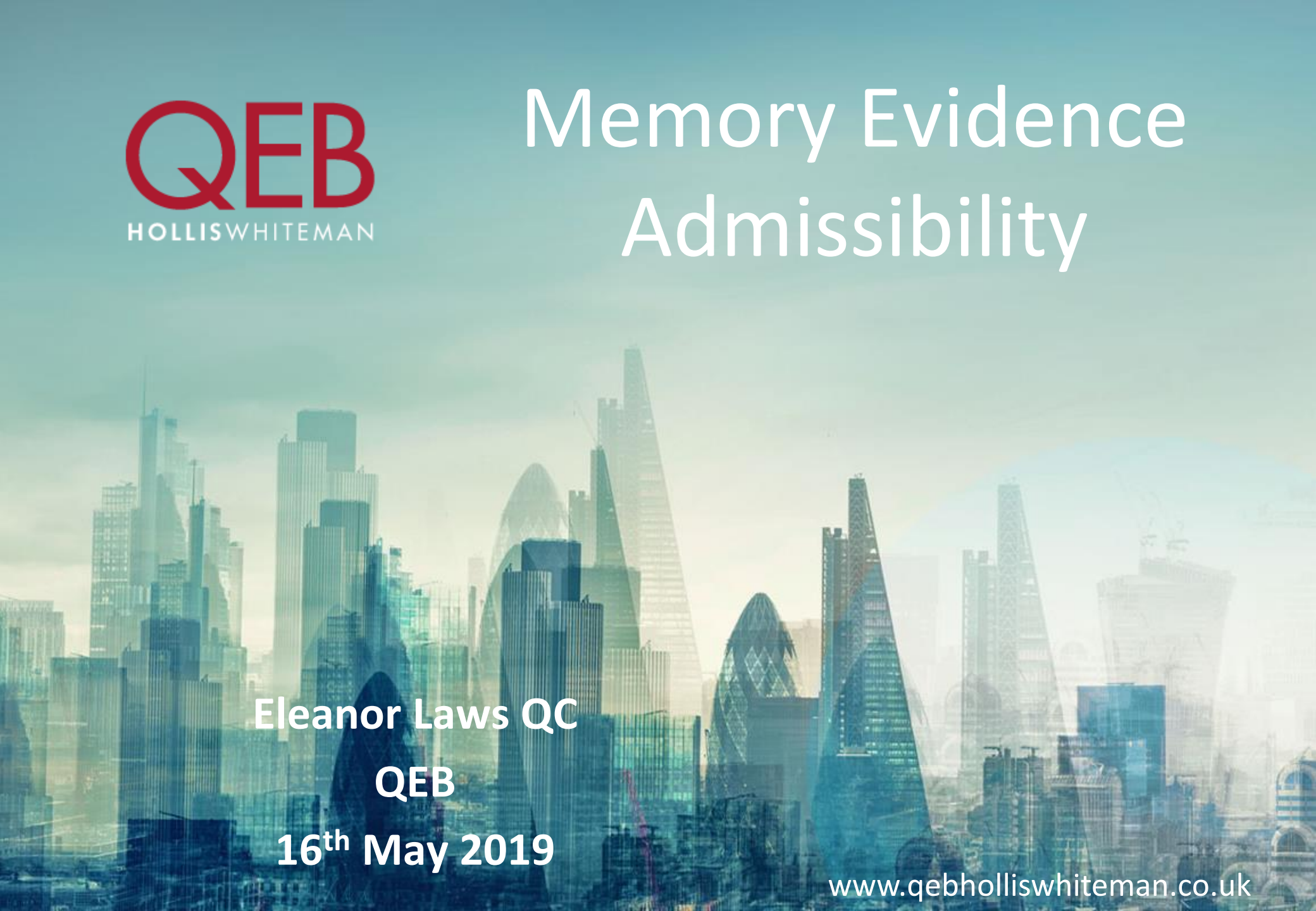

Memory Evidence Admissibility

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MEMORY EVIDENCE

Admissibility of expert evidence in cases involving memory.

Necessary assistance

Turner [1975] QB 834 [841]

An expert's opinion:

[I]s admissible to furnish the court with ... information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.

Browning 1995 CLR 227

Memory deterioration is not a topic for expert evidence from either a psychologist or a medical expert.

Murder case: female driver. D identified by his car.

Witness 1: called into the police 10 days later after a public appeal, giving piecemeal information about the vehicle registration number.

