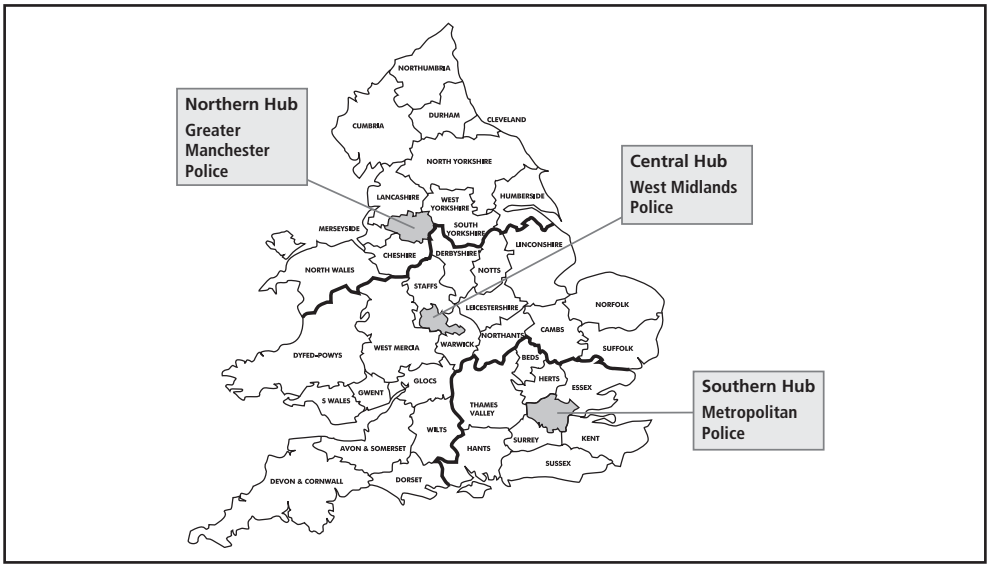
6 Playing Your Part

Unless everyone uses the system effectively it will not work, so investigating officers are urged to make full enquiries to find out if a firearm was involved. As Chief Supt James explains: *"Don't walk away from a scene until you are sure. Ask questions, conduct house-to-house enquiries, come back and search in daylight. To get the best intelligence, officers have to work smarter and have processes in place to ensure they are doing everything they can to retrieve every scrap of ballistic material."*

NaBIS is not a comprehensive intelligence system – it is a flagging system which signposts information which could be held by other forces. Officers are responsible for checking their own intelligence systems, such as PNC, IMS and FLINTS, as information vital to their case may not be gun-related and so may not appear on the NaBIS database.

For SIOs there could potentially be a dilemma between sending ballistic material to the forensic service providers or to NaBIS. Both present different opportunities to an investigation, however the NaBIS database must be updated either way to ensure the information held on the system is as complete as possible. If SIOs are in any doubt they can call their regional hub to get advice. SIOs can identify the regional hub to which their force has been assigned on the map in Figure 1. Further details on contacting the NaBIS is available on the website www.nabip.police.uk

Figure 1: Map of regional hubs



SIOs have a responsibility to filter material before it is sent to forensic service providers. They could in effect save money by using NaBIS as a filter, by not putting material through to service providers until the evidential product is required.

All forces should therefore ensure that all ballistic material is subjected to an effective and consistent internal 'clearing house' process to ensure that only suitable items are submitted to NaBIS.

The circumstances of each submission are also crucial. For example, shotgun cartridges recovered from a farmer's field may not be appropriate for NaBIS, whereas cartridges recovered from a busy high street might have a story to tell. If a gun is found inside a plastic bag, any fingerprints found on that bag should also form part of the submission.

7 Training

Training will be provided to officers at all forces from April onwards to ensure that they are familiar with processes to maximise the chances of retrieving ballistic material from any incident where a firearm may have been discharged – not just crime scenes themselves.

Officers will also be trained in how to utilise the database fully in terms of entering information consistently and updating it as more results come in, and to inform tactical and strategic intelligence use.

A facilitated learning pack and associated material will be made available to raise awareness of the programme with all police officers and staff.

8 Conclusion

At present there is no system like this anywhere in the world, making NaBIS a world leader in ballistic intelligence. But it can only be as good as the forces and organisations responsible for inputting and updating intelligence allow it to be.

For more information, visit the programme website at www.nabip.police.uk

The SIO and the Tier 5 Interview Adviser

Detective Superintendent Tony Hutchinson
Cleveland Police

Abstract

The Tier 5 Interview Adviser is able to advise the SIO on many differing aspects of any homicide investigation. Although the role was initially introduced to support all types of interviews, anecdotal evidence suggests that some SIOs have still failed to fully grasp this and see it as suspect focused; only considering their use at the arrest stage.

This paper looks to examine the role of the Tier 5 Interview Adviser and by asking a series of questions, establish that this narrow view needs to be extended in order to reinforce the need for the SIO to use this adviser much earlier in an enquiry than is perhaps the norm.

I am an experienced SIO who has led Cleveland Police's dedicated Major Incident Team since its inception in July 2001. The subject of interview techniques is one in which I have taken a special interest for some years. I work closely with the interview Steering Group and this partnership was key in introducing Tier 5 Interview Advisers to the force.

Contents

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1 Introduction

In recent years the way in which the police conduct interviews has changed radically from the interviews of 20 years ago. There has been a willingness and a necessity to engage with many professionals outside the 'police family' in an effort to professionalise our processes and obtain the best evidence possible

The Tier 5 Interview Adviser has a key role to play in developing interview policies and strategies. The SIO has an obligation to maximise every opportunity to obtain the best evidence. The Tier 5 Adviser can assist in ensuring good quality interviews, both of the suspect(s) and witness(es), that are conducted in accordance with all relevant legislation.

In order to achieve those quality interviews the Tier 5 Adviser should also be able to assist with identifying those officers who have the necessary skills to deliver what the SIO requires. A huge benefit of this approach is that the Tier 5 can identify, from a force perspective, any skills gaps and subsequently seek methods/people to fill those gaps.

In terms of major incident investigations the initial question is surely at what point should the SIO seek the services of the Tier 5 Interview Adviser? In answering this question SIOs need to ask themselves a number of questions:

- Should they be used in every homicide enquiry?
- Is there a criteria the SIO should look to use before their services are utilised?
- Should they be used only once a suspect has been arrested? Or at least when one has been identified?
- Alternatively, can they be used at a very early stage of the investigation in order to assist the SIO with both suspect and witness management?

By drawing upon my own personal experiences this paper will examine the benefits of employing the Tier 5 Interview Adviser more extensively than is currently the case for a large percentage of investigations. These benefits span both suspect and witness interviews.

As an experienced SIO I do not subscribe to the view that the Tier 5 Adviser should only be used on complex investigations, as suggested in ACPO (2006) *Murder Investigation Manual* (Section 20 Suspect Management, Para 20.6; Section 15 Witness Management,

Para 15.5.1.). If nothing else, in the field of homicide investigation, it is difficult to define exactly what constitutes a 'complex investigation'. More importantly utilising the adviser on an occasional basis will not allow them to develop their skills. Quite naturally the more they are used, the more proficient they will become.

The Tier 5 Interview Adviser brings many differing dimensions to the management team on any enquiry. A Tier 5 Adviser can provide such a wealth of advice and options to the SIO that perhaps the time to call upon their services is at the same time as the Crime Scene Manager is called to the initial scene. For many years I have had the Interview Adviser attend the initial scene. A clearer understanding of what has happened can prove valuable in informing the interview strategy and allowing the Adviser to provide the maximum benefit to the investigation. It allows them to provide timely advice and options to the SIO with regard to witness management and suspect management. It also helps the Interview Adviser to manage all the information emanating from the subsequent witness interviews, and indeed, the subsequent suspect interviews.

We operate in an era when the police are constantly striving to professionalise the investigative process, and the judiciary are quite prepared to openly criticise police interviews. Therefore does the early involvement of a fully trained Tier 5 Interview Adviser not have a key role to play in that investigative process?

2 Witness Management

Early involvement of the Interview Adviser allows the SIO access to a valuable resource for the planning of witness interviews. In many investigations these early witness interviews are not afforded the kind of careful planning that may go into a suspect interview. Yet the identification of a suspect is frequently dependent on the information provided by witnesses and all too often the suspect interview yields little other than a refusal to comment. As a result, should the golden rule always be that the same amount of planning that goes into a suspect interview goes into the witness interviews?

Planning for a witness interview is likely to consist of a couple of key components:

- Categorisation of the witness and subsequent recording of the interview; and
- Choice of interviewer(s).

2.1 Categorisation and recording of witness interviews

The early appointment of the Tier 5 Adviser will ensure that the SIO has the earliest advice regarding witness categorisation. There are many categories of witnesses and their categorisation will dictate how their witness statements are obtained. The Interview Adviser is best placed to identify those categories of witness who will require particular consideration, including:

- significant witnesses;
- vulnerable or intimidated witnesses;
- juveniles;
- reluctant or hostile witnesses.

Other witnesses whose needs may require special consideration would include any who have the potential to become a protected witness and those that may fall into more than one of the above categories.

It is my view that the categorisation of witnesses should NEVER be left to an officer within the MIR who has no experience in Tier 5 or Tier 3 witness and suspect interviews.

The Interview Adviser can advise the SIO with regard to both witness categorisation and the best method of obtaining their evidence. A key issue is whether the interview should be visually recorded[1] or orally recorded. Force and legislative requirements regarding the recording of witness interviews have undergone substantial changes in the last few years and continue to do so. Concepts of best practice have developed alongside these changes. As a result, SIOs may need to consider whether they are best placed to ensure that the witness interview strategy is obtained in accordance with the ever-changing legislation.

Witness evidence is vital to any case. It is my belief, certainly in the arena of major crime, that in the future all evidence in chief from a witness will be visually recorded. Is there a better way of accurately reflecting what the witness has to say? Visual recordings undoubtedly give the SIO a more accurate picture of exactly what the witness has to say

[1] The author accepts that "visually recorded" is more commonly referred to as "video recorded/interviewing". The author's force uses primarily digital recording equipment i.e. DVD. In order to encompass all types of recording equipment the author will refer throughout to "visual recording")

and how they said it, as opposed to the more selective account provided in a witness statement. As a result, visually recording witness statements must surely be considered best investigative practice?

In addition to the rather general issues of categorisation of witnesses and the subsequent recording of their statements, the Interview Adviser can then advise the SIO whether particular witnesses may require a specific strategy. This may be particularly important where the witness(es) have got something crucial to say or their testimony may be at variance with everyone else's. A Tier 5 Adviser can also provide invaluable advice if a witness presents particular communication issues. For example those for whom English is a second language, who are deaf or have learning disabilities or whose communication abilities may have been compromised by a head injury.

The following case highlights the benefit of:

- a specific witness strategy for a single witness: and
- visually recording a 'significant witness.'

Case Study 1

In February 2006 the body of a clothed female was found in her house. There was no sign of forced entry. The victim lived alone, although she had a boyfriend. The victim was aged 43. The boyfriend was 52 years of age. There was a history of violence between them as both were heavy drinkers. The victim had died as a result of manual strangulation.

As the SIO, I immediately appointed a Tier 5 Interview Adviser.

Although the boyfriend was identified as a suspect very early in the investigation, he was not arrested. Rumours were circulating within the small community that the boyfriend was responsible and that the cause of death was strangulation.

At 10.30pm on the day after the discovery of the body a juvenile walked into a police station stating that he had witnessed the attack. I was immediately notified and requested the Tier 5 attend and co-ordinate the interview. The juvenile was to be treated as a significant witness and despite the time of night it was decided that he would be visually interviewed by enhanced cognitive interviewers. The juvenile was with his parents who were insistent that he be interviewed there and then, or not at all.

The account provided by this witness was that as he was walking past the rear of the victim's house he saw her being strangled by her boyfriend. Both individuals were known to the witness. This account was believable, but when probed by the interviewing officer he was unable to provide the finer details.

The lack of fine detail was a concern to both the SIO and the Tier 5 Adviser. Both were able to view the interview in its entirety. The witness account was made a line of enquiry, in order to fully test its content. It was subsequently proven that the witness had invented this account out of a misplaced sense of loyalty to the victim.

Of course the same outcome could have been achieved by raising concerns about his account from a written statement. The benefits in this instance, however, were that the SIO and Tier 5 Adviser could watch the interview as it took place.

Clearly the worst-case scenario in this case would have been the suspect being charged as a result of this 'evidence', or the truth being exposed under cross-examination at Crown Court.

Whilst the above case is perhaps an extreme example, how many times has a SIO, or a member of the Major Incident Room, had to have a witness re-visited to seek clarification? Do the witness statements contain all the available evidence? Do they always, for example, adhere to the identification rules as per R *v Turnball and Camelo* ([1976] 63 Cr App R 132).

The aim of speaking to any witness should always be to obtain the available evidence first time every time. A Tier 5 Adviser, working alongside the SIO, can help maximise the investigative opportunities to ensure that this occurs.

2.2 Choosing the interviewer(s)

The appointment of a Tier 5 Interview Adviser can ensure that all the SIO's instructions, in relation to witnesses, are complied with. They can brief the interviewing officers as to what is required. However, how often are officers selected to obtain a witness statement because of their AVAILABILITY as opposed to their ABILITY? In the planning stages much thought is usually given to which officers will interview the suspect. The best and most experienced interviewers are chosen, consciously or subconsciously, in the belief that they will maximise the amount of value derived from the interview output. The question is; is the same amount of thought given to identifying those officers who will conduct witness interviews? If the answer is no, then it is my belief that that is a view which needs to be changed.

A Tier 5 Interview Adviser who is responsible for maintaining the portfolios of Tier 3 witness interviewers should be aware of those officers who show promise to aspire to Tier 3, both force-wide and within the MIR.

2.3 Multiple witnesses

The Tier 5 Adviser can also provide invaluable assistance when there are a huge number of witnesses. In such cases SIOs will need to consider how else they will categorise and prioritise the witnesses. The Interview Adviser can also work with the SIO to ensure that all the required resources are available including:

- interviewers;
- facilities;
- equipment;
- third parties e.g. intermediaries.

The benefit of an Interview Adviser in cases of multiple witnesses is illustrated below in Case Study 2.

Case Study 2

In July 2007 a coach with schoolchildren on board collided with a private motor vehicle. The road traffic accident occurred outside of a large comprehensive school as school was finishing for the day.

Having collided into the car the coach swerved, mounted the footpath and careered into a group of children. Some children were trapped under the bus, but there were no fatalities.

The Road Policing Unit requested the assistance of a Tier 5 Interview Adviser to advise the SIO. There were in excess of 160 potential witnesses aged between 11 and 16 years.

