

The Criminal Law Review

ISSUE 5 2008

Articles

Causing Death by Driving and Other Offences: A Question of Balance

Michael Hirst

Public Nuisance Injunctions Against On-Street Sex Workers?

Tracey Sagar

"Up-Skirts" and "Down-Blouses": Voyeurism and the Law

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The Criminal Law Review

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May 2008

Editorial

 Criminal evidence; JSB specimen directions

The Judicial Studies Board plays an extremely important role in training and supporting the judiciary, not least in criminal justice matters which are so prone to hasty legislative change. A familiar aspect of the Board's work, and one which impacts tangibly on all Crown Court trials, is the provision of specimen directions. Their development and use have been criticised by many, as for example with typical flair by Dr Munday, "*Exemplum Habemus*" (2006) J Crim. Law 27. The directions have recently been criticised by the Lord Chief Justice in his Kalisher Lecture "Trusting the Jury" (2007) (www.judiciary.gov.uk/docs/speeches/lej_trusting_juries_231007.pdf) echoing his views when presiding in *Campbell* [2007] EWCA Crim 1472. In his lecture, Lord Phillips voiced concern "at the number of directions that are given to juries that, at the end of the day, are no more than matters of common sense" and announced that "Lord Justice Latham is leading a working party to see whether some of these cannot be dispensed with, or at least simplified". Since many of these directions are given in the Crown Court in England and Wales every working day, their reform is of considerable importance.

His Lordship's desire to prevent unnecessary direction of jurors is of course welcome. As a matter of principle jurors ought to be given directions only where they will be of assistance and only then in a form in which they can be readily understood and applied. Over-directing juries has long been a concern (see E.J. Griew, "Summing up the Law" [1989] Crim. L.R. 768) and it certainly seems that some current directions are unnecessary, revealing nothing to jurors which would not already have occurred to them. Equally, it is doubtful whether some of the directions are as clear as they might be or whether they assist jurors. However, before pressing ahead with revision and possible removal of some directions we must be confident of how if at all they are defective, what purposes they serve and what juries need from them. All too often we have been prepared to make false assumptions about jurors and their decision making (see, recently C. Thomas [2008] Crim. L.R. Issue 6 and W. Young, "Summing Up to Jurors in Criminal Cases" [2003] Crim. L.R. 665). If we are serious about crafting optimal jury directions we should invest time and money in appropriate empirical studies. This extends not just to what areas of law require directions, but the form they should take to ensure maximum effectiveness. There have, for example, been repeated calls for greater use of written directions: see N. Madge, "Summing Up: A Judge's Perspective" [2006] Crim. L.R. 817; R. Auld, *Criminal Courts' Review* (2001), Ch.5 para.50.

In reforming the specimens, a further dimension must be borne in mind: although primarily for the benefit of the jury their benefit to judges is undeniable. Judges' need for specimens is perhaps greater than ever as criminal legislation becomes increasingly complex and technical. (Anyone doubting that should cast an eye over the labyrinthine Pt 2 of the Serious Crime Act 2007). As legislative complexity increases so does the risk of error in directing the jury, and consequently specimen directions assume greater significance. When regard is had to the hundreds of Recorders sitting in criminal trials, for many of whom their own practice lies

outside criminal law, the value of specimens is manifest. However, the specimen directions have always been intended to provide guidance rather than a mantra to be recited unthinkingly. Much of the Lord Chief Justices' criticism may be borne of a well-founded concern—that the directions are being recited too readily without any attempt to create bespoke directions tailored to the needs of individual cases. As the law becomes more technical, the temptation to recite presumably increases, especially for part-time judges. If the judges' needs are to be adequately met, the exercise of reforming the specimens becomes even more difficult.

A further reason for caution in revision of specimen directions is because they serve not only to assist jurors and judges, but to protect defendants and improve efficiency and consistency in the criminal justice process. How often has reliance on the form of words in the specimens on something as important as the burden of proof prevented a judge making a slip, particularly on something so routine? Many defendants will have been saved from wrongful conviction and the Court of Appeal spared another unnecessary appeal because of careful adherence to the directions on any number of subjects. In Art.6 terms they also go some way to making up for the absence of juries delivering reasons.