Witness 2 called in the next day, and after hypnosis gave more detail which was partially correct.

Memories from childhood

Between 2005 & 2012 a number of Appellants convicted upon evidence from adult complainants alleging that sexual abuse had taken place when they were young, sought to rely upon studies or reports written by **Professor Conway**, (described as an expert in memory formation and development), post trial, in order to challenge the safety of their convictions.

These cases trace the development of a restrictive approach by CA to the admissibility of expert evidence in cases involving the development of childhood memory.

Memories from childhood

Professor Conway's research and considered area of expertise led him to conclude that children may remember an event, and sometimes a visual image, but the recall will be fragmentary, disjointed and idiosyncratic. This period in early childhood is called the 'period of childhood amnesia' which would usually extend to the age of about 7.

In the course of his research, the professor had never come across a person who had been able to provide a detailed narrative account of an event that had taken place at the age of 4 or 5. A child of 4 might well remember something that had happened when he was 3, but by the time he was 7 or 8 he would have forgotten it and it would not be recaptured. It was possible that, if a child was regularly reminded about an event which occurred when he was very young, he might retain the memory of it. **If the child had a traumatic experience, one would expect that, as an adult, he or she might recall a few - usually three or four - intrusive and disjointed features of the event.** However, where the childhood event was merely unpleasant, such as a painful medical procedure or an accident such as falling off a bicycle, the adult might well remember the salient or central feature of the event but would not remember the surrounding or extraneous details. He would not be able to give an accurate and reliable narrative account.

JH; TG (Childhood amnesia) [2005] EWCA Crim 1828

The research and expertise of Professor Conway was not in doubt in this case.

The C alleged that she had been sexually abused by two adults when she was a child. The first in time, was her father. She gave a *"detailed narrative account"* of abuse when aged 3, 4 & 5 including details of how she was held by him, what clothing they were wearing and her emotional reaction to events. The abuse she continued until she was aged 10.

JH; TG

Conway's conclusions about the development of childhood memory (above) was considered to be relevant expert evidence in this case. The CA considered that the enhanced detail in the C's allegations, might lend the C more credibility than it ought, to a juror and may be unreliable.

Furthermore:

"...a judge should direct the jury to treat such evidence (of childhood memory) with caution; and whilst childhood amnesia was a proper subject of expert evidence, it would only be in most unusual circumstances where such evidence would be relevant".

JH; TG

Whilst the allegations made by the C here, and most of the authorities hereafter, relate to childhood memories of sexual abuse, Professor Conway's conclusions about memory essentially relate to the formation of childhood memories and the effect that unpleasant or traumatic events might have upon memory formation.

The CA has time and again sought to distinguish ***JH;TG*** on the basis of its exceptional circumstances.

But were the facts "exceptional" in the context of historical sexual allegations?

R v S; R v W [2006] EWCA Crim 1404

A Report written by Professor Conway was again put forward as expert evidence on the topic of childhood amnesia. **He repeated that he would be extremely concerned about claims for detailed memories of events from the age of three and below, and [had]…considerable reservations for such detailed memories from three to five, and less so, from five to seven years.** He emphasised, that these delineations by age represented generalisations.

The CA stressed that expert evidence would only be admissible in those **rare** cases in which a witness provided a description of early events containing an **unrealistic amount of detail.**

R v S; R v W

In S, he concluded that the complainant's account did not appear to be sufficiently detailed to be credible (the alleged abuse took place when he was aged 6-8 years).

In W the C alleged that she had been abused between the ages of three and a half to aged 13, she could not recall detail as to the first incident or when it started. Prof Conway stated this was "extraordinary".

His evidence was considered to be inadmissible.

R v S; R v W

Expert evidence would be inadmissible where it sought to analyse the accuracy or otherwise of a statement made by the witness.

It was the evidence that the witness gave at the trial that mattered: issues as to the accuracy and truthfulness of the allegations were critically for the jury, upon careful reflection on a claimed memory of distant childhood events.

The court added that save where there was evidence of mental disability or learning difficulties, attempts to persuade the court to admit such evidence should be scrutinised with great care.

Bowman [2006] EWCA Crim 417

Again, another case where the Appellants sought to rely upon a Professor Conway - post trial - report.

This case involved allegations against the Appellant by his children, some 22 years after his wife's death, that he had been violent to her before her death and had sexually abused them.