An interview strategy was formulated which included a matrix for the prioritization, and subsequent interviewing of, significant witnesses. The matrix was completed after each witness completed a pre prepared brief questionnaire which allowed a decision regarding

their priority to be made. In the cases where the witness could provide nothing of evidential value then the questionnaire proved sufficient.

It was then incumbent upon the Interview Adviser to overcome the logistics of interviewing a large number of juvenile witnesses and organizing the presence of appropriate adults at premises equipped with visual and audio recording facilities.

At the conclusion of this enquiry the SIO said "without the appointment of the Tier 5 Interview Adviser, the enquiry may have become difficult and protracted. Given that there was only a week left of term time it was imperative that all witnesses were seen as soon as possible in order to preserve and maximise the best evidence."

No SIO would develop a forensic strategy without surrounding themselves with the relevant experts. Why develop a witness management strategy without the relevant expert?

3 Suspect Management

The SIO has to continually exercise planning and judgement. This is the ethos of Professionalising the Investigative Process (PIP). There are a vast amount of considerations to be made in the area of suspect management.

- Who will prepare your suspect interview strategy?
- When does that preparation begin?
- What strategy will you have in place if a suspect walks into a police station and asks if the enquiry team wish to speak to him/her?
- What is your strategy if external factors dictate that your suspect must be arrested earlier than perhaps you wish?
- Who will prepare the pre-interview disclosure?
- Is there a requirement for staged disclosure?
- Who will give that disclosure?

- Where will it be given?
- Who will brief the custody staff regarding disclosure?
- Who will brief any medical examiners regarding disclosure?
- Should all disclosure given to a defence solicitor be in writing and given on tape?

There is a raft of considerations that the SIO must consider with regard to any suspect interview. The Tier 5 Interview Adviser can assist in all aspects of this part of the investigation. In addition to the above, the Tier 5 Adviser can provide advice regarding the structure of the interview, including;

- The opening question;
- significant statements/silences;
- topics;
- adverse inferences;
- special warnings;
- bad character;
- warrants of further detention;
- exit strategy;
- admission strategy.

The development of the suspect interview strategy can commence at the point of discovery of the deceased. The Interview Adviser can begin to assimilate all the relevant information as it is discovered. This strategy would continue to be developed as the enquiry progresses.

Like most SIOs I have personally experienced offenders walking into the police station and asking if anyone wishes to speak to them. Similarly circumstances have sometimes dictated that an arrest needs to be made earlier than we had initially intended. These events are not problematic provided the suspect interview strategy has already been developed.

3.1 Identification of the interviewing team

As with the Interview Adviser, the early appointment of the suspect interview team is, in my opinion, vital. By including those interviewing officers very early, often before a suspect has been identified, they will have sufficient knowledge of the incident at the point of arrest whenever that may be.

In order to ensure the team's readiness to interview I regularly appoint a reserve interview team to cater for abstractions in the event that the appointed interview team, through whatever circumstances, are unavailable on the day of arrest. This is obviously more important when the offender is not known and any arrest may be some weeks/months away.

Where a reserve team has been identified I do not specify which team is, in my mind, the lead interview team should not be identified. In doing so I ensure that everyone prepares to the same required level.

3.2 The Interview Adviser and disclosure

The Tier 5 Interview Adviser, in addition to developing pre-interview disclosure, can also be used to give the same disclosure to all defence solicitors. The benefits of this tactic are that any confrontations or disagreements are between the Adviser and the solicitor, and not the interview teams.

I am firmly of the opinion that all pre-interview disclosure should be written. A copy can then be handed to the defence solicitor after it has been read out by the Interview Adviser. Furthermore I also ensure that disclosure is conducted on tape.

From our requirements under Criminal Procedures and Investigations Act 1996 what better way is there to 'Record, Retain, Reveal?

3.3 Further considerations

There are further considerations that the Tier 5 Adviser can assist with in respect of the suspect interview. These include:

- where the interview will take place;
- the person responsible for ensuring all equipment requirements are present;

- the person who should de-brief the interview teams;
- the person who will brief the interview teams with regard to any emerging issues;
- how emerging information from the interviews (during monitoring) will be fed into the MIR allowing actions to be expedited;
- the person who will monitor the interview.

4 Conclusion

I firmly believe that the Tier 5 Interview Adviser should be utilised on all homicide enquiries at the earliest opportunity i.e. at the time the SIO attends the initial scene. As outlined the adviser can assist with all aspects of witness management, and commence preparation of the suspect strategy immediately, even in cases were the primary suspect is not immediately known. The interview adviser can play a key role in developing all policies and strategies, as well as providing knowledge in the areas of legislation, PACE, and policy guidelines.

The final overriding question is this: **can the SIO afford not to utilise the services of the Tier 5 Adviser?**

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The Use of Forensic Entomology in Criminal Investigations: How it can be of benefit to SIOs

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Abstract

This article introduces the science of forensic entomology, its application in criminal investigations and how it may be of use to Senior Investigating Officers (SIOs). Its use in the estimation of the minimum time since death or post-mortem interval is described, which is often one of the key questions asked by a SIO during a murder investigation. After 48 to 72 hours of death occurring, it can be difficult to obtain such an estimate by traditional pathologists' methods and the time interval beyond this is where entomology is potentially of great benefit to the police. Research on human donor bodies is also discussed, which forms a backdrop to the use of forensic entomology in casework.

Contents

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1 Introduction

Forensic entomology is the study of insects and other arthropods in relation to the law, most commonly to assist in criminal investigations by the interpretation of insect evidence in cases of suspicious death (*Amendt et al*., 2007; *Anderson*, 2001; *Byrd and Castner,* 2001; *Catts and Haskell,* 1990; *Greenberg,* 1991; *Smith,* 1986). While this is one of its predominant uses, entomological techniques can also be applied in a variety of other ways which do not necessarily always include a criminal aspect, such as in civil cases or in a medical context. The scope of forensic entomology is therefore very broad and is sometimes called 'medico-legal entomology', particularly in the USA and Canada. Some of its applications include the following examples:

- An infestation of insects on a living person, often the young or the old, is called myiasis, and indicates a case of neglect and/or abuse, even if discovered after death.

- If the victim was taking drugs, toxicological analyses of any insects which have fed on the body can reveal the presence of such toxins, which is especially important if the body itself has decomposed beyond examination.

- In cases of importation of illegal plant material such as cannabis, any insects present on the plants can potentially identify where it was grown.

- In cases of wildlife poaching, insect evidence may aid the investigation.

- Entomological material that has contaminated food may provide information as to how long the food has been spoiled for health and safety investigations. Insects may also be deliberately placed into food substances for blackmail or fraudulent reasons.

- During investigation of insurance fraud where for example individuals falsely claim to have structural damage caused by termites.

- Endangered species of insects may be illegally imported and traded by collectors.

However, the main use of forensic entomology is for the estimation of the minimum time since death or post-mortem interval (PMI) to aid murder investigators (*Anderson,* 2001; *Dadour et al*., 2001; *Goff,* 1993), which requires an understanding of the taxonomy, biology and ecology of the insects involved.

2 Forensically Important Insects

The decomposing body attracts a succession of insects in a relatively predictable order. These may include flies (Diptera), beetles (Coleoptera), butterflies and moths (Lepidoptera), and wasps, bees and ants (Hymenoptera) among other groups (*Turner,* 1987). Flies and beetles are the most frequent visitors, as both immature insects (larvae) and adults. However, the bluebottles and greenbottles (blowflies or Calliphoridae) are generally the most forensically important insects (*Greenberg,* 1991) because they are the most numerous insects on dead bodies and they are usually the first to arrive. Therefore they are the most useful group of insects for estimating the minimum time since death.

As the body begins to break down, flies are attracted within minutes to the odours emanating from the decomposing tissues and fluids. Upon arrival they may begin feeding and some of the females lay eggs in and around the natural orifices of the body (eyes, ears, nose, mouth and genital region), although eggs may also be found in the hair, between the body and the ground, in the folds of clothes, or in open wounds. In the latter case, the presence of eggs or larvae may indicate the presence of an injury caused by a knife or a gunshot.

The eggs hatch out into tiny first instar larvae (commonly called maggots) and pass through two more instars. In the late second and throughout the third stage the larvae form feeding 'maggot masses', which can lead to an increase in temperature of the mass, sometimes as much as 20°C above the surrounding temperature, depending on the numbers of larvae. When the larvae have finished feeding, they disperse away from the body and, depending on the nature of the ground, may burrow into the soil, or move under stones, logs and vegetation. The larvae metamorphose into puparia, which are immobile while the adult fly develops inside before eventually emerging and beginning the life cycle again.

3 Stages of Decomposition and Associated Insect Activity

Insect activity has a major role to play in the decomposition of a cadaver. *Payne* (1965) found that carcasses of piglets exposed to insect activity lost 90% of their body weight in six days, whereas carcasses which were free of insects lost just 30% during the same period. Although decomposition is a continuum, its process has been described in five stages, each of which attracts different groups of insects, referred to as succession (*Goff,* 1993):

1. **Fresh** – blowflies are attracted to the body to feed and lay eggs.

2. **Bloat** – gases are released from the rapidly reproducing anaerobic bacteria in the body. The metabolic activity of feeding larvae can cause a localised increase in the body temperature. If the body is found on soil, fluid leakage combined with the formation of ammonia makes the substrate alkaline and repels the usual soil-living invertebrates.

3. **Decay** – openings created by the feeding activity of the larval masses allow the gases to escape, resulting in deflation of the body. By this stage adult and immature beetles are also present, feeding on the tissues of the body and predating upon the fly larvae, early colonisers of which have started leaving the body to pupate.

4. **Post decay** – most of the soft tissues of the body have now been consumed, leaving only mummified skin, cartilage and bones which may be fed on by beetles.

5. **Skeletal** – all that remains of the body are the bones and hair, with few or no carrion insects present.

The latter two stages were combined by *Rodriguez and Bass* (1983) and termed the 'dry stage'.

The majority of forensic entomology research has used pigs as models for humans, for physiological, economical and ethical reasons, an extensive literature exists on this. However, to date there is only one location in the world where it is possible to study the decomposition process in donated human cadavers, namely the Anthropological Research Facility, University of Tennessee, Knoxville, USA, known colloquially as 'The Body Farm'.

4 Research on Insect Activity and Decomposition of Human Cadavers

The Anthropological Research Facility was founded in the early 1980s by Professor William Bass, a pioneer of forensic anthropology, and is now managed by the Forensic Anthropology Centre based at the Department of Anthropology at the University of Tennesse, Knoxville (*Marks,* 1995). Bodies are donated to the facility where they are decomposed in a natural outdoor setting, enabling research to be carried out in areas such as entomology, soil ecology, microbiology, chemical ecology and histology. In addition, some of the bodies may be placed in various 'crime scene' scenarios, for example submerged in water, in a car boot, buried underground or placed indoors. Once the body has decomposed to the skeletal stage, the remains are collected, processed and then

accessioned in the department's William M. Bass Donated Skeletal Collection to be used for future research, teaching and reference material in forensic casework. Details of the donors' gender, race, age, stature, life style and medical history, gathered prior to donation, are kept on record which greatly enhances the value of the collection. A facial photograph of the donor, taken while still alive, is also archived to assist with cranio-facial reconstructions and human identification studies. The facility is also used as a training ground for the FBI and international disaster body recovery teams.

There has been a paucity of research in the area of insect activity and human decomposition (*Rodriguez and Bass,* 1983; 1985) due to ethical constraints, and since its inception only a few forensic entomologists have had the opportunity to work at the Anthropological Research Facility. More recently, scientists from three institutions have been collaborating on a 4 to 5 year study at the facility into the role of insect activity on the decomposition of human cadavers: the Forensic Science Service, London, the Natural History Museum, London, and the University of Western Australia, Perth.

During the course of this study, a number of cadavers were laid out at the facility. Probes were inserted into the mouths, rectums and backs of the bodies in order to record the internal body temperature as decomposition progressed and ambient temperatures were also recorded for comparison. The temperatures of the larval masses that formed as they fed on the bodies were recorded using a non-invasive infra-red thermometer. Using these techniques it was possible to record the elevated temperatures that occur due to the aggregated feeding activity of the larvae; temperatures of up to 46°C were reached, about 20°C above the ambient temperature. Samples of insects that were present on and around the body were collected twice a day, killed by immersion in freshly boiled water, and preserved in ethanol. These have been retained for identification, measurement and analysis, with a view to detailing the development of these insects on the bodies in relation to the temperature. A proportion of the collected insect specimens were kept alive and reared through to adulthood in order to assist in the identification of the insects.

Photographic and written records were kept, cataloguing the process of decomposition for each of the bodies for the duration of research at the facility. Given the high humidity and temperatures recorded in Knoxville at the time of year when the studies were conducted, it was possible to observe and record decomposition from fresh through to part skeletonisation and mummification within a short time. There was a large amount of insect activity during this time, with thousands of larvae forming huge feeding masses on the body. Time lapse photographic images were taken to demonstrate this progression and to show the rapid development of such masses. Video recordings were also made to provide a

record of the behaviour of insects and the changes in their activity throughout the decomposition process of human cadavers. In addition, thermal imaging was used to non-invasively record temperatures, which will give a greater understanding of the dynamics of larval masses, and how this affects the development of the larvae. Crime scene investigators only witness the process of decomposition at the point in time when a body is found, and researchers generally work only with non-human carrion. Therefore, it would be useful in the future for such images to be used in the education of personnel involved in crime scene work and body recovery.

5 Role of the Forensic Entomologist in a Criminal Investigation

Ideally, when the victim of a suspicious death has been found the SIO should request that a forensic entomologist attend the crime scene and the autopsy to record and collect any insect evidence that may be present. This is for three main reasons:

1. A forensic entomologist is the most qualified person to identify insect evidence: eggs and early stage larvae are small, and may be hidden or otherwise inconspicuous and therefore easily overlooked. In addition, the oldest larvae may have already finished feeding and left the body to pupate, and therefore their presence may not be obvious. Even if there is no apparent insect evidence present, a forensic entomologist may be required to assess the possible reasons for this absence.

2. A forensic entomologist can be sure that the evidence has been collected, killed and preserved using the approved methods.

3. A forensic entomologist will make a systematic written and photographic record of the insect evidence collected in the context of the crime scene, followed by a detailed analysis, resulting in a written report and, if necessary, a court appearance.

When preserving insect evidence, blowfly adults, eggs and pupae can be put directly into 70 to 80% ethanol (alcohol), the latter being pricked first. Larvae should be immersed in freshly boiled water to maximally extend them and prevent bacterial decay, before placing them in ethanol. Preserved specimens are taken back to the laboratory where the species, lifestage and age can be determined. In addition, live specimens of eggs, larvae and pupae should also be collected (ensuring they are aerated and that feeding larvae have food), and reared through to adults to confirm identification of preserved specimens.