There is a further, more controversial dimension to Lord Phillips' criticism. Behind his suggestion that the specimen directions need reform, is the broader issue about whether we should be more willing to trust the jury to deal with the evidence they receive. His Lordship draws support for his preference for greater trust from the dramatic legislative changes in the law of evidence over the last decade or so. It is true that these led to the jury being permitted, for example, to draw inferences from silence, hear more hearsay and have revealed an accused's bad character. However, it should be noted that Parliament legislated to permit these potentially prejudicial forms of evidence to be received, knowing that the jury would be given appropriate judicial direction. Moreover, these examples could be used against His Lordship's position. It might be argued that the greater the volume of (prejudicial) evidence which legislation makes potentially admissible, the greater is the obligation on the trial judge to guide the jury on how they may approach it. In particular, for example, it could be said that it is only because of the judicial guidance on adverse inferences that the legislation has not created unfairness and wrongful convictions. With hearsay and bad character it may be too early to say how jurors are coping, and research into jurors' experiences of such evidence under the Criminal Justice Act 2003 is desirable, particularly as to evidence of an accused's bad character. Declaring a wider trust in juries and jettisoning the specimen direction on such an important form of prejudicial evidence, as suggested in *Campbell* [2007] EWCA Crim 1472 may, it is respectfully submitted, be premature. Life is made more rather than less difficult for judges by decisions such as *Campbell*, where the specimen direction on bad character was rejected. It is obvious that judges cannot simply say nothing to the jury regarding the bad character evidence which has been adduced. But if they cannot rely on specimen directions, what are they to say? Trial judges will turn to personal invention leading to inconsistency, uncertainty and more appeals.

The specimen directions may well be in need of a major overhaul and in some cases deletion, but that should be conducted against a backdrop of reliable research.

David Ormerod

Causing Death by Driving and Other Offences: A Question of Balance

By Michael Hirst*

Professor of Criminal Justice, De Montfort University

LT Causing death by careless or inconsiderate driving; Causing death by dangerous driving; Causing death by driving; Sentence length; Sentencing guidelines

Summary: *This article examines road traffic homicide offences and argues that current sentencing practice in relation to them has become disproportionately punitive and severe, at least in cases where death results from a simple human error, rather than from wilfully culpable driving.*

Introduction

There is a widespread belief that motorists who cause fatal accidents are treated leniently by the courts. The red-top tabloids, pressure groups and local newspapers, in particular, have campaigned long and hard for greater severity in the punishment of “killer drivers”, often by focusing on individual cases in which it is claimed that justice was not done. A common complaint is that such motorists ought to face charges of manslaughter, instead of the less serious offence of causing death by dangerous driving (CDD) under the Road Traffic Act 1988 s.1.

Such complaints may once have had some validity. The s.1 offence once attracted much lower penalties than it does today,¹ and is derived from an offence first created as a “soft option” because juries were considered reluctant to convict motorists of anything as serious as manslaughter.²

A study of modern sentencing guidelines and decisions of the Court of Appeal reveals a very different picture, however. A series of increases in both maximum and guideline penalties for death by driving offences means that motorists convicted of such offences are now punished *more* severely than most other involuntary killers. Cases of manslaughter by gross negligence (other than road traffic cases) typically attract lower sentences, which have changed little in recent years. Even when we turn to constructive manslaughter, where longer sentences are sometimes imposed, many cases involving deliberate, savage and unprovoked physical violence,

*My thanks to Gavin Dingwall for his helpful comments on a first draft of this article.

¹ The maximum penalty has been increased from 5 to 10 years and then to 14 years’ imprisonment, in addition to obligatory disqualification.

² In a debate on what was to become the Road Traffic Act 1956 s.1, Lord Goddard said: “Juries hate the word ‘manslaughter’. They see in front of them . . . 15 years, or something of that sort. They associate manslaughter with murder trials . . .”, *Hansard*, HL Vol.191, col.86 (1955).

serious enough to have attracted an initial charge of murder, nevertheless result in sentences significantly lower than those deemed appropriate in CDDD cases where no deliberate criminality is involved.

Inevitably, some drivers who kill are not prosecuted and of those that are prosecuted some face “downgraded charges”, such as careless driving.³ Evidential uncertainties, particularly in connection with proof of fault, are often the reason, and no doubt some guilty drivers escape justice. This is not of course a problem unique to such offences, but has been addressed in the Road Safety Act 2006 by the creation of new homicide offences (notably one of causing death by careless driving (CDCD)). Sentences of imprisonment and obligatory disqualification will thereby become available in fatal accident cases even where there is no evidence of seriously culpable driving, but only of what Lord Diplock once referred to as:

“... the kind of inattention or misjudgment to which the ordinarily careful motorist is occasionally subject without it necessarily involving any moral turpitude . . .”⁴