One of his children, aged 30 at trial, had been aged 6 at the time of the murder. Her evidence was contradictory and she failed to witness the strangulation although she was present.

Bowman 2

Conway gave evidence in the CA about childhood memory, along the same lines as before.

In addition, he said that in his opinion it was not possible for an adult to relate accurately conversations heard under the age of seven.

The Court of Appeal held that this evidence was on the very **borderline of admissibility.** Essentially the expert's evidence of the results of research into memories went little further than common sense and well within normal human experience.

However, he was still being referred to as an expert and his evidence was described by LJ Gage as “impressively candid”.

The tide appears to turn against Prof Conway

R v E [2009] EWCA Crim 1370

In ***R v E***, the appellant had been convicted of sexually abusing his daughter, stepdaughter and wife. In respect of his daughter, who was alleged to have been abused between the ages of 4 or 5 to 7 or 8, the appellant sought to adduce fresh expert evidence from Professor Conway about the level of detail to be expected in memories from early childhood.

There were conflicting reports on the issue before the court, both containing what LJ Hallett described as unfortunate "vitriol" aimed at each other.

R v E [2009]

The Court of Appeal refused to receive the report of Professor Conway as fresh evidence.

Prof Conway had made a broad range of comments in his Report. Lady Justice Hallett criticised many of his conclusions and the basis upon which he made them; including his definition of leading questions, his conclusions on the plausibility of some of the detail of C's accounts, and the fact that Conway appeared to contradict himself.

He was also criticised for the the paucity of the material upon which he had based his report and his failure to have conducted a proper analysis of it.

> *"In our judgment, absent **exceptional circumstances**, the question of the plausibility of a child's account and the extent of detail he or she provides are all matters for a jury. Experts should not used so as to usurp the function of a jury."*
>
> *(Per Hallett LJ at paras 43)*

R v H [2011] EWCA Crim 2344

This case involved allegations dating back to when the C was aged 3 or 4 until he was aged 10. Prof Conway had not provided a report, but Counsel attempted to advance to the CA, (based upon Conway's research upon childhood amnesia to age 7 as reported in the case of ***JH;TG [2005]***), that the trial Judge ought to have warned the jury about the dangers and unreliability of purported memories of early childhood. The CA refused and LJ Rix went further than LJ Hallett, proclaiming that this evidence was "unsatisfactory", "controversial" and "sceptically regarded".

The Court held that Judicial warnings given upon:

- the prejudicial effects of delay
- that time may play tricks on memories
- to look at the evidence fairly, were sufficient.

Further criticism of Professor Conway:

Anderson [2012] EWCA Crim 1785

Although the Appellant's Counsel changed his mind about relying upon Prof Conway's report, it did not stop the CA's criticism of him. Hallett LJ criticised his CV and methodology and stated that if the CA had known about the controversial nature of Conway's approach, she doubted whether the case of ***JH;TG*** would be decided the same way today.

Recovered memory

The theory of recovered memory is that a person may involuntarily banish from consciousness the memory of repeated childhood trauma. This is termed "traumatic amnesia". Proponents argue that it is possible to retrieve these memories therapeutically.

There appears to be little scientific support for this theory.

Recovered memory

Opponents of the theory argue that most "recovered memories" are the result of suggestive therapeutic techniques. Memories, even apparently vivid or dramatic memories, can be confabulated and re-interpreted. As such, the memories can be false (often referred to "false memory syndrome").

Many of these cases have involved reports from Dr Janet Boakes, Consultant Psychiatrist and Psychotherapist. She, like Professor Conway, has fallen out of favour with the CA.

However, the CA has not closed the door to expert evidence of FMS being called, provided that the evidential foundation is met.

Bernard V [2003] EWCA Crim 3917

In this case, the Appellant produced a report by Dr Boakes which included a review of background material which the jury had already been made aware of, and observations about how that material may have influenced the witnesses.

The CA made it plain that these were not matters for any expert to comment upon. However, parts of Boakes's report contained information about false memory syndrome which they considered to be material which a jury might be unaware of and which would assist any assessment of a complainant's reliability, and so considered this part of her Report to be potentially admissible.

The Court ruled that in cases where a C indicated that they had suddenly, during therapy, had a revelation of abuse, the court could hear expert evidence on the fact **there is a body of scientific opinion that memories recovered in such sessions can be, and frequently are, false.**

Clark 2006 EWCA Crim 231

The case of ***Clark 2006 EWCA Crim 231*** involved allegations which emerged after the complainant had received hypnotherapy. The CA held that evidence from Dr Naish, (a psychologist, who Chairs the FMS) about how a susceptible person could come to form false memories, and criticisms of the therapy received, ought to have been admitted at trial.