The rate of development of insects is largely dependent upon temperature: the hotter it is, the faster they develop, and conversely the colder it is, the slower they develop. (*Donovan et al*., 2006). Therefore, it is essential that the temperatures at which the insects have developed are estimated. A forensic entomologist places an electronic datalogger at the crime scene to record ambient temperatures for 7 to 14 days. Temperature data for the same period is obtained from the nearest meteorological station to the crime scene, and that for the preceding period during which the body may have been there. A regression analysis is carried out on the temperatures from the two locations for the same time period, and based on this, the temperatures to which the developing insects were exposed before the body was found can be estimated. Once the fly species have been identified, the age of the preserved specimens can be determined by measuring the length of the larvae or dissecting the pupae, and comparing their stage of development with published data in the context of the temperatures at which they developed. Therefore an estimate of the post-mortem interval is produced which is then passed to the SIO either for intelligence or evidential purposes. It is important to remember that any estimate is of the time when blowfly eggs were laid on the body. Death may have occurred before the insect activity commenced because the body may have initially been inaccessible to the first arriving insects, for instance if the body was wrapped in a blanket or placed in a sealed container such as the boot of a car (*Goff,* 1993). Clothing, submersion in water or burial can all reduce accessibility of adult insects to a body, and therefore delay or prevent egg-laying. Therefore any post-mortem estimate is of the *minimum* time since death.

6 Case Examples

Case 1

In 2003 in northern England, a man was reported missing, having last been seen on his way home on the evening of 19th November. Despite searching the area, his body was not found until 3rd February 2004, lying at the bottom of a deep ditch, created between a vertical embankment and a single storey building not far from his home. The forensic pathologist estimated that he had died approximately two to three weeks prior to discovery, i.e. around the middle of January. A forensic entomologist was brought in, and having collected samples of bluebottle larvae and pupae from the body and from the scene, gave an estimated most likely date of insect infestation (minimum time of death) of 27th to 28th November, with a broader range of 19th November to 6th December. So why had the two experts given post mortem intervals differing by seven weeks? The pathologist had based their estimate on standard post mortem changes, bearing in mind the average temperatures

at that time of year. However, post mortem changes are highly variable and their use in establishing a time since death has been described as *"an achilles heel in forensic medicine"* (Henssge *et al*., 1988), especially more than three days post mortem. The forensic entomologist placed a temperature datalogger at the scene of discovery, i.e. in the ditch, and conducted a regression analysis for the ditch temperatures with those from a nearby meteorological station for the same time period. From this he had been able to estimate the temperatures in the ditch, from the time when the man was last seen alive. It became apparent that the ditch was shielded from direct sunlight and had its own mini-climate, so that the temperatures at which the flies had been developing were overall much lower than would have been expected from the average ambient temperatures. It later transpired that the man had erred from the path on his way home, fallen down the slope and broken his spine, dying instantly – a tragic accident.

Case 2

In July 1999, the badly burnt body of a man was discovered by some children in an old ammunition bunker in Essex. Because of the extensive damage incurred by the body from the fire, which had apparently taken place in the room, the forensic pathologist had great difficulty in estimating a time of death in this case, which was eventually shown to be a suicide. There were large numbers of fly eggs and larvae on the body, so a forensic entomologist was called to the scene. He found no evidence of burnt insects on or around the body, so concluded that adult flies had laid eggs on the body after the burning had occurred. The temperature in the underground bunker was buffered from ambient fluctuations to a great extent and was relatively constant at about 14˚C. The larvae were measured and several distinct size cohorts were found, representing larvae that had hatched from eggs laid on several consecutive days. The largest and, therefore, oldest larvae were estimated to have been laid as eggs six days before the body was found, establishing a minimum time of death. That information enabled the police to focus their investigation to a particular time frame and subsequent witness interviews recorded that a fire had been seen in the bunker on the night before the flies found the body.

Case 3

In April 2003, a body was found burning in an area of open woodland in Southern England. It turned out to be the body of a young woman who had disappeared more than a month before. Forensic examination of the body showed that although it was partly decomposed, there was no evidence of insect activity on or around the body. The forensic entomologist who was consulted concluded that the lack of insect evidence indicated that the body had been stored in a location where flies could not gain access to it. Although seemingly obvious, this information was of value because a body exposed at that time of year, either inside or outside, would have become infested by blowflies if it had not been concealed in some way. This information fitted other evidence that the victim's body had been securely wrapped since death and it later transpired that the body had also been stored inside a large cardboard box within a rented secure storage unit.

These three cases illustrate situations where abnormal conditions made it difficult for the forensic pathologist to estimate a post-mortem interval based on normal decomposition rates. In the first two cases, the blowfly larvae feeding on the bodies could be collected as evidence, and having correctly identified them, and calculated the temperatures at which they developed, it was possible to calculate an accurate minimum post mortem interval. However, in the third case, it was the *lack* of insect evidence which was important, supporting the prosecution case concerning the post mortem storage of the victim's body. Thus forensic entomology played a significant role in the investigation and solving of these three cases.

7 Conclusion

The objective of this article is to raise further awareness of the application of forensic entomology in criminal investigations. The research carried out at the Anthropological Research Facility in Tennessee presents a unique opportunity to witness the process of decomposition of a human cadaver first hand, and this in turn allows us to use this opportunity to study the vital role that insects play in this process. Although used intermittently in the UK for the past 50 years or so, forensic entomology is now gaining much greater acceptance in this country, and should be viewed as a standard tool to aid criminal investigations where necessary. In particular, the integrity of the science must be maintained by rigorous scientific research, the results of which can be used to carry out accurate and constructive casework, making forensic entomology a valuable asset to the Criminal Justice System in the UK.

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Criminal Cases Review Commission: The first ten years

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Abstract

For 10 years, the Criminal Cases Review Commission (CCRC) has been reviewing and investigating alleged miscarriages of justice in England, Wales and Northern Ireland (Scotland has its own Commission – SCCRC). The Commission was created by the Criminal Appeal Act 1995 (the Act) and at the time of its introduction in 1997, it was the first of its kind in the world. This article introduces the origins of the Commission, its purpose and operation and reflects on lessons to be learned from the first 10 years.

[1] The authors write in a personal capacity. Any views expressed are their own and should not be attributed to the Criminal Cases Review Commission.

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1 The Roots of the CCRC

Prior to 1997, the Home Secretary was able to refer cases to the Court of Appeal after an initial appeal had been turned down. In July 1993, the Royal Commission on Criminal Justice ("The Runciman Commission") proposed that such power be vested in an independent body.

As a result, the Criminal Cases Review Commission came into being on 1 January 1997. The Commission receives its funding from the Ministry of Justice and is accountable to Parliament, but neither the legislature nor the executive has any involvement in, or ability to influence, casework decisions.

The Commission responds to applications from people who believe they have been wrongly convicted or sentenced[3]. The Commission reviews the available material, investigates specific issues where appropriate and then decides whether to refer the case to the relevant appellate court for a fresh appeal. The Commission does not act for the applicant, nor does it represent the interests of the prosecution. In an adversarial system, it is uniquely independent and inquisitorial in nature.

2 The CCRC as a Decision-Maker

Decisions to refer cases to the appellate court are made by appointed Commissioners. The Commission may refer both convictions and sentences arising out of the Crown Court or magistrates' courts, although in practice the majority of the Commission's work concerns serious offences tried in the Crown Court[4].

The Commission may refer a conviction or sentence only if there is a "real possibility" that it will not be upheld. When dealing with a conviction, the real possibility must be based on new evidence or a new argument, unless there are "exceptional circumstances" (which are not defined). For a sentence to meet the test for referral, the real possibility must be based on new information or a new argument on a point of law. In general, a convicted person must have lost an appeal or been denied leave to appeal before the CCRC will review a case. Here again, however, that requirement may be waived in exceptional circumstances.

[3] The Commission can initiate reviews of its own accord, but most reviews are applicant-generated.

[4] In the five years from April 2002, around 40% of applications to the Commission concerned sexual offences and approximately 15% concerned murder or manslaughter, 15% violence against the person and 15% drugs offences.

All of the Commission's decisions, whether to make a reference or not, are explained in a Statement of Reasons, as required by the Act. Where the Commission reaches the view that a case does not raise a real possibility, it issues a Provisional Statement of Reasons, supported by any disclosure necessary to enable an applicant to make his or her best case in response[5]. In the event that a case is referred, the Commission sends a copy of the Statement of Reasons to the applicant, the appellate court and the prosecuting authority. Where a case is referred to an appellate court, it is treated in the same way as any other appeal, save that in cases referred to the Court of Appeal the appellant is limited to arguing those grounds relied on by the Commission in making the reference (unless the Court grants leave to argue other grounds)[6]. Having made a reference, the Commission plays no part in the appeal proceedings (unless requested by the Court to carry out further work).

3 New Evidence

As described above, one of the conditions for making a reference to the Court of Appeal is new evidence. Under section 23 of the Criminal Appeal Act 1968 (as amended by the 1995 Act), the Court of Appeal may receive new evidence if it thinks it *"necessary or expedient in the interests of justice"*. In making that decision, the Court must have regard to whether the evidence is admissible, whether the evidence is capable of belief, whether there is a reasonable explanation for the failure to use the evidence earlier and whether it appears that the evidence may afford grounds for allowing the appeal. These are all matters, therefore, which the Commission must also consider before making any decision as to whether there is a real possibility that the evidence will lead the Court to conclude that the conviction is unsafe.

4 What Constitutes New Evidence?

The following examples represent some of the more common themes encountered by the Commission in the last 10 years.

Hidden evidence of innocence

Ryan James was convicted of murdering his wife and making it look like suicide. His wife's genuine suicide note was discovered after the first appeal.

[5] Subject to the considerations under Section 25 of the Act – see later.

[6] This is an amendment introduced by s315 Criminal Justice Act 2003. Before the amendment, an appellant whose case was referred to the Court of Appeal was free to argue any grounds he chose.

Scientific advances

In a number of cases, DNA profiles have been recovered from re-submitted samples – in some cases introducing a new suspect, in others confirming the involvement of the applicant. Similarly, re-running fingerprints through NAFIS[7] has also brought about results.

False confessions

In *Fell*, the defendant made a false confession as a result of his personality disorder. In *Brown*, the false confession was the result of oppressive behaviour by the interviewers. Allied to this, ESDA[8] testing has raised questions over the integrity of some written records of interviews and resulted in the quashing of the convictions of *Gorman and McKinney.*

Non-disclosure

This includes cases in which evidence was withheld from the court as well as the defence – for example, *Villiers and others*. Commonly, material that could assist the defence is not revealed to the prosecutor or disclosed to the defence. That material may, on occasion, be in the possession of the case investigator but its potential for the defence is not recognised, or it is in the possession of the police but never sought by the investigator.

False allegations

These are most commonly encountered in sex offence cases. Commission investigations sometimes reveal information in Social Services files or Criminal Injuries Compensation Authority claim files which might call into question the credibility of a complainant. More worrying is the fact that the Commission has referred a number of cases recently which resulted in convictions being quashed where it was shown that relevant material existed in police possession at the time of the investigation. This, of course, links into the disclosure issue.

Deliberate misconduct

Corruption within one or two high-profile and well-publicised units created a number of referrals in the Commission's early days and still generates the occasional application from that era. The advent of PACE[9] and CPIA[10] has largely addressed this, but there is no room for complacency in complying with the requirements of both.

[7] National Automated Fingerprint Identification System
[8] Electrostatic Document Testing
[9] Police and Criminal Evidence Act 1984
[10] Criminal Procedures and Investigations Act 1996

Poor performance

As distinct from deliberate misconduct, poor performance may also lead to a miscarriage. This refers not only to the investigation and prosecution but includes lack of preparation by defence solicitors or counsel or misdirection by the trial judge. Many referrals are based on bad directions on the law such as adverse inferences, provocation, and joint enterprise.

5 The CCRC as an Investigator

Whereas previously the Home Secretary relied on the police to carry out any necessary enquiries, the Commission employs around 45 case review managers to carry out the day-to-day task of reviewing and investigating cases. The Commission employs two investigations advisers (former senior detectives) and two legal advisers to provide guidance and assistance.

The Runciman Commission recommended not only that the Commission should consider allegations of wrongful convictions or sentences, but also that it should investigate alleged miscarriages of justice. Accordingly, the Criminal Appeal Act 1995 gave the Commission the means to conduct the investigations necessary to inform the decision whether to exercise its power to refer. As a result, the Commission frequently has access to all the material generated by both sides of a case and by third parties who were never involved in the original proceedings.

Section 17 of the Act gives the Commission the power to obtain any document or other material in the possession or control of any public body irrespective of any of the usual constraints on disclosure. This covers not only formal documentary records such as statements, but everything from computerised records to forensic samples and murder weapons. Moreover, it is not limited to the prosecuting or investigating authorities, but applies to any public body, including for example, the National Health Service, local authorities, the Prison Service and the Court Service. Furthermore, the Commission is entitled to see all material – even confidential or secret material covered by public interest immunity orders, data protection or official secrets provisions.

Section 17 is crucial to the Commission's functioning. It ensures that the Commission is able to take a comprehensive view of a case. The requirement for something new means that the Commission must establish what has gone before. Thus the prosecution and appeal files are vital. It is also true, however, that using section 17 the Commission has

uncovered the new evidence on which some references have been based: for example, the existence of an alternative suspect which was never disclosed to the defence, misconduct by investigators, evidence of a history of false allegations by the complainant in a sex offence case or prison medical records which formed the basis of new expert psychiatric reports.

A public body required under section 17 to produce material has a legal obligation to do so. The Commission seeks to co-operate with public bodies and has established not only its right to access material but also its ability to handle the material appropriately. Section 25 of the Act allows a public body to insist that the Commission seek its consent before making any onward disclosure and it is the Commission's practice to treat all sensitive material as though section 25 has been invoked. Once the Commission has asked for permission to disclose something, consent can be withheld only if there is some constraint which would have prevented the public body giving the information to the Commission had a section 17 requirement not been made and it is reasonable to withhold consent.

How then does the Commission deal with a situation in which it has accessed sensitive material that forms the basis of a reference to the Court of Appeal? Generally speaking the relevant public body and the Commission will come to an agreement about what should be disclosed and in what format. Whilst it may be reasonable for a public body to object to disclosure to an appellant, it is inconceivable that it would be reasonable to object to disclosure to the Court of Appeal. The Commission has therefore developed a mechanism by which only the Court can see the sensitive material.