Nor should it be supposed that imprisonment for the new CDCD offence will be reserved only for exceptionally bad cases. On the contrary, the indications are that courts and judges will be expected to impose it in all but the least serious of cases involving the lowest levels of culpability.⁵ As the Road Safety Minister, Fiona McTaggart, explained when the proposed offences were first unveiled:

“We’re on the side of the victim: we’re making sure that people who kill on the road can get proper prison sentences. We’re making sure that if someone kills when they’re driving carelessly – even if they didn’t mean to – then they can be sent to prison.”⁶

Whilst the punishment of motorists who kill is now severe, the same cannot be said of sentences imposed for many serious but non-fatal traffic offences, for which the penalties have not been raised in recent years. By fixating on fatal offences, we have created a regime in which a motorist who makes one fatal error or misjudgement following a lifetime of exemplary driving can expect to be treated more severely (and in some cases many times more severely) than a serial traffic offender whose latest deliberate, prolonged and viciously irresponsible escapade miraculously leaves only damaged vehicles and traumatised road users in his wake. This makes no sense from a deterrence or road safety perspective. Human error cannot effectively be controlled or deterred by punishment.

It is now generally accepted that even the unintended consequences of offending behaviour should be taken into account when determining the seriousness of an offence. Conduct that kills will thus attract heavier penalties than identical conduct

³ See S. Cunningham, “The Unique Nature of Prosecutions in Cases of Fatal Road Traffic Collisions” [2005] Crim. L.R. 834.

⁴ *Lawrence* [1982] A.C. 510 at 525. This is essentially the test now codified in the Road Traffic Act 1988 s.3ZA: driving which falls below the standard expected of a competent and careful driver.

⁵ This is what is now proposed by the Sentencing Guidelines Council: see below.

⁶ BBC radio interview, October 31, 2005.

that does not.⁷ In the case of one who kills as a result of deliberate or reckless misconduct, one might justify this on the basis that he must bear the chance consequences of such misconduct,⁸ but this does not make imprisonment an appropriate penalty for tragic error or misjudgement. The Sentencing Guidelines Council (SGC) states that “harm must always be judged in the light of culpability” and:

“[T]he culpability of the offender in the particular circumstances of an individual case should be the initial factor in determining the seriousness of an offence.”⁹

Regrettably, however, luck or chance plays a stronger role in shaping the sentences imposed on road traffic offenders.

Road traffic homicide offences

Murder and constructive manslaughter

Motorists who kill when using their vehicles as weapons may face charges of murder or constructive manslaughter, as in *Brown*,¹⁰ in which the defendant (hereafter, D) attempted to commit suicide by ramming another car, but succeeded only in killing the other driver. He received a 10-year sentence after pleading guilty to manslaughter. Although *Andrews v DPP*¹¹ makes it clear that negligent or reckless driving does not in itself constitute an “unlawful and dangerous act” for manslaughter purposes, deliberate and dangerous road traffic violations should on principle suffice. For example, a motorist who kills when racing another on a public road must be guilty of manslaughter, because this is not merely a case of a lawful activity improperly performed. It is a deliberate and dangerous offence causing death. In practice, however, prosecutors are usually happy to settle for a charge of CDDD in such cases.¹²

Negligent manslaughter and causing death by dangerous driving

In the context of road traffic offences, which include offences committed by drivers in public places, such as car parks, there is little practical difference between the elements that must be proved on a charge of negligent “motor” manslaughter and those that must be proved on a charge of CDDD. Manslaughter requires proof of

⁷ As Martin Wasik notes in “Form and Function in the Law of Involuntary Manslaughter” [1994] Crim. L.R. 883 at 891–892, this has not always been the position adopted by the courts. See, e.g. *O’Neill* (1967) 51 Cr. App. R. 241.

⁸ See T. Honore, “Responsibility and Luck” (1988) 104 L.Q.R. 530; A. Ashworth, “Taking the Consequences” in Shute et al., *Action and Value in the Criminal Law* (1994). See also S. Cunningham, “Punishing Drivers Who Kill” (2007) 27 L.S. 288 at 300; R. Henham, “Sentencing Policy and Serious Motoring Offenders” (1996) 60 J.C.L. 208.

⁹ SGC, *Overarching Principles: Seriousness. Guideline*, 5.

¹⁰ [2005] EWCA Crim 2868; [2006] 1 Cr. App. R. (S.) 124. See also *Bissell* [2007] EWCA Crim 2123 where the jury, in convicting D of manslaughter on a charge of murder, indicated that they were divided as to whether D had used his lorry as a weapon or simply failed to see the deceased. He was sentenced to eight years’ imprisonment on the basis of gross negligence. The fact that he drove off leaving her dying in the road was a major aggravating feature.