However, criticisms were made of various conclusions drawn in Naish's Report about the C suffering from false memory.

R v Nicholson [2012] EWCA Crim 1568

In ***R v Nicholson [2012] EWCA Crim 1568*** the Appellant, a nurse, faced allegations that he had sexually abused some patients whilst they were coming round after having been anaesthetised. The jury had heard from prosecution experts on anaesthesia, about the likelihood of the C's memories being false.

It was held that the prosecution experts were not required to produce statistical proof.

R v H [2014] EWCA Crim 1555

This would now appear to be the leading case on recovered memory.

In ***R v H*** a daughter alleged sexual abuse by her father, a general practitioner, over a period of 2 - 2.5 years, from when she was aged **10 until she was 12/13**. The C suffered from mental health issues and received psychological counselling.

During in patient hospital treatment, whilst receiving counselling, the C alleged her father physically abused her from the age of **3 until the age of at least 11**. The C made her first disclosure of sexual abuse to a friend at school about six months after the therapy had ended.

R v H

The defence sought to adduce a report from Dr Boakes which argued that the complainant may have 'recovered' her memory during therapy and that accordingly the reliability of her allegations may be affected. The trial judge refused to admit the report on two grounds:

- Dr Boakes's reports contained comments on the credibility and reliability of the C which were inappropriate for an expert to make. She had, he stated, in effect assumed the role of advocate and would be usurping the role of the jury.

- The evidence demonstrated that the C's memory of the abuse was continuous. The Judge concluded that at no stage had the C ever claimed not to have remembered this aspect of her childhood and there was no evidence to support Dr Boakes's claim that the memory was in fact recovered.

R v H

Sir Brian Leveson, delivering the judgment of the Court of Appeal, held that the judge had been correct not to admit the evidence of Dr Boakes and approved the following:

> *"[1] The defence were not permitted to call an expert to examine the detail of a complainant's statement/evidence, and other relevant evidence such as medical or counselling notes, and then pass judgement or adverse comment on whether the witness was a credible or reliable witness. To do so would be to usurp the jury's function.*
>
> ***[2] The defence were entitled, in an appropriate case, to call expert evidence on a specific subject which would be outside the knowledge and experience of the jury and which might assist them in their task of assessing the credibility and reliability of allegations of historic sexual abuse.***
>
> ***[3] False Memory Syndrome, or Recovered Memory Syndrome, was just such a subject where defence expert evidence was potentially admissible.***
>
> ***[4] There had to be a sound factual foundation for such expert opinion which had to be established in evidence prior to such expert evidence becoming admissible. It was for the trial judge to decide whether such foundation had been laid." (para 20)***

R v B [2019] 1 W.L.R. 2550

Finally, a Professor Conway case. His report was not used

In R v B, B (a PCSO) was alleged to have sexually abused and raped his two daughters when they were under the age of 13. The defence had commissioned a report from Professor Conway regarding false memory/recovered memory syndrome. However, that report was not served, disclosed or relied upon.

During trial, it appeared that one of the two daughters claimed her memories of abuse had lain dormant for 6 or 7 years (including a period of therapy & after a talk on rape) and were later triggered by the sight of a police officer.

The other sister disclosed after 10 or 11 years, claiming that she recovered her memories of abuse after she knew that her sister had disclosed, after therapy and after having denied being abused during police interviews.

R v B [2019] 1 W.L.R. 2550

The judge gave the standard delay direction; designed to address circumstances where a complainant has continuous memory but has delayed disclosing it. **The judge did not draw attention to, or give any particular direction on the late-emergence of the memory of abuse.**

Sir Brian Leveson, stated that it was clear that **the judge's directions did not fully capture the nature of the defence and made the following observations:**

> *"Furthermore,* ***it is clear that there was a potentially important distinction to be made between a continuing memory and a late-emerging memory of abuse and we do not accept that, in the absence of expert evidence, the judge would have had no evidential foundation to justify drawing out that distinction for the jury's consideration. It seems to us that, even in the absence of expert evidence on memory, the late emergence of a hitherto entirely absent memory*** *(if that, in both cases, is what it was)* ***was a singular feature of the evidence to which the defence was entitled to draw attention*** *in making the case that R and E were mistaken in what they said they now recalled." (para 38).*