Although the Commission spends a great deal of time examining papers, its investigative powers are not limited to requiring the production of material under section 17. Section 21 of the Act gives the Commission the authority to take *"any steps which they consider appropriate"*. This includes requesting other agencies, including the police, to provide assistance.

The Commission also has the power to require the appointment of an investigating officer (under section 19 of the Act), particularly where police powers are required to pursue a particular line of investigation. The Commission may require the appointment of an officer from the police force or other investigating authority which carried out the original enquiry or, having regard to the requirement that justice be seen to be done, an officer from another force. Where the Commission requires the appointment of an investigating officer, the Commission continues to supervise the investigation. However, the vast majority of investigations are carried out by case review managers, with the advice and assistance of the two investigations advisers.

Just as the Commission does not replay the trial, so it does not completely re-investigate a case. The Commission's investigations are focussed on those issues which might give rise to a real possibility that the conviction, verdict, finding or sentence would not be upheld if referred for an appeal. In each case, therefore, the Commission has to be sure that it conducts all the necessary enquiries whilst avoiding redundant enquiries which add nothing to the review and serve only to delay the process.

The Commission does not simply react to applicants' suggestions. Many applicants are unrepresented and are not in a position to identify or convey their strongest case. Moreover, some potential grounds for referral are unknown to the applicant. As noted above, the Commission has referred a number of convictions for sexual offences based on new information about the complainants' credibility. In particular, using its section 17 powers, the Commission has uncovered new evidence that the complainants have made previous demonstrably false allegations against other people. There is no reason why a defendant should know that his accuser has made previous false complaints, perhaps in other counties. It is only through CCRC-generated investigations that this information has come to light. Such cases illustrate the need for the exceptional circumstances provision. A defendant in this position might only be able to offer a simple denial and may well have been advised not to appeal.

What sort of enquiries does the Commission make? Over the last 10 years, the Commission has instructed an enormous number of expert witnesses in areas as diverse as accident reconstruction, false confessions, Sudden Infant Death Syndrome, banknote contamination, DNA, ESDA testing, firearms and psychiatry. In fields where accepted wisdom is always changing and scientific developments are to be expected, it is inevitable that the Commission will sometimes find new evidence which raises a real possibility that someone's conviction will not be upheld. Equally so, further expert evidence may support the safety of a conviction.

The Commission has also spoken to thousands of people, including police officers, customs officers, solicitors, barristers, judges and witnesses. As a general rule, the Commission does not re-interview trial witnesses unless there is some new information to put to them and the Commission is particularly careful when it comes to re-interviewing victims. Indeed, in the majority of cases, the victim will not know that the Commission has reviewed a conviction, thus avoiding any unnecessary distress[11]. The Commission's focus is on establishing whether a person has been wrongly convicted, but the Commission contributed to, and has specific responsibilities under, the Code of Practice for Victims of Crime to ensure that all investigations are conducted sensitively.

[11] Approximately 96% of applications to the Commission do not result in a reference.

It would be wrong to give the impression that the Commission's reviews focus only on the search for new evidence. As noted above, the real possibility may also be based on a new argument. This might mean a new way of looking at the existing evidence, but is more likely to depend on the development of a fresh legal argument.

6 The CCRC as a Resource

The Commission receives around 1000 applications every year. Around 40 people will have their cases referred to an appeal court and of those, 70% are likely to have their conviction quashed or sentenced reduced. Not all of those who have their conviction quashed will be 'factually' innocent, but there will be some who are. For those individuals, the importance of the Commission is self-evident. The value of the Commission is not limited, however, to assisting individuals. The Commission also aims to enhance public confidence in the criminal justice system and to contribute to reform and improvements in the law, based on our experience. The Commission is currently hosting three research projects and last year two conferences were held, one to consider the causes and remedies of miscarriages of justice and an investigations conference for the purpose of disseminating to police forces, and other investigative bodies, some of the lessons learned in the Commission's first 10 years of case review.

7 Lessons to be Learned

The Commission believes its experience may be of benefit to others in trying to reduce the number of cases resulting in miscarriages of justice. The lessons learned may affect only a few cases a year but they can only serve to enhance public confidence in the system. At the investigations conference recently hosted by the Commission,[12] a number of case studies were presented where repeating themes were identified.

8 Sexual Offences

Complaints of rape and other types of indecency are serious offences and they are frequently difficult to deal with. The outcome will often depend upon whom the jury believe – the complainant or the accused. The Commission well understands that complainants in such cases need to be treated with a great deal of care and consideration. It is important that they feel they are receiving an appropriate level of support. The Commission is also

[12] September 2007

aware of the pressures on the police service and prosecutors relative to 'attrition rates'[13]. However, in a number of recent cases convictions have been overturned as a result of the discovery of 'new' evidence which affected the credibility of the complainants.

The HMIC[14]/HMCPSI[15] joint review of the investigation and prosecution of rape offences, 'Without Consent', advises: *"The nature of the offence means that often there are no witnesses other than the victim, which leads to significant reliance on the credibility of the victim. Unused material may contain background information by which that credibility can be tested…".*

8.1 Case Studies

Study 1: *R v Warren* (2005)

The applicant was convicted of rape against a former partner. During the course of the investigation, the investigators were in possession of material that should have alerted them to the fact that the complainant had been involved in two incidents of a similar nature in another police force. One of these incidents was thought to be of a dubious character and a second had been finalised as 'no crime'. Whilst there was an entry in an investigation log indicating material existed, the investigators did not highlight that fact in the disclosure schedules. The investigators did not consider the relevance of the material and its potential to undermine the prosecution case or assist the defence and there was nothing revealed to the prosecutor to indicate the actual nature and outcome of those incidents.

The Commission learned from officers in the second police force that the first of those incidents resulted in a civil court making significant comment in relation to the credibility of the complainant.

In the second incident there was evidence to show clearly that the offence of rape complained of never happened and the complainant, faced with independent evidence, eventually admitted that to be the case – hence 'no crime'. This second incident bore several identical features to the allegations made against Mr Warren. The prosecution did not resist the appeal and the conviction was quashed.

[13] In 2007, the Commission contributed to the HMIC/HMCPSI joint review of the investigation and prosecution of rape offences, 'Without Consent'.
[14] Her Majesty's Inspectorate of Constabularies
[15] Her Majesty's Crown Prosecution Service Inspectorate

Study 2: *R v K* (2006)

In this case the complainant made two similar, but separate, complaints against two young men at the same time. One of the offences had been committed in a neighbouring division within the same police force and was therefore referred to that division for investigation. The investigators of both cases knew of each other's involvement.

One case was investigated and resulted in the conviction of the defendant. The other case was investigated and proven to be false – the file included evidence of an independent witness to show it was false. The Crime Manager in the second case finalised the complaint as 'no crime' and was able to produce for the Commission a report setting out the reasons for making that decision. The two complaints were of a virtually identical nature.

The CPS lawyer who dealt with the prosecution was never told of the second offence. When interviewed by the Commission, she confirmed that, had she been in possession of all the information about the second offence, she would have had to consider whether a prosecution was appropriate. The case was unopposed at appeal and the conviction quashed. The Court of Appeal commented on the content of the Home Office Counting Rules in relation to the recording of 'no crime', highlighting that in such a case "…there is evidence to show that a crime has not been committed".

Study 3: *R v Blackwell* (2006)

The applicant was convicted of indecent assault in 1999. On New Year's Eve 1998, he attended a party at a local social club where he was introduced to the complainant. She later complained that she went outside the club for some air and was approached from behind by a man who forced her to walk a short distance from the club before he punched her to the ground and indecently assaulted her. She lost consciousness and was discovered by people leaving the club a few minutes later.

The applicant was one of the first people on the scene. The complainant initially said that she did not know who had attacked her, but the following day named the applicant. He was arrested and she picked him out at an identification parade. The defence case was that Mr Blackwell was not the man who had attacked the complainant.

Mr Blackwell appealed unsuccessfully against his conviction. He later applied to the Commission, alleging police misconduct in the arrangements for the identification parade,

suggesting another possible suspect for the offence and suggesting that he, Mr Blackwell, did not have the opportunity to commit the offence.

The investigation found new evidence which strongly suggested that the complainant was not the victim of an attack by another person, but had inflicted her injuries on herself. Two separate incidents were uncovered where the complainant reported to the police that she had been attacked and indecently assaulted. Her descriptions of the attacks bore striking similarities to the index offence. In each case, the investigating police concluded that she had not been attacked and that the injuries were self-inflicted. In addition, the complainant had undisclosed convictions for dishonesty and people who knew her gave compelling accounts of her ability and propensity to lie. Her medical and psychiatric records were obtained and showed that she had long-standing psychiatric problems and a history of self-harm.

The Crown had failed to disclose that the complainant had previous convictions for dishonesty. They also failed to disclose those parts of her medical records that they had obtained which contained material that might have led the defence to question whether the attack had happened at all.

Study 4: *: R v T* (2007)

The applicant was convicted in 2004 of indecent assault on the complainant. There was no medical or corroborative evidence and the case was a straightforward 'her word against his'.

There were two post-trial incidents involving the complainant. In July 2005, she complained that she had been raped by another man. This case went to trial and the defendant was acquitted. In January 2007, she made further allegations of rape against a third man. During the investigation, this man maintained that there had been consensual sex and the complainant eventually admitted that she had lied about having been raped in this instance.

When the investigating officers were seen by the Commission, they said that they had always had misgivings about this complainant but had not considered that the revelations of the later incidents could impact on the safety of the earlier conviction.

The case has been referred and awaits the appeal hearing. The Commission did not consider that the 2005 acquittal should form any part of the referral but they did conclude that the admitted false allegation in 2007 would have been admissible at trial.

9 What Should Investigators Consider?

In the light of the various cases outlined here, the Commission takes the view that, particularly where it is the word of the complainant against that of the defendant, consideration should be given as to whether there exists any material that would impact upon the credibility of the evidence.

The appeals of *Warren* and *K* featured information and material that was in the possession of the police at the time of the initial investigations as did, to a degree, the *Blackwell* case. Investigators need to be able to recognise what it is that they already have and its potential relevance to their case.

CPIA, of course, dictates that the investigator *"should pursue all reasonable lines of inquiry"*. Is it reasonable to expect an investigator to check all available systems for material that may be hidden away, on the off chance that there may be something of relevance, bearing in mind that in the vast majority of cases there will be nothing? Arguably it is and the Commission's view is that it would be good practice to adopt that approach. What must be recognised is that material held in police systems, whether known to the investigator or not, will be considered by the court to be in the possession of the prosecution.

It does not automatically follow that cases will not be pursued where material is found to undermine witness credibility, although that might be an option. Those cases that were prosecuted in the light of such disclosure would undoubtedly result in fairer trials and safer convictions.

The Commission strongly advocates that investigators be alert to markers which may indicate problems, such as previous reports marked 'no crime', cases where investigators are not sure about the complaint, or cases where the CPS have previously declined to prosecute.

The case of *R v T* featured material that came to light *after* the conviction. The Court of Appeal has ruled that such material is admissible when considering the credibility of a witness who gave evidence at trial.

Of course, an investigator cannot cater for this eventuality. There is nothing wrong with an investigator considering a case to be closed once the trial process is complete. Disclosure, however, is an ongoing responsibility. In at least one of the cases referred to above, the investigators came into possession of material relevant to the credibility of the complainant between the time of the conviction and the first appeal, but they did not disclose it for that appeal. That evidence was admitted following the referral to the Court of Appeal by the

Commission and attracted criticism from the Court in respect of its non-disclosure at the first appeal.

Some of these cases suggest that investigators are, generally, unsure of what their responsibilities are after the trial and appeal process has concluded. *R v C* (2007), another similar case, provides a refreshing example of an officer recognising that new information is capable of impacting on the safety of a conviction and reporting it to the CPS, resulting in a Commission review and referral. This case is not unique and the Commission has other examples of police officers making a direct approach to disclose new evidence to the Commission.

In *R v T*, the investigating officers were prepared to demonstrate an open mind to the possibility that convictions were unsafe, but they were unsure what to do when they came into possession of new evidence. The Commission's advice would always be – take that information to the CPS who should disclose it to the appropriate body, whether that be the defence or directly to the CCRC.

9.1 Is it right to challenge the victims of such crimes?

The Commission is not suggesting that all complainants in cases of a sexual nature are challenged directly. However, information within existing data systems – whether it comes from incident reports, crime reports or intelligence – is available to those investigating serious matters. The Impact Nominal Index is a resource which now allows investigators to share information across force boundaries. Such data can be researched without ever saying or implying that the investigator does not believe a complainant or suggesting his or her credibility is in issue. If nothing is found, the case is strengthened: if something of concern is found, then surely it is better to deal with it at the earliest opportunity? In any case, the suspect is entitled to have such reasonable investigations carried out "whether these point towards or away from the suspect"[16].

The Court of Appeal made the following comments on quashing the conviction in *R v Blackwell:*

> *"The judgment we have delivered gives rise to the concern that there may in the future be another case in which this complainant makes similar allegations against another man. If that were to happen, it would be in the interests of justice that the alleged attacker should be able to find out about and use in his defence the information contained in the report of the Commission and referred to in this judgment. Counsel has told us that he will take such steps which are available to ensure that these matters are recorded and are available to any police force investigating any future allegation."*

[16] CPIA Codes of Practice, paragraph 3.5.

10 Material Which May Assist the Defence

The police service is generally attuned to the need to disclose material which may undermine the prosecution case, but less so when it comes to material which may assist the defence. This may be because the defence, very often, do not disclose what their case is or what their options are. The Commission, on the other hand, is often presented with sight of all the options considered by the defence and the tactical reasoning that went into defence decisions. The Commission is, therefore, in the position where it can assess whether the defence may have adopted a different approach at trial had the non-disclosed material been available.

It is easy to say that the defendant knows his case and should not be able to fashion a defence around information as it is discovered during an investigation. The case of *Blackwell* illustrates why this is a flawed argument. The defence mounted on Mr Blackwell's behalf was that the attack took place but the attacker was not Mr Blackwell. The jury was asked to decide, therefore, if the complainant's evidence of identification was correct and if it was they were entitled to convict Mr Blackwell. Had the defence been in possession of the material that later emerged, the more appropriate defence would have been that the complainant was a fantasist who was known to be dishonest and had previously made similar complaints where it was proved that her injuries were self-inflicted. In other words – the incident never happened.

11 The Use of Covert Tactics

From about 1986, the former HMCE[17] adopted a particular operational tactic in order to address the problem of large-scale drug importations from, most notably, Pakistan and South America. The tactic was a type of 'controlled delivery'. It relied upon the receipt of information from informants in the source country who then agreed to participate as couriers in the trafficking of drugs from the supplier in that country to the importer in the United Kingdom. Generally, HMCE took control of the drugs in the source country and supervised the importation into the UK, intending to identify and arrest the recipient (the importer).

