E41 Avoiding Wrongful Convictions: Proving the Corpus Delicti

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After attending this presentation, attendees will have an appreciation for a class of criminal cases where the association between a suspect and the scene is not at issue. Rather, the issue in these cases is what happened at the scene. A proposal for avoiding the miscarriages of justice that accompany these kinds of cases will be put forward.

This presentation will impact the forensic science community by giving defense attorneys several options for eliminating prejudice and improving the scientific quality of trials. Current trial tactics involving bootstrapping weak science with character assassination may be curtailed as a result.

The Sixth Amendment to the United States Constitution begins with the phrase, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein **the crime** shall have been committed". These words were written a simpler time, when the existence of a crime was usually not debated. It is unlikely that there were many criminal prosecutions for which there was not an obvious *corpus delicti.* Even today, in the vast majority of criminal trials, the issue before the jury is "Whodunit?" rather than "What happened?"

It is not surprising, therefore, that the recent National Academy of Sciences Report*, Strengthening Forensic Science in the United States: A Path Forward*, dealt almost exclusively with forensic science issues related to associating a suspect with a crime scene, rather than issues related to determining what happened.

In almost all cases where "What happened?" is at issue, the defense takes the position that "It was an accident," or, "It was self-defense". When these defenses are raised in shooting incidents, the entire trial revolves around what exactly happened, but in other cases, the evidence is far more subtle and open to debate. There is no doubt that in these cases, the prosecution should have the burden of proving beyond a reasonable doubt that a crime actually took place, but far too often, when faced with weak scientific evidence, the prosecution focuses on character assassination of the defendant to bootstrap weak or nonexistent evidence that a crime actually took place.

The Goudge Inquiry in Canada (www.goudgeinquiry.ca) focused on 20 cases of alleged shaken baby deaths, in which the cause of death was known, but the manner of death was ruled a homicide based on debatable interpretations of injuries detected at the autopsy. The following excerpt from the report sums up the problem:

> ***The interpretive nature of forensic pathology - both in evaluating the findings made at the autopsy and determining what, if any, conclusions can be drawn from them - reinforces the limitations of the science. Even when the controversy does not divide the pathology community, there are diagnostic challenges that limit what a pathologist can reasonably say about an individual case, and the level of confidence or certainty with which he or she can say it.***

There is another kind of crime for which the same problems exist, and that is arson. The problem is magnified by the fact that while any forensic pathologist can determine the *cause* of death, in order to determine *manner* of death, he or she must rely on the opinion of a fire investigator, possibly one with little or no scientific education. Thus the highly educated and trained forensic pathologist relies on someone with much less education and training to determine the manner of death. In fact, the bottom line of the Goudge Inquiry can be translated directly to the problem of fire investigation ever simply by substituting "fire investigator" for "forensic pathologist" and "fire scene" for "autopsy."

> ***The interpretive nature of fire investigation-both in evaluating the findings made at the fire scene and determining what, if any, conclusions can be drawn from them-reinforces the limitations of the science. Even when the controversy does not divide the fire investigation community, there are diagnostic challenges that limit what a fire investigator can reasonably say about an individual case, and the level of confidence or certainty with which he or she can say it.***

Cases involving the death of children are always very emotional, and when a criminal case is brought, that is exactly where the prosecution tends to focus. In arson trials, particularly when the science is weak, the prosecution may spend the first few days of trial proving that the accused mother or father is a monster because if this was in fact a set fire, then a monstrous act has been committed. Unfortunately, by the time the defense goes on, the jury is already persuaded by the character assassination evidence that the fire was intentionally set, even if there is serious doubt about that fact. The same kind of dynamic takes place with shaken baby trials.

In both arson and in shaken baby cases, there is usually little doubt about the identity of the perpetrator, only about the *manner* of death. If the fire can be shown to have been intentionally set, there is little doubt about the identity of the perpetrator. It is a survivor who provided the fire investigator with an account of an accidental fire. If the shaken baby can be shown to have been shaken to death, the perpetrator is the person holding the baby. The question of "Whodunit?" is settled.

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Because it is incumbent upon the prosecution to prove beyond a reasonable doubt that a crime actually took place, it only seems fair that **before** the prosecutor begins proving who is responsible for this horrible act, he or she should be required to prove that it was in fact a horrible act. Put forward for your consideration is the following language which is suggested should be the law:

> ***In all prosecutions involving homicide, unless the manner of* death is stipulated, the State shall have the burden of proving beyond a reasonable doubt that the manner of death was homicide prior to any evidence being presented regarding the guilt or innocence of the defendant.**

And similarly,

> ***In all prosecutions involving arson, unless the cause of the fire is stipulated, the State shall have the burden of proving beyond a reasonable doubt that the cause of the fire was incendiary prior to any evidence being presented regarding the guilt or innocence of the defendant.***

Several states already have statutes or case law regarding fires and a presumption of accidental cause unless proven otherwise. When mere money is at stake, Federal Rule 42 (b) allows for bifurcation to prevent prejudice:

> ***The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue…***

Other then the near impossibility of passing legislation over the screaming opposition of the prosecution and insurance defense bars, there should be no reason that trials where the manner of death or the cause of the fire are in dispute should not be bifurcated so that the state is first required to prove the *corpus delicti*.

Short of passing legislation, bifurcation might be accomplished by requesting that the judge bifurcate the trial, and short of that, the judge can be requested to issue a jury instruction telling them that before they begin debating the guilt or innocence of the defendant, they first decide whether a crime has in fact been committed.

Bifurcation, Arson, Shaken Baby

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