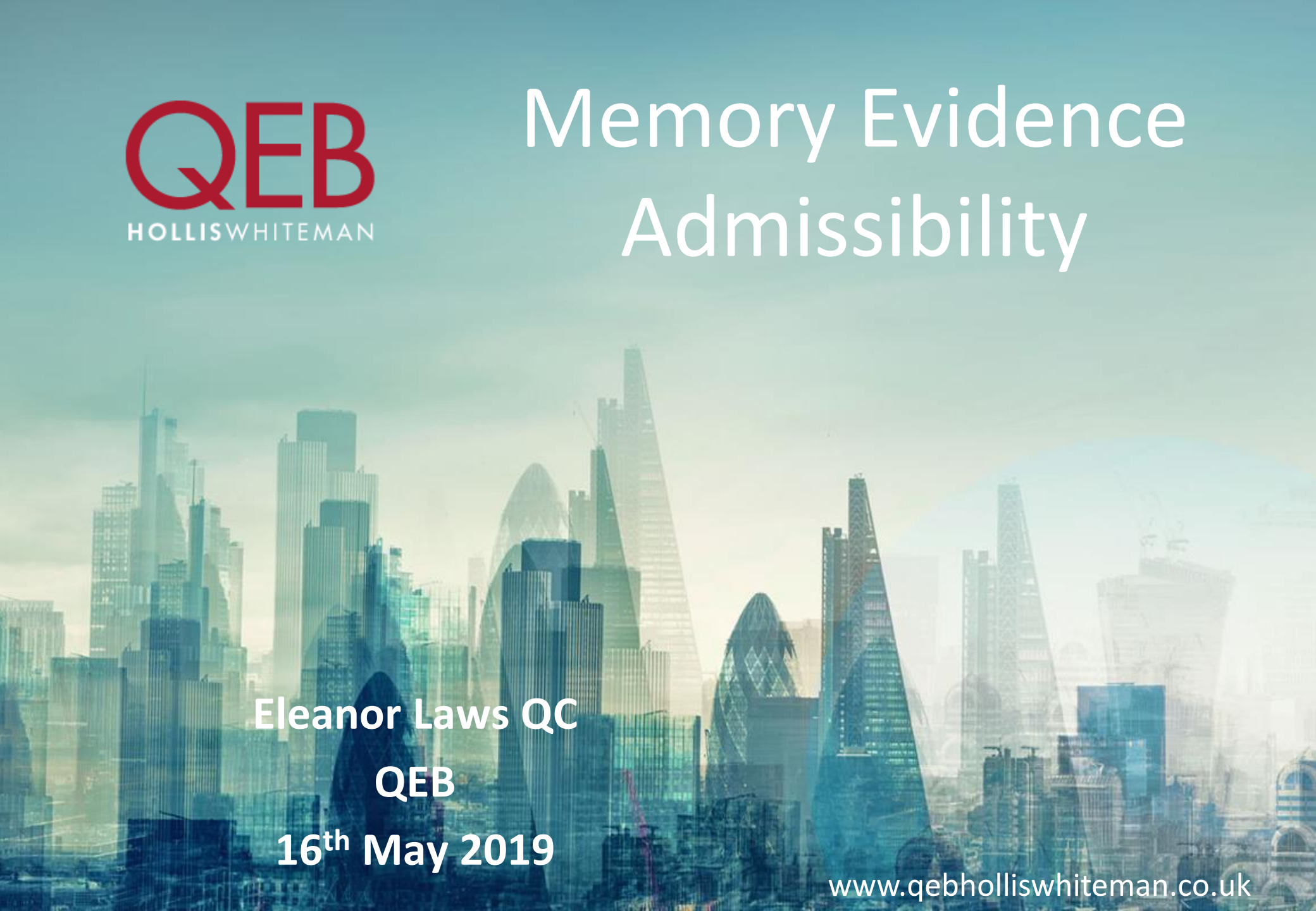
Nevertheless, it was held that the deficiencies in the judge's summing up were insufficient to render the convictions unsafe. The convictions were therefore upheld.

Conclusions

Be careful about your choice of expert.

Ensure your expert:

- complies with CPR 2015 (SI 2015/1490)
- has the relevant expertise,
- lists key research/ studies;
- can justify his/her conclusions with reference to research/studies;
- does not stray into areas beyond his/her expertise;
- has read the recent case law.



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