By 1997-1998, the use of this tactic had become a matter of parliamentary and public concern after a number of prosecutions were stayed as an abuse of process. In November 1998, *Operation Brandfield* commenced. This was a joint National Crime Squad/West

[17] Her Majesty's Customs and Excise, now Her Majesty's Revenue and Customs.

Midlands Police investigation into allegations of conspiracy to pervert the course of justice in relation to cases concerning this type of 'controlled delivery'. By the time the Commission became involved, *Operation Brandfield* had been in existence for 18 months – it was to continue for several years. There was considerable overlap between *Operation Brandfield* and the Commission's reviews of a number of convictions that had resulted from 'controlled delivery' operations.

The investigation and reviews considered cases emanating from several operations and the convictions of a number of individuals. This article is not intended to give a detailed explanation of the way in which 'controlled deliveries' worked nor is it intended to give a detailed history of *Operation Brandfield*. It does seek to identify some of the features from which lessons can be learned in relation to the use of covert techniques generally and to highlight some of the views expressed by the Court of Appeal in handing down their various judgments.

There is, of course, nothing wrong in utilising covert tactics in investigations. RIPA[18] specifically sets out a legal framework enabling such usage.

Operation Brandfield established that there were policies and guidelines in place relating to 'controlled deliveries' that had evolved and developed over time. These policies and guidelines were available to senior management and investigators alike. The Court of Appeal found that in many of the cases before them the guidelines had not been considered or had been disregarded. The picture that emerged was that those involved in many of the operations forged ahead, relying on their own experience rather than revisiting the set rules.

In the appeals of *Choudhery, Ashraf, Ahmed, Akhtar and Shah,* the Court of Appeal considered it *"worthwhile to stand back and imagine what the situation would be if these guidelines were being observed".* The Court then set out what it referred to as *"the paradigm controlled delivery".* The Court had the advantage of hindsight when considering how the tactic should have been employed. The investigators might also have taken advantage of hindsight because this was a well-known and frequently used tactic, but they failed to make use of available experience. One of the reasons why the Court set out its paradigm was to establish the standard by which it would consider any future cases. However, non-compliance with the paradigm did not and does not mean that any subsequent convictions are automatically regarded as unsafe.

[18] The Regulation of Investigatory Powers Act 2000

What the Court of Appeal found in many *Operation Brandfield* cases was that there was a clear failure to comply with existing policy and guidelines. The use of the controlled delivery tactic became commonplace and neither the operational officers nor senior management paused to consider whether each and every one of the operations complied with the appropriate policies and guidelines. It was perhaps an example of the old adage, 'familiarity breeds contempt'.

In 1998 an internal HMRC[19] review[20] reported that there were some weaknesses in operational control and procedure and *"…our concern results from the finding that within our system each case has been dealt with on an individual and isolated basis by different offices and different officers, without reference to other similar cases, even when the same P.I.[21] has been used"*. This comment applies both to the management of the operation and subsequent disclosure (see below). In reality, however, the individuals responsible for supervising the operation and handling the informants were common to many of the cases. It was often only the case-officers who were encountering this type of operation for the first time and they ought to have had the guidance of those with relevant knowledge and experience.

It was the failure to recognise and adhere to existing policies and procedures which led to abuse of process arguments being put to the Court of Appeal.

12 Disclosure

The same internal HMRC review (1998) identified *"…one area where the department may not have met, in full, its legal obligations, that being disclosure"*. As noted above, this failing was largely attributed to the fact that different people were involved in different operations. The failure to disclose material properly led to a number of appeals being unopposed. In one such appeal, prosecuting counsel commented: *"Full disclosure should not be dependant upon the astuteness of prosecuting counsel to ask appropriate questions in any given case."* The Court of Appeal added to that sentiment: *"…nor should the obligations of disclosure be approached … as if playing a game of hide and seek. We hide it, you seek it."*

The Court of Appeal was especially critical of a situation where the history of one individual, as set out in an informant file, had not been made known to those conducting the prosecution. It is important that information of such a sensitive nature is afforded the

[19] Her Majesty's Revenue and Customs
[20] HMRC (1998) The Fletcher Raynes Review. London: HMRC
[21] Participating Informant

appropriate security. If, however, those security measures exclude investigators from access to such material, those holding the material must recognise that the responsibility for onward and appropriate disclosure rests with them. It will not necessarily follow that material is disclosed or prosecutions discontinued. The Court of Appeal made the point that there will be occasions where Public Interest Immunity is successfully argued. The crucial point is that the Court is not misled.

The Court of Appeal examines each of these cases on their individual merits and in a number of cases relating to 'controlled deliveries' the Court has upheld the conviction. In *Vernett-Showers, Sabir and B Ahmed* the Court considered that there was overwhelming evidence to suggest the transaction was genuine and found that there had been no non-disclosure in the case. In *Khan and Ryan*, the Court found that

> *"there was nothing in the undisclosed material relied on by the appellants which, had the defence been able to deploy it, might reasonably have affected the jury's decision to convict. Nor (was) any prosecutorial misconduct established".*

The paradigm referred to above provides a model to work to. Similar models can be found, through established policies, in relation to many operational scenarios. It is not always possible to run an operation to plan. What is important is that where an operation has deviated from policy or guidelines, that fact is recognised and disclosed. Such disclosure may well result in an abuse of process argument being successfully resisted.

Amongst the written feedback received following the recent investigations conference organised by the Commission, one delegate simply wrote the words *"Disclose, Disclose, Disclose"*. How very wise!

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Child Homicides: A suspect in the family. Issues for the Family Liaison Strategy

DCI Dave Marshall
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Abstract

In London the Child Abuse Investigation Command (SCD5) of the Metropolitan Police Service has two dedicated major investigation teams whose remit includes the investigation of intrafamilial child homicides and suspicious child deaths. Over the last three years we have dealt with over 85 such cases, 35 of which were subsequently classified as child homicides. The following article outlines the issues we have encountered that impacted specifically on the family liaison strategy and that are often unique to this type of investigation. Consideration of these issues has informed the generic strategy that can be adapted for similar investigations. A copy of the generic family liaison strategy is included in the appendix.

The author and contributors to this article have been involved in this area of crime for over three years. In this article we will endeavour to identify and explain the often unique investigative environment, issues and options in terms of the family liaison strategy in this type of case. It is hoped that this article will assist others in formulating a family liaison strategy when involved in investigating the intra-familial deaths of children. In addition, some areas may be relevant to other types of homicide investigation where there is a suspect in the family.

Note:
This article should be seen as practical guidance from a very experienced and knowledgeable author in the field of investigating infant death homicides. It is an important reference paper, but should be read in conjunction with the guidance within the ACPO (2006) *Murder Investigation Manual*[1] relating to infant death investigations. It also should be viewed with due cognizance to the ACPO (2008) *Family Liaison Manual*[2], published in March this year. A further worthwhile reference paper is the ACPO, University of Surrey and NPIA (2008) *A Contribution to the Evaluation of Recent Developments in the Investigation of Sudden Unexpected Death in Infancy,* Briefing Paper; relating to a review of infant death investigations since the Baroness Kennedy report was published[3]. This was also published earlier this year.

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1 Introduction

Our experience on the Child Abuse Investigation Command suggests that child familial homicides and suspicious child deaths present unique challenges for the deployment of family liaison officers (FLOs). The general rationale for FLO deployment still applies. In addition, the variable dynamics within the investigative focus, particularly in relation to suspects, significant witnesses and witnesses (within and connected with the victims family) will mean that the senior investigating officer (SIO), investigating officer (IO) and family liaison co-ordinator (FLC) will have to give special consideration to the formulation of the family liaison strategy.

While the following comments are based on practical experience of investigating intrafamilial homicides some of them will be relevant to other cases where there is a suspect in the family. The observations are intended as a guide and should not be considered as prescriptive as there is a need for flexibility depending on the specific case. The emphasis of this article will be on intrafamilial homicides and suspicious deaths where we suggest these strategies will be particularly relevant and may assist with the accepted practice that all family liaison rationale will be fully documented by the SIO, FLC and the FLO in the appropriate logs.

2 The Investigative Environment

The current investigative environment contains a number of factors that can be considered and would form the background for any decisions regarding the FLO strategy. Sudden unexpected death in infancy (SUDI) is where a child dies and no apparent cause of death can be ascertained, sometimes referred to as cot death. A sensitive approach is required whilst ensuring a proportional and detailed police investigation is undertaken, including forensic examinations to confirm that there are no criminal factors associated with the death. The Baroness Kennedy report 'Sudden Unexpected Death in Infancy'[4] includes a suggested national investigation protocol for care and investigation in relation to SUDI. This has a clear impact on the investigation of suspicious child deaths and came about largely as a result of the publicity in the three high profile cases that all went to the court of appeal.

Such are the vulnerabilities of young infants that tale-tale signs evident in adult deaths are absent or less obvious in child deaths e.g. cases of suffocation. As a result, although a dedicated FLO would not be routinely allocated to all SUDI investigations in London there have been a number of cases that initially were considered to be a SUDI but subsequently discovered to be suspicious leading to the deployment of a FLO.

The particularly emotive nature of an investigation involving the death of a child can increase both the likelihood and intensity of media interest. There have been a number of high profile child death enquiries, such as Cannings, Clarke and Patel. Such attention means that any police response could be subject to considerable scrutiny. A FLO deployment is clearly a key area of the police response and one that may be particularly effected by an increase in media attention.

Unlike many adult homicides where the cause of death is obvious and there are independent witnesses, in the majority of child homicides great reliance is placed on circumstantial and expert medical evidence. The suspect is also invariably in, or closely connected to the family as opposed to being a stranger. Due to the specialised field of criminal investigation and reliance on forensic evidence there is often a protracted period of time before the results of forensic tests are ascertained and expert evidence provided. The results of toxicology tests and examinations of the brain, for example, can take up to six weeks. During this period there is occasionally a high level of uncertainty for those involved as to who or what was responsible for the death. This uncertainty can remain if the findings are inconclusive.

At one stage police investigations were disadvantaged with limited legal options where two parents were potential suspects for the death of a child but where the police could not establish which person was actually responsible. New legislation on familial homicide has been introduced under Section 5 of the Domestic Violence Crime and Victims Act 2004 to deal with this lacuna and created an offence of 'causing or allowing the death of a child or vulnerable adult'. This caters for the situation outlined above where it is presumed one or other of the parents were responsible for the death but due to the circumstances the police are unable to establish who was/were responsible. This new offence allows both parents to be charged but allows factors of fear, intimidation, domestic violence and attempts to highlight concerns to third parties to be considered as mitigating factors in relation to the parent who 'allowed' the death of a child.

As previously indicated the cause of death is not always immediately obvious and will often await the final result of the post mortem examination and other forensic tests. During this period the parents maybe considered as either victims or potential suspects and the police response will depend on the level of suspicion in relation to any criminal offences. In this specialised area of child homicide in addition to murder, manslaughter and familial homicide there are a number of unique criminal offences in relation to the death of a child e.g. infanticide, child destruction, and neglect where the child dies from suffocation as a result of an adult overlaying a child whilst sleeping with them, whilst intoxicated.

Occasionally the cause of death may be recorded as 'unascertained' where there is a raised level of suspicion. For example, the post mortem findings may show factors consistent with suffocation that are not conclusive so that suffocation cannot be given as the actual cause of death, although there maybe some grounds to suggest this may have been the case, either accidentally or deliberately. With this essential element of a potential offence absent, i.e. the cause of death, the Crown would be unable to proceed with a criminal prosecution, e.g. with a charge of child neglect where the child was overlaid by an adult who was intoxicated.

There is a perception amongst some officers that child death enquiries follow a particular pattern. However, we have encountered a number of different scenarios, listed below, each of which place very different requirements and limitations on the FLO strategy.

1. **Which One Did It?** This is where both parents were sole carers at the time of death or when the injury, which culminated in the death occurred.

2. **Readily Identifiable Suspect?** This is where one parent is the sole carer at the time of death or when the injury that culminated in death occurred. The other parent being elsewhere at the relevant time or estranged. This scenario may not always be obvious at the outset and may take time to ascertain e.g. requirement to confirm whereabouts or an alibi.

3. **Readily Identifiable Suspect – third party?** This is where a sole carer e.g. aupair or child minder is the sole carer and therefore the sole suspect with the parents being elsewhere at the time of death or when the injury which culminated in the death occurred.

4. **Numerous suspects or significant witnesses?** In this scenario other persons are present in addition to the parents or parent during the time frame in which the death or injury that culminated in the death occurred.

5. **Apparent SUDI dealt with as such but subsequently becomes suspicious.** In this case any of the scenarios 1 – 4 listed above may apply e.g. a death initially treated as non suspicious and believed to be SIDS (Sudden Infant Death Syndrome) following post mortem toxicology results shows that in fact that the child had been poisoned.

3 Issues for FLO Deployment

The following are key issues the authors have found of relevance when considering the FLO deployment.

Sensitivity

Are the parents victims of a tragic loss or should they be considered as suspects for a serious criminal offence? This will obviously depend on the individual circumstances and the level of suspicion at the various stages of the enquiry. The parents clearly have rights under the European Convention on Human Rights (ECHR) but likewise the deceased child had a right to life, a right not to suffer any inhuman or degrading treatment and a right to a family life.

Initial account

This will be essential to the instigation of an effective investigation and will assist the early introduction of a FLO if appropriate. The initial account may provide essential information to inform the rational for the FLO strategy.

Level of suspicion

Is the level of suspicion such that the parent or parents should be interviewed under caution or do the circumstances justify one or both parents being treated as a significant witness?

Relationships

One partner maybe unable to accept that the other partner was responsible or even capable of injuring their child. This may present problems for the FLO as all the information given to one parent maybe divulged to the other partner who is a potential suspect and possible defendant.

Family dynamics

It is almost inevitable that the unexpected death of a child will be followed by a period of high emotion and tension within the family, particularly if it is believed to be a homicide. In this emotional cauldron interactions and loyalties between grandparents and other members of the extended family may be a key factor in the effective deployment of the FLO and influence the management of their responsibilities as FLO.

Suspect's contact with their partner and other family members

Whilst under investigation and possibly on police bail the suspect(s) may be living with these potential prosecution witnesses. Again this will present issues for the FLO, particularly in meeting persons on bail. There may be additional issues in relation to surviving siblings' access to their parents.

Inclusive FLO deployment

The rationale for the deployment of a FLO and involvement with both parents may in many circumstances be appropriate. It may be considered that although one or both parents are suspects in the death of their child they still have the right to be informed of certain facts in relation to the investigation into their child's death. This may include information regarding cause of death, details regarding the inquest and retention of materials from the post mortem examination. There is also the ongoing police-public relationship and public confidence issues if a suspect is subsequently eliminated from the investigation, particularly if an initially suspicious death turns out to be non-suspicious or the post mortem findings are inconclusive.

Delay in the death of the child

If the child does not die from the suspected criminally inflicted injuries for some time (days/weeks) the investigating team may wish to consider a contingency plan for a supervised visit by the suspected parent(s) who maybe in custody to the hospital if the child is unlikely to survive and death is expected shortly.

4 Operational Considerations and Options for FLO Deployment

FLOs are an essential element of the police investigation as in all homicide enquiries. SIO and IO involvement with the FLO, as for other cases, is essential at an early stage when setting the FLO strategy and taking into account the special circumstances when formulating it.

As outlined above in the case of intrafamilial deaths there are additional factors to be considered. In this type of case we advocate deploying a FLO and Deputy FLO so that there are two officers at all times for corroboration, integrity, continuity and officer safety. If only one qualified FLO is available we have utilised a suitably FLO aware officer to accompany the FLO or Deputy FLO. Because of the unique nature of these cases we feel it is appropriate to always have two officers present for any FLO related meetings.

When deploying FLOs in a child death enquiry we also consider whether it is appropriate for one set of FLOs (FLO and Deputy) to be responsible for all family contact or whether it is appropriate to appoint a set for each side of the family, particularly if there is any animosity between the parents' respective families. There are obvious resource implications and a risk that with two sets of FLOs the message being delivered by different offices may unintentionally lead to misunderstandings over the information provided. Again this is a decision for the SIO, IO and FLC that would be considered on a case-by-case basis.

At times we have found it necessary for FLOs to contact parents who are also suspects in the case. This presents an increased level of risk to the officers involved and the investigation itself. Therefore, where such contact has been necessary we have managed the contact in one of three ways:

1. Direct contact by a FLO with suitable authorities and safeguards. For example in the MPS written authority is required to meet a person who is on bail and conditions relating to the meeting documented.

2. Indirect contact via a suitable third party. For example: a solicitor, willing friend or family member acceptable to both the parents and the investigation.

3. Contact by letter.

Significant witness statements and statements from family members, including the parents, are, we feel, best taken by the FLO. The FLO is primarily an investigator and as such ideally placed to obtain or undertake the significant witness process. The FLO will have built up a rapport and hopefully have the trust of the family. A significant witness statement is audio or video recorded and all contact with the designated family members detailed in the FLO log or significant witness log that would be regularly supervised. There is always the possibility of allegations of coaching, irrespective of whoever is involved in the process, but credibility and integrity for the system is managed as outlined above. Clearly it would not be suggested that a FLO be involved in any interviews under caution. But the very title significant witness suggests that it is no different from an investigator taking a witness statement, the process merely has more safeguards. Again this will be a decision for the SIO based on the individual circumstances taking into consideration the factors above, balancing the investigative advantages or disadvantages of the FLO being responsible for the significant witness interview.

If there is any deployment of any intrusive surveillance including an undercover officer a decision will have to be made as to whether or not it is appropriate to inform the FLO of its

or their existence. This needs to be carefully managed but is a common investigative tool used in many homicide investigations and not specific to child homicide.

All of the above are considerations the SIO, IO or FLC may consider when formulating the FLO strategy. It is not realistic to be prescriptive, as each case would have to be considered on its own merits. When a decision is agreed then the rationale for the appropriate strategy would be recorded in the relevant logs. The authors hope that this discussion of this distinct area of criminal investigation will help inform this process.

Acknowledgements

The original work on which this article is based was undertaken by DCI Dave Marshall and DI Keith Braithwaite. DI Colin Burgess prepared the initial version of the generic family liaison strategy, shown in the Appendix. All three officers are employed on the MPS SCD5(6) Child Abuse Investigation Command's, Major Investigation Team (East). This team is responsible for the investigation of intra-familial child homicides in North East and South East London. The team also deals with complex child abuse cases, internet based paedophile enquiries and assistance with critical incidents being dealt with by other units within the Child Abuse Investigation Command.

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[2]ACPO (2008) *Family Liaison Manual*. London: NPIA.

[3]ACPO, University of Surrey and NPIA (2008) *A Contribution to the Evaluation of Recent Developments in the Investigation of Sudden Unexpected Death in Infancy*, Briefing Paper. London: NPIA.

[4]Kennedy, Baroness H. (2004) *Sudden Unexpected Death in Infancy: A multi-agency protocol for care and investigation*. London: Royal College of Pathologists, Royal College of Paediatrics and Child Health.

Appendix

This is a generic Family Liaison Strategy that is adaptable on a case-by-case basis. Some sections may not be applicable to all cases and in some cases additional strategies may have to be included – this is a template that investigators in the MPS have found useful.

Family Liaison Strategy

Operation xxxxxxxxxxx

AIM

To facilitate the police investigation into the circumstances leading to the death/serious potential life threatening injuries sustained by xxxxxxxxxxx.

This will be achieved by:

1. ensuring that the family are considered as partners in the investigation and;

2. establishing and maintaining a sensitive, supportive and appropriate relationship with the family and extended family.

The Family Liaison Officers will be open and honest with the family within the parameters of this strategy.

OBJECTIVES

- To endeavour to provide care, support and information in a sensitive and compassionate manner which is appropriate to the needs of the family.

- To gather evidence and information from the family in a manner which contributes to the investigation and preserves its integrity.

- To document any request made by the family. Such requests will be forwarded for consideration by the SIO.

- To act as a conduit between the family, and the SIO/IO and investigation team.

THE FAMILY

For the purposes of this strategy the family and extended family are:

1. person 1 – relationship e.g. mother
2. person 2 – e.g. father
3. person 3 – e.g. grandfather
4. person 4 – e.g. grandmother
5. person 5 – e.g. grandmother

STRATEGY

1. The FLO will be open and honest at all times with all members of the family. HOWEVER, WHERE THE SIO CONSIDERS THAT THE GIVING OF PARTICULAR INFORMATION MAY BE LIKELY TO COMPROMISE THE INTEGRITY OF THE INVESTIGATION, THE FAMILY WILL NOT BE PROVIDED WITH SUCH INFORMATION.
2. Family members will not be given the expectation that any information they provide will be given in confidence. The nature of the FLO role precludes this approach.
3. The FLO will set and maintain clear boundaries with the family and extended family. Telephone numbers and times of contact will be set by the FLO – usually within office hours and only outside these in extraordinary circumstances.
4. The IO will maintain contact with the FLO and ensure regular debriefs and support.
5. There will be a deputy FLO to support the FLO, providing continuity and cover for them when unavailable.
6. All contact with the family will be recorded in a FLO log that will be regularly supervised by the IO.

7. If parent(s) are charged with an offence contact will be through the respective solicitor or nominated contact person (name ….) if appropriate. If on bail all contact will be recorded as normal in the FLO log and relevant authorising officer shown.

8. In line with Decision xx (SIO LOG) to comply with integrity/accuracy of any comments made and H & S considerations there will always be 2 officers present for all meetings. Ideally this will be the FLO and Deputy FLO.

Agreed by SIO and IO

SIO _____

IO _____

Date and Time _____

FLO _____

FLO _____

Date and Time _____

Focus on… Forensic Gait Analysis

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Abstract

With the increasing range of experts available to advise SIOs, this feature section aims to increase the awareness of specialist fields which have application to homicide and major incident investigations.

The NPIA's Specialist Operations Centre maintains a database of expert advisers who can provide assistance to UK crime investigations. Utilising this valuable resource, experts will be interviewed about the advice they have provided on previous cases, and key issues and developments within their field of expertise.

We start the series with the relatively new field of forensic gait analysis, the study of a person's style of walking. Gait analysis was first admissible as evidence in criminal law in July 2000 at the Old Bailey. This article details interviews conducted separately with two expert advisers at the forefront of this developing field, Haydn Kelly and Ian Linane. All the material contained in this article has been provided by these two podiatrists and we are grateful for their input.

If there are particular specialist areas you would like to see in future issues please contact the editorial team at: npia_investigations@npia.pnn.police.uk

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1 Introducing the subject

1.1 What is gait analysis?

Gait analysis is the study of a person's style or manner of walking which falls within the field of podiatry. Podiatry also involves biomechanics, the science of human movement and the forces acting on the human body. Gait analysis involves the biomechanical analysis of the feet and legs but also considers the whole posture and movement of a person's body, arms and head. Gait is assessed by clinical interpretation, descriptive and quantitative analysis.

It is well recognised that a person's abnormal stance and gait can be the cause of recurrent postural problems which commonly include back, hip, knee, ankle and foot pain. Symptoms may relate to such things as, for example, leg length differences (actual or apparent) and high arched or flat feet. Research into human gait patterns indicates that identification by movement is possible (see further reading).

The analysis of a person's gait requires knowledge in a number of areas which include:

- anatomy;
- clinical biomechanics;
- pathomechanics – gait and gait abnormalities;
- medicine and orthopaedics;
- neurology;
- effects of drugs/alcohol and general pharmacology;
- medical history – effects of previous injuries, surgery and medical conditions.

Gait analysis examines types of body movements. This could be the degree of rotation of an arm or leg, the rotations of the foot through its various phases of gait, the position a limb takes at rest or how the head and neck are held. An opinion is given about whether gait, posture, positioning and movement appear within relatively normal bounds or whether there are obvious or subtle aspects to their movements that are likely to be particular to the individual. Identifying characteristics may include an obvious skeletal posture that is less common such as the degree of bowing of the knees or the heel position when the shoe/foot is flat.

1.2 How can gait analysis be used in a criminal investigation?

Gait analysis can aid:

- identification of a person or persons at a scene;
- identification of a person or persons pre and post event;
- identification of masked persons – who did what;
- verification of alibis by a person's presence/absence at a location;
- comparing the effects of drugs/alcohol on gait;
- excluding persons from enquiry;
- tracking people of interest;
- reducing the time analysing CCTV in locating persons of interest.

2 Introducing the Experts

2.1 Haydn Kelly

What are your qualifications and experience?

I am a Fellow of the College of Podiatric Surgeons, FCPodS, and has a BSc degree and Diploma in Podiatric Medicine. I am a Lead Assessor for Podiatry at the Council for the Registration of Forensic Practitioners and is on the Expert Witness Institute and UK Register of Expert Witnesses. I have over 20 years of experience in podiatry, diagnosing and treating patients both surgically and non-surgically with foot and ankle conditions and also knee, lower limb and back problems which are stance, posture or gait related. I have provided forensic reports on gait analysis and biomechanics for 8 years, creating a world first in this area in July 2000 as cited in the Guinness Book of Records. I have since successfully provided reports on numerous occasions.

How many forensic gait analysis reports have you provided?

I have provided 51 reports.

How many times have you given evidence at court?

I have given evidence in Court on 19 occasions.

2.2 Ian Linane

What are your qualifications and experience?

I hold a BSc and Diploma in Podiatry Studies. I am a member of the Society of Expert Witnesses and the British Association for Human Identification. I have been a podiatrist for 15 years, in private practice, working with and treating people with foot and ankle problems; working in multidisciplinary clinical settings assessing posture, movement and gait in relation to knee, back and upper body conditions. I have provided forensic reports on movement, gait and posture since 2001.

How many forensic gait analysis reports have you provided?

I have provided 21 reports based on and around CCTV analysis. These have included armed robbery, murder and elimination enquiries. These reports have been written for both the prosecution and the defence.

How many times have you given evidence at court?

I have made six court appearances so far. There have been additional court attendances where I have not been used, either because on the day the suspect has admitted guilt, or the police case has folded just before my evidence was given.

3 The Interviews

3.1 What material is required to carry out forensic gait analysis?

Two sets of footage are required. The first is CCTV footage of an unknown individual which is compared to covert/overt footage of a known individual (e.g. custody suite footage). A copy of both sets of footage must be provided. Sending this by email will save time. A copy on DVD is sufficient. Digital footage means stills of images can be captured and software used to slow the footage down frame by frame.

Whether the material is of suitable quality is the first test when the images are received.

However, it should be recognised that just because the footage may appear to be or is of poor quality it does not follow that the footage is not suitable for analysis. Conversely excellent quality footage, recently viewed by Ian was unsuitable as the movements of the subject were not comparable.

Initially one hour is allocated to view the footage and this will usually allow an opinion to be provided as to whether it is worthwhile proceeding and which also helps to minimise the costs involved. If there are defining features of gait to work with then further advice and analysis can be provided and a report produced.

Unusual and notable features of gait are looked for. The unusualness might be something as subtle as the way an individual sticks their head out when they walk. It is not only the feet and legs which are of relevance it could be the shoulder position, arm or leg position or movement or a combination of these.

If a notable feature(s) of gait exist the degree of comparison to the individual on the incident and covert/overt footage is described on a scale which ranges from none to extremely strong. This is a scale which is regularly used and accepted by various forensic service providers. If the person's gait or feature of their gait is able to be quantified then this should also be included.

The angulations and planes the footage is viewed in, i.e. front, back or side are important; like must be compared with like. For example, a front view of a person on the CCTV footage should also be compared to a front view of a person on the known footage.

Before recording covert footage it is useful to examine the position in which the person is standing, walking or running on CCTV. Are they walking towards the camera, away from the camera, from the right to the left of the screen or from the left to right of the screen? When recording covertly one cannot affect this so in some cases more footage may have to be recorded. Obtaining this material may of course take more time. However, this can be minimised by having a closer look at the CCTV footage to begin with.

Before a report is provided the original footage should be viewed. If the footage is digital and on a DVD the quality should not be an issue. But if there is a quality issue then the footage would need to be viewed directly from the hard drive because of potential distortions in the copying process. Aspects of gait may be more apparent on the original footage. It is therefore important procedurally that the original footage is viewed.

Every report prepared is case specific and the process may be somewhat labour intensive depending on the amount of material to be examined.

3.2 When was the first time forensic gait analysis was used as evidence?

The first occasion worldwide that forensic gait analysis was admitted as evidence in criminal law was on the 11th July 2000. Haydn Kelly gave evidence on behalf of the prosecution at the Old Bailey. The case was Operation Richterman, an investigation led by the MPS into a series of armed robberies on jewellers shops carried out by John Brian Saunders. Saunders was convicted and sentenced to 14 years imprisonment.

3.3 How was the first request for advice received?

Haydn:

It began with a request for advice from DS Wilf Pickles of the MPS Flying Squad. From that I realised that the analysis of gait is significant for the identification of persons in forensic matters.

DS Wilf Pickles contacted me at my practice. He had been given my contact details by an image analyst with whom I had spoken at an expert witness conference a few weeks previously. DS Pickles informed me that he had CCTV footage of someone who appeared to have an unusual walk. The individual had, in lay terms, bow-legs of a large magnitude. Even though the individual wore two pairs of trousers, mask and gloves he could not disguise the way he walked. I was asked to provide a report outlining how likely it was that the person featured in the different police tapes had the same gait. Figure 1 shows an example of the footage I worked with.

Figure 1 Example of CCTV footage from Operation Richterman

I worked through the footage frame by frame and from this Saunders was linked to the man police videotaped during undercover surveillance as he planned a series of robberies. It was deduced that less than 5% of the adult population have the same factors as Saunders bowlegged walk.

DI Wilf Pickles explained: *"The advice and subsequent evidence provided by Haydn was fascinating for us and the jury. It was key evidence against a team of dangerous armed robbers led by Saunders who were targeting high class jewellers in and around London and the Home Counties. Forensic gait analysis played a significant role in the conviction of Saunders".*

Since then there have been a number of cases where I have been able to give advice about whether a masked offender could be responsible for an offence or series of offences. In a case examining a series of armed robberies captured on CCTV, limb position, posture and gait were analysed and it was concluded that the same individual was responsible.

3.4 Can offenders disguise their gait?

Haydn:

Offenders who believe that they may be able to disguise their gait by wearing big baggy clothes have had a few surprises. This is evidenced by a murder by way of arson, Staffordshire Police, Wolverhampton Crown Court, June 2002. One of the defining features of the offender, Christopher Smith, was the size of his calf muscles and his upper body posture. There was a short piece of footage of the offender captured on a security camera. The camera had a thermal imaging sensor which was set off by the cigarette he was holding. It was very poor quality footage but it sufficiently showed his upper body posture position and the unusualness of his calf muscles which could be clearly seen through his trousers. The defendant was convicted and sentenced to life imprisonment.

3.5 Have individuals ever pleaded guilty on the basis of forensic gait analysis?

Haydn:

Yes, two cases come to mind:

1. In Operation Cathedral an investigation by West Midlands Police, March 2005 into eight offences including attempted robbery and possession of a firearm.

DC Roy Ward explained: *"The forensic gait analysis report was part of the evidence together with visual imaging expert advice. Based on this and the police work the defendant pleaded guilty and was sentenced to 9½ years".*

2. Operation Novity2, an investigation by Merseyside Police, December 2007 into offences of robbery and possession of an imitation firearm.

DS Steve Homes explained: *"The forensic gait analysis report provided by Haydn was very useful. For one of the robberies we had high quality CCTV footage, Haydn provided strong evidence that linked the suspect to this offence. The gait analysis report was part of the jigsaw together with partial DNA evidence, recovery of clothing and the firearm that resulted in the offender being convicted for six armed robberies and sentenced to nine years".*

Ian:

There is a strong sense that this has validity to it. Generally speaking the ones I have suggested are one and the same person have been found guilty or eliminated from enquiries. In a number of cases they have admitted their guilt.

I received a request from Surrey Police to conduct forensic gait analysis for a shooting incident. The incident footage was recorded on a home security camera and the comparative covert footage recorded when the suspect was brought into custody for questioning. The incident footage was of poor quality and distorted by a flood light which was activated as the offender approached the house. I identified ten indicators that I felt I could work with. A quick, bouncy, strutting walking style, quick and full left arm swing, erect head and markedly flexed neck position, forward and rotated shoulders and an erect upper trunk. His legs did not seem to show any great alignment issues but there appeared to be a small amount of genu varum (bowing of the legs). However, the camera angle and walking mostly with a flexed leg could have exaggerated the appearance of bowing.

The comparative footage of the suspect showed he walked with a strutting action, erect posture and extension of the head and marked flexion of the neck with a quick, full left arm swing. The strutting and bounce action to the gait were identical to the offender's on the incident footage. The suspect was wearing jogging bottoms and the offender tight fitting jeans. My view was that whatever very mild varum may or may not have been there was not a significant one and in baggier trousers would not be seen. Also when I watched him running in the incident footage there was no indication there was any real varum. However, the suspect was of a much bigger build. I stated in the report that I could not explain this difference. It was a significant difference but if a reasonable explanation could be found this would not get in the way of the other evidence. The police however, were able to say that the suspect did go up and down in weight because of drug use.

DC Fentiman explained: *"Ian's examination of the CCTV footage we had from the scene of the shooting and his conclusions from this formed a significant part of the evidence against the defendant in this case. It enabled the prosecution to adduce an important piece of evidence that would otherwise have had to be discounted due to the poor quality of the images. When faced with the evidence against him the defendant pleaded guilty at court and received a nine year custodial sentence".*

Defendants admitting their guilt on the back of forensic gait analysis is important from a legal, evidential perspective and also saves the cost of a case going to trial.

3.6 Has gait analysis been used to eliminate suspects?

There have been cases where forensic gait analysis has been used to eliminate a suspect from an enquiry.

Ian:

In one case the suspects were two cousins and one cousin was trying to blame the other. The footage was time lapsed over a period of steps. Analysis of the positioning of the arms and shoulders together with the way the feet were positioned eliminated the individual being accused.

Haydn:

There was a case where a person's arm position was very relevant. Two people were facing an allegation. The investigation was going down the line that it was one person, gait analysis of the CCTV and covert footage actually showed that the other person's arm was out to the side in an accentuated manner when walking, which people do not do very often. Because this feature did not exist in the main suspect at the time they were eliminated.

Ian:

Gait analysis has also been used in a case to eliminate the victim.

I was asked by Cheshire Police to examine two lots of CCTV footage recorded around a pub late in the evening. The video material quality was very poor and the images quite blurred. There was footage of the victim as he left a public house late in the evening and then disappeared from view as he walked into an alleyway. This was the last sighting of him until he was found dead in the alleyway. The problem the police had was that relatively shortly after he entered the alleyway another male is seen walking back up the alleyway. The police wanted to know two things:

1. Was the male walking back up the alleyway the victim?

2. Was the pair of legs seen walking out around the corner the victim or someone else?

The timing was important because if the victim had walked out of the alleyway he could have returned at a later time when the suspect may not have been in the area.

Based on contrasts in co-ordination, reciprocal arm swing, postural and height differences and tone of footwear I took the view that the person walking out of the alley was not the victim. Equally the images that showed only the lower half of a person walking out of the alley were eliminated from being the victim by their apparent co-ordination ability. I concluded there was limited support for it being a different individual to the victim because the image quality was the poorest I had used. The case went to court twice. The defence did not fully challenge the report probably partly due to the fact that it did not name or directly implicate their client. The defendant was convicted of murder.

4 Points for the SIO to Consider

What are the limitations of forensic gait analysis?

Haydn:

Real time footage and much time lapsed CCTV allows for comparison of limb and body movement as well as gait. In worse case scenarios, it can be difficult when comparing time lapsed footage where there are long time intervals between the images seen of the person. This essentially reduces the number of images which are available to examine and which may therefore not show a gait abnormality in the person, even though it may actually exist.

Ian:

Caution also needs to be taken with artefacts of images such as clothing, the affect of ground surfaces in some cases and footwear.

What should SIOs consider when requesting forensic gait analysis?

- The quality of CCTV footage and the need for surveillance footage to capture full head to toe images as often as possible.

- The CCTV footage in order to be able to compare like for like images.

- To provide where possible an edited copy of CCTV and covert/overt footage to save analysis time.

- LCD screens/monitors are generally much better than plasma screens for viewing the footage and this is particularly important in Court rooms so that all parties and jurors can easily see what is being discussed.

What does the future hold for forensic gait analysis?

- Setting academic foundations to build on and standardise the processes involved in analysing gait.

- Research is being carried out to determine and collate visual information on features of normal movement for abnormal movements to be compared against.

- Automatic gait recognition. The development of individual gait prints which are electronically stored and used to track/locate persons of interest.

- Official guidelines established for CCTV to be set up with a view to optimising gait and posture analysis.

Forensic gait analysis has links with the following areas of expertise:

- Forensic foot fit – footwear and footprint identification and marks on footwear;

- Osteology – the analysis of skeletal remains to map how a person may have walked;

- CCTV imagery experts – installation, camera type, pixels and distortion;

- Photogrammetry – estimation of individual's height.

For further information and contact details of specialists working within the above fields contact NPIA's Specialist Operations Centre 0870 241 5641.

5 Conclusion

Forensic gait analysis, the assessment of a person's gait and features of their gait with the view to eliminate or implicate suspects is a useful investigative tool which has application to any type of crime where CCTV and covert/overt footage has been obtained. However, like any expert advice the final decision of the utility of such information rests with the officer in charge of the case.

Further Reading

The following reading material is based around computer recognition approaches:

BenAbdelkader C., et al (2002) EigenGait: motion-based recognition people using image self similarity. *Audio and Video-Based Biometric Person Authentication. Vol 2091/2001*: pp 284-294.

Bobick, A.F., and Johnson, A.J. (2001) *Gait Recognition Using Static Activity Specific Parameters.* Proceedings of Conference on Computer Vision and Pattern Recognition. Vol 1 p 423.

Lee, I., and Grimson, W.E.L. (2002) G*ait Appearance for Recognition.* Paper from the international workshop "Biometric Authentication" Copenhagen, Denmark, June 2002.

Mituosi, T., and Boyd, J. (1998). Recognising people by their gait. The shape of Motion. *Videre*, Vol 1 (2).

Shutler, J., Nixon, M., and Harris, C. (2000) Statistical Gait Recognition via Velocity Moments. *Visual Biometrics (Ref.No. 2000/018) IEE Colloquium.* Available on: http://ieeexplore.ieee.org/servlet/opac?punumber=6829.

The Corporate Manslaughter and Corporate Homicide Act 2007: A challenge for investigators?

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Abstract

DCS Mark Smith is Head of CID for BTP and holds the portfolio for corporate manslaughter as a member of the ACPO Homicide Working Group (HWG). Mark has been involved in a number of multi fatality corporate manslaughter investigations and has had a key role in relation to the new Act, liaising with the bill drafting team and providing evidence and submissions to Government on behalf of the HWG.

In this article Mark looks at the key elements of the new corporate manslaughter offence, and considers some of the key issues for Senior Investigating Officers (SIOs). Despite written and oral evidence from HWG members to the Parliamentary Select Committee that considered the provisions of the bill, the Government decided not to give police similar powers to the Health and Safety Executive (HSE) when investigating the new offence. This is likely to prove a major area of frustration for police investigators and will only perpetuate the investigative difficulties experienced by SIOs investigating the current common law offence.

There is significant concern and uncertainty as to the number of cases that police will be required to investigate, and in an attempt to assist SIOs in making initial assessments, this article breaks down the specific elements of the offence and describes them by way of hurdles that need to be overcome before the new offence can be engaged. One caveat to this approach is that it may not be possible to make a judgement on some elements of the offence until a reasonable level of investigation has already been undertaken, however structured approach and compliance with the ACPO *et al* (2003) *Work Related Death: A protocol for liaison* (henceforth referred to as the Work Related Death Protocol) should assist in this regard.

This article does make reference to the liability of the police under the Act but in a very general sense, and does not seek to provide guidance in this area

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1 Background

The Corporate Manslaughter and Corporate Homicide Act 2007 received Royal Assent on 26th July 2007, following a fairly lengthy period of debate and amendment in both houses of Parliament. In fact the bill was at serious risk of running out of parliamentary time and some special provisions had to be used to enable it to finally be passed. The bill however, did make it onto the statute books and with it comes some real challenges and expected difficulties for the police service.

The new offence was no doubt intended to make it easier to hold large corporations to account, unfortunately without the specific powers normally given to agencies tasked to investigate corporations, what we may be left with is a great deal of expectation from bereaved families and the judiciary for more timely investigations and better judicial outcomes, without perhaps the tools to do the job.

It should be remembered that the new offence was born out of the inadequacies of the old, which saw only a handful of successful prosecutions of very small organisations. With the old offence, there was a need to identify an individual who could be considered as the 'directing mind' of the organisation, and whose own gross negligence was causative of the death. This did not present a particular difficulty to investigations into those very small organisations. The common law offence however, consistently failed to hold larger corporations to account even where the levels of negligence where substantial, due to the lack of proximity to the causative events of anyone senior enough to be established as the 'directing mind'.

We should also remember that individual liability for gross negligence manslaughter still remains and is not repealed by the Act.

2 The Offence

Before we go much further we should perhaps look at the definition of the new offence. Section 1 of the Act states:

(1) An organisation to which this section applies is guilty of an offence is the way in which its activities are managed or organised:
   a. causes a person's death and;
   b. amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2) The organisations to which this section applies are;
   a. A corporation.
   b. Department or other body listed in Schedule 1.
   c. A police force.
   d. A partnership or a trade union or employers' association that is an employer.

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

(4) For the purposes of this Act:
   a. "Relevant duty of care" has the meaning given by section 2, read with sections 3 and 7.
   b. A breach of duty of care by an organisation is a "gross" breach if the conduct alleged to amount to a breach of duty falls far below what can be reasonably expected of the organisation in the circumstances.
   c. "Senior management", in relation to an organisation, means the persons who play significant roles in:
      i. The making of decisions about how the whole or a substantial part of its activities are to be managed or organised.
      ii. The actual managing or organising of the whole or a substantial part of those activities.

As can be seen above the offence has a number of elements. What I will aim to do in the coming sections is to look at each element in turn, and in the case of the first four think of them as hurdles that need to be overcome before we can consider corporate manslaughter as an offence requiring investigation. Elements 5 and 6 will be the main focus of investigation and so are unlikely to be issues that will be obvious from the outset. It is hoped that this approach will aid those officers who are called upon to make initial assessments. Put simply these elements are;

1. Commencement.

2. Jurisdiction.

3. Organisational status.

4. Relevant duty of care.

5. Senior management failings.

6. Gross Breach.

2.1 Commencement – the first hurdle

On the 6th April 2008 the majority of the provisions of the Act came into force, immediately repealing the common law offence. As the offence cannot be applied retrospectively (section 27(3)) the first thing to consider is the commencement date and how it will operate. In simple terms the failings that cause the harm that in turn caused death must occur on or after the 6th April 2008. Cases where failings have occurred in whole or part before commencement, which cause harm leading to death after commencement, should be dealt with under the old common law offence (s27 (4)). Failings which initially occur before the commencement date but which continue or perpetuate beyond it can be considered to be covered by the new offence, as long as that continuing failing (beyond commencement) is both causative and grossly negligent.

This general issue of commencement is likely to be the first matter for the SIO when considering whether the new offence will apply and whether an investigation for corporate manslaughter should be undertaken. In most cases this will be straight forward, however in some cases it may be some time before it can be established when the causative failings occurred. In such cases both the old and the new offence could be in play, and this may well cause some conflict in the investigative strategies that need to be applied as the old offence is based on personal liability and the new on purely corporate liability.

2.2 Jurisdiction – the second hurdle

The jurisdiction of the new offence depends not on where death occurs, but where the harm that causes death was sustained, and for the offence to apply that harm must have occurred:

- in the UK;
- in the UK's territorial waters (for example, in an incident involving commercial shipping or leisure craft);
- on a British ship, aircraft or hovercraft;
- on an oil rig or other offshore installation already covered by UK criminal law.

For the sake of illustration I will propose an extreme application of that jurisdiction. We might imagine an outbreak of food poisoning on a British registered cruise ship sailing in international waters, and the fact that a group of ten US citizens fall seriously ill from food poisoning whilst on board. They are disembarked in the USA, where they subsequently die from the illness contracted on the ship. Assuming there are causative links to senior management failures, then despite the victims being foreign nationals who have died abroad, the offence may still have been committed.

We should also consider deaths that occur due to harm sustained in the UK, by the senior management failures of organisations based abroad which will be covered by the new offence. As we know foreign based companies have significant interests in some areas of UK business including for example the domestic energy industry. Where those companies have UK registered offices then the investigative process may be channelled through them, however some foreign businesses may not have any UK offices and this will present significant challenges to the SIO for which there are no special provisions within the Act. We will need to rely on current process and systems for gathering evidence and conducting investigations on foreign jurisdictions.

2.3 Organisational status – the third hurdle

The next issue for the SIO to consider is whether the organisation involved in the death is actually covered by the Act. Generally the Act applies to incorporated bodies, however this is not as simple as it may first appear. It includes certain Crown bodies and public sector organisations such as the police and the National Health Service. It also extends to limited liability partnerships, other partnerships, and trade associations which employ people.

Section 2 and Schedule 1 of the Act explain who is and who is not covered and it will probably be a requirement in any prosecution to establish the status of the organisation concerned in evidential terms. Such enquiries would be familiar ground for Economic Crime Units, which may provide a useful point of reference for the SIO in the initial assessment phase and to assist with any later evidential requirements.

It is probably worth highlighting two particular issues at this stage in relation to the status of organisations. The first is that organisations are often taken over by other organisations and as such cease to exist in legal terms. In such circumstances the new organisation will often assume the liabilities of the old in what is called a transfer of undertakings. It is through this mechanism that Network Rail was prosecuted for the failings of Railtrack, an organisation which no longer existed yet was in being and the relevant duty holder at the time of the major rail crashes in 1999/2000. In evidential terms this transfer of undertakings will need to be established and again Economic Crime Units and the services of forensic accountants may help with this process. The Act provides specifically for the transfer of functions between public organisations such as government departments (section 16).

The second issue is that in some instances the directors of a company may attempt to liquidate or wind it up rather than face prosecution and fine under the Act. As there is no individual liability there would be no personal redress for the directors involved. As there would have to be an application to Companies House for voluntary liquidation there is an opportunity in the process for the police to formally object. Police could also seek an injunction through the Courts to prevent the liquidation taking place. The key here is to make sure investigators liaise at an early opportunity with Companies House to ensure we are notified of any application to liquidate a company under investigation.

2.4 Relevant duty of care – the fourth hurdle

A key element of the new offence is to establish that the organisation concerned owed a 'relevant duty of care' to the deceased. For this concept of a 'relevant duty of care' the Act relies not on the duty owed under Health and Safety legislation but to the civil law of negligence, which is carried forward from the common law offence of gross negligence manslaughter. In fact the 'relevant duty of care' can differ according to the type of organisation involved due to a number of comprehensive and partial exemptions. For example the standard duty of care arises through:

- employer and occupier duties;

- duties connected to;
  - – supplying goods and services
  - – commercial activities
  - – construction and maintenance work
  - – using or keeping plant, vehicles or other things
  - – duties relating to holding a person in custody.

However when we come to organisations such as the police the relevant duty of care is essentially limited to the employer and occupier duties. There are also exemptions to cover certain types of training and operational activity. The key thing to remember in relation to the liability of the police is that it relates to our employees and only to the general public when they enter onto our premises or when held in custody (although this part of the Act is yet to come into force). By way of example the shooting of Jean Charles de Menezes at Stockwell tube station would not fall within the scope of the Act.

In many cases determining whether a relevant duty is owed will be straightforward. In others however, especially when we consider public sector organisations such as the emergency services and the NHS, the issue becomes far more complex and early consultation with CPS would be advisable. For example the emergency response (actually getting to the call) of an ambulance crew is not covered, whilst the quality of care they deliver once they have arrived is, unless they are performing a triage function which is not!

There is also an important exemption relating to public policy decisions (Section 3 (1)). This covers, for example, strategic funding decisions and other matters involving competing public interests but it does not exempt decisions about how resources were managed. So if we consider this in an NHS setting, a public policy decision made in relation to the level of funding provided to the NHS will be exempt, however if the managers of a particular hospital decide to divert funding away from essential hygiene services and into local medicine supplies then this comes under 'managing resources' and will not be exempt. We can see here the implications for hospitals which do not manage their resources effectively to prevent outbreaks of disease such as MRSA.

When we consider the application to child protection services, decisions as to whether or not to take a child into care are not covered. Once a child is in care, however, duties arise as occupier and for the safety of the child in a 'custody' type context (Section 2 (1)(d)).

The question as to whether a relevant duty of care is owed to the deceased is ultimately a decision for the trial judge.

2.5 Senior management failings

This part of the offence requires that the way in which the activities of an organisation were managed or organised by its senior management were a substantial element in the breach of duty which led to death. This perhaps represents the most significant change over the old law. As we have already discussed the old offence required proof that an individual who could be considered a 'directing mind' was themselves guilty of a causative breach of duty which was grossly negligent. We could not aggregate the lesser failings of a number of individuals and hold them up as evidence of gross negligence by the organisation.

The new offence changes all that and we will no longer need to prove failings on behalf of individual senior managers. We can look at collective failings by considering how activities were managed by the organisation as a whole. The sort of failings to be considered will be the extent to which the organisation failed to comply with any health and safety legislation that relates to the alleged breach of duty which in turn caused the death. In fact the Act puts very specific emphasis on compliance with Health and Safety legislation and guidance and serious breaches of the same will provide evidence of the offence. It is recommended that SIOs who will be tasked with investigating the new offence should consider the Health and Safety at Work Act 1974 as companion reading to this Act. It is accepted however, that police officers are not experts in the application of safety management principles and there will be a need to draw heavily on the expertise of partner agencies such as the Health and Safety Executive (HSE) when assessing safety management arrangements.

How activity was managed at all levels in the organisation can be considered but for the offence to have been committed, a substantial part of those failings must have occurred at senior management level. The most obvious effect of this provision is to potentially protect well managed and responsible organisations from the rogue actions of individual employees. For example where a company has good health and safety management systems, training and supervision across the organisation, but fatal failings occur at ground level due to an individual or small group acting against company policy and training and against what would normally be adequate supervision then the company would not be liable under the act. The individuals concerned could still of course be guilty of gross negligence manslaughter under common law.

Who might be considered as 'senior management' is not defined beyond what appears in Section 1 (4). A reasonable yard stick which I have discussed with others is to think of those individuals who have an element of autonomy, which allows them to make decisions about

how large parts of the organisation are organised and deployed. If we consider senior managers within the police environment it is likely that BCU and departmental heads who enjoy that level of autonomy will qualify, as well as specialist HQ managers with responsibility for health and safety.

2.6 Gross breach

The final element of the offence to consider is that of gross breach. For the offence to be committed there must have been a gross breach of a relevant duty of care to the deceased, and that breach must have been causative of the death. It does not need to have been the only cause, but we will need to show that 'but for' the breach, including the substantial element that occurred at senior management level the death would not have occurred. This is consistent with the approach to causation under the common law and the application of the 'but for' test.

The term gross breach in practical application means gross negligence and Section 1 (4)(b) of the Act states that a breach of a duty of care by an organisation is a "gross" breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances. This is similar to the current common law approach.

It will be for the jury to decide whether the breach was gross and in making that decision they must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so how serious that failure was and how much of a risk of death it posed (Section 8 (2)). Section 8 of the Act also lists other factors that a jury can consider in coming to this decision, and there are two particular issues that I'd like to highlight.

The jury can also consider attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged the failing or to have produced tolerance of it. This is a new concept and is something investigators should bear in mind when interviewing witnesses and inspecting documentary material as this will obviously require a wider approach than focussing purely on causative issues.

The second issue the jury can consider is the existence of any health and safety guidance that relates to the alleged breach. This goes wider than looking purely at compliance with the Health and Safety at Work Act 1974 (HSWA) and again will require a fairly wide review by investigators to establish what other relevant guidance exists, however the guidance must have been issued by a relevant Enforcement Agency. This again would be an area

where we could seek the assistance of partners such as the HSE. The final point to make here is that despite what has just been said about considering guidance issued by Enforcement Agencies, many organisations issue their own internal guidance, standards and policies on health and safety issues applicable to their own area of business. It has been my experience that evidence of failure to comply with self declared standards and guidance can be pretty powerful evidence of gross negligence as the specific guidance is often there to deal with specific identified risks. This could be considered by the jury under the general provison (Section 8 (4)) which allows them to consider any other matters they consider relevant.

3 Investigative Issues

Having looked at the key elements of the Act I will now highlight two key investigative difficulties, which were highlighted by national research conducted by the HWG in preparation for submissions to Government in support of our argument for extended police powers. This argument was ultimately unsuccessful and leaves the areas of difficulty unaddressed.

The first thing to point out is that this offence is one of purely corporate liability and so no one can be arrested for it or interviewed under caution. Obviously if individual gross negligence manslaughter offences are suspected then current police powers can be used in the normal way. The main difficulty arises when it comes to quickly understanding organisational structures and roles and responsibilities. The HSE have powers to demand such information but the police will have to rely on the voluntary release of such information through witness accounts or the analysis of documentary material.

The current process for obtaining documentary material is problematic and was a consistent theme in the national research conducted. If police are lawfully on premises then we have powers to seize relevant evidence. However much of the documentary records required will often be held at locations remote from the scene of death to which police will obviously attend.

To gain access to material we can seek voluntary disclosure however this leaves the investigation at the mercy of the defendant organisation and their integrity. Another option is to seek warrants or orders from the Courts, however many of the records held by corporations will come under the definition of 'special procedure material', for which a production order is required under Section 9 and Schedule 1 of PACE. This process generally requires that the organisation involved has firstly been asked for the material and refused to

supply it. Hearings are held in front of a Circuit Judge and the application can be contested by the organisation involved.

It is due to this issue that many of the investigations subject of the research had suffered the concept of 'drip feeding'. Organisations will often offer to supply material voluntarily so avoiding the production order route, but there is then the risk that they will effectively 'manage' and 'filter' the process for their own purposes.

The second key difficulty identified was gaining access to witnesses. Large organisations will often employ legal teams to represent their employees when asked to give accounts to the police. Often trade associations will do the same. In the case of a corporate lawyer representing an employee, the investigator should be encouraged to confirm with the legal representative who they are representing; the organisation or the employee. As we have seen rogue actions by employees acting against company policy and procedure might provide a defence for the organisation and therefore conflicts of interest could occur.

It remains to be seen to what extent company directors and senior managers will cooperate with police when they have no personal liability for this offence and we have no power to compel them to give an account or answer questions.

4 Working with Partners

As already stated how far organisations comply with Health and Safety legislation is a key tenet of the new offence, and police will not be the experts in this field. In fact the Ministry of Justice guidance to the Act (*Ministry of Justice*, 2007) encourages police to seek expert support from HSE and other relevant agencies and to work in accordance with the Work Related Deaths Protocol.

The HSE and other regulatory and enforcement bodies have some wide ranging powers to enable them to perform their statutory functions and these can include powers of compulsion. For example Section 20 of the HSWA, gives HSE inspectors the power to demand information and the production of documents. It also provides a power to compel individuals to answer questions and to sign for the truthfulness of what they have said. It must be emphasised that the HSE have no jurisdiction to investigate suspected corporate manslaughter, however they will generally also investigate deaths in the work place for their own purposes and to look at a potential prosecution under the HSWA.

In joint investigative arrangements with the police we must ensure that due regard is given to the application of different powers of the relevant agencies in working out the sequencing of investigative action. Otherwise there is a danger that the evidential process could be contaminated leading to possible unfairness issues at trial.

Put simply if the HSE or another agency uses their powers for their own purposes, then they can share the product with the police. Such agencies cannot use their powers to gather material for the police which they would not have sought for their own purposes as this would be considered *Ultra Vires*. In general terms documentary material lawfully gathered by such other agencies can be used in evidence by the police, however statements taken under Section 20 cannot. They can however be used as intelligence and the evidence sought in a fresh form by the police.

It should also be noted that there are a number of accident investigation branches such as the Marine Accident Investigation Branch (MAIB) which undertake confidential investigations which do not apportion blame. These agencies also have considerable powers not only to take the lead role in an investigation but also to demand material and compel witnesses. Again the sequencing of investigative activity can be critical in investigations involving not only accident investigators, but also HSE inspectors and police. There are memorandums of understanding[1] in place between ACPO and most of these agencies which set out how we should seek to work together and these should be read in conjunction with the Work Related Deaths Protocol when such agencies are engaged.

5 NCRS[2] and Recording Corporate Manslaughter

A recent decision has been made by the Home Office that offences of corporate manslaughter will be counted according to how many people have been killed. This is consistent with current policy in relation to the recording of homicide offences and is based on a recommendation from the HWG. What is different is that such crimes will not be recorded until the offence is made out, and that essentially means when CPS give authority to charge. Up until that point the matter will be recorded as a crime related incident. This approach has been designed to limit a sharp rise in recorded homicide crimes based on allegations made or investigations undertaken. Detailed guidance will be issued in due course.

[1] These memorandums are available on the CD-ROM of supplementary material contained within the ACPO (2006) Murder Investigation Manual. See References for full details.
[2] National Crime Recording Standards

6 NPIA[3] and HWG support

NPIA have briefed their regional advisers on the new offence and its application and they will be available to support SIOs in forces. NPIA also have details of other advisers who can provide further support in complex cases. It is recommended that all forces look to appoint an experienced SIO as a 'champion' for corporate manslaughter issues to assist in making initial assessments as to whether the offence may be engaged. It is anticipated that NPIA and HWG will provide opportunities for conferencing and networking on this subject in the future.

[3] National Policing Improvement Agency

References

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