¹¹ [1937] A.C. 576.

¹² See, e.g. *Hampson* [2006] EWCA Crim 163; [2006] 2 Cr. App. R. (S.) 82; *Antoniou* [2004] EWCA Crim 2984. See also S. Cunningham, “The Reality of Vehicular Homicides” [2001] Crim. L.R. 679.

gross negligence as to an obvious risk of death,¹³ whereas CDDD requires only that death is caused by driving that falls far below what would be expected of a competent and careful driver, and involves an obvious risk of injury or serious damage to property.¹⁴ In practice, however, driving that involves an obvious risk of injury or serious damage will also endanger life, so that distinction is largely theoretical.¹⁵ Neither offence requires proof of wilful misconduct and it is no defence in either case for an inexperienced driver to claim that he was doing his incompetent best.¹⁶

Nor is there much difference in practice between the sentences that may be imposed. Although the penalty for manslaughter is at large, sentences for the gross negligence variety, even in road traffic cases, rarely match the 14-year maximum that may be imposed in the worst CDDD cases; and many of the most shocking road traffic homicide cases, including some in which a vehicle has been used as a weapon, are prosecuted as CDDD.¹⁷

Other existing homicide offences

CDDD is supplemented by the offence of causing death by careless driving when intoxicated, etc. (CDCDI) contrary to the Road Traffic Act 1988 (RTA) s.3A, and two more homicide offences will be added when amendments made by the Road Safety Act 2006 come into force. The s.3A offence carries the same maximum penalty as CDDD, as does aggravated vehicle-taking (contrary to the Theft Act 1968 s.12A(4)) if the vehicle is then involved in a fatal accident. This last offence is not strictly one of homicide, because D need not himself have caused the fatal accident, and nor is it necessarily a road traffic offence, because the vehicle in question need not at any time have been driven on a road or other public place. It would suffice, for example, if D took a farm tractor without consent, and he, or a companion, then overturned it in a field and killed the victim (hereafter, V). Offences under s.12A are nevertheless subject to obligatory disqualification under the Road Traffic Offences Act 1988 s.34.

The new offences

The first of the two new homicide offences added to the RTA 1988 by the Road Safety Act 2006 is intended to bridge a perceived “justice gap” between CDDD

¹³ See *Adomako* [1995] 1 A.C. 171; *Misra* [2004] EWCA Crim 2375; [2005] 1 Cr. App. R. 21.

¹⁴ See the RTA 1988 s.2A. There may also be dangerous driving where it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous, or if D happens to know of such a defect, even if it is not otherwise obvious.

¹⁵ See Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*. Law Com No.237, 1996, para.2.20. See also Cunningham, “The Reality of Vehicular Homicides” [2001] Crim. L.R. 679 at 681–682.

¹⁶ There is a suggestion in *Richardson* [2006] EWCA Crim 3186; [2007] 2 All E.R. 601 at [28] that dangerous driving differs from careless driving because it involves recklessness or conscious risk taking, rather than mere negligence, but clearly this need not be so. Wilful misconduct or recklessness may increase D’s culpability, but that does not make it a necessary ingredient of the offence.

¹⁷ See, e.g. *Whitnall* [2006] EWCA Crim 2292, in which D deliberately rammed another car from behind at over 100mph.

on the one hand and the minor summary offence of driving without due care and attention (RTA 1988 s.3) on the other. The latter offence, even where it involves a fatal accident, is punishable only by a fine together with endorsement and discretionary disqualification.

Section 2B creates an offence of causing death by careless or inconsiderate driving (CDCD). This will be triable either way and punishable by up to five years' imprisonment (12 months¹⁸ on summary conviction) together with obligatory disqualification. Section 3ZB creates an offence of causing death by driving when disqualified, unlicensed or uninsured, and will attract a maximum sentence of two years' imprisonment, even where the manner of D's driving cannot itself be faulted.¹⁹

Criticism of the new offences

The new CDCD offence has been subjected to cogent criticism both in Parliament²⁰ and elsewhere. In "Punishing Drivers Who Kill",²¹ Sally Cunningham argues that it is objectionable in principle and will do nothing in practice to prevent fatal accidents or deter offending. I respectfully agree with much of her analysis. In my submission, however, the creation of the offence is not in itself objectionable. It builds on the basic careless driving offence in exactly the same way that CDDD builds on the basic dangerous driving offence and recognises the enormity of the consequences.²² If disqualification were discretionary and imprisonment reserved for exceptionally grave cases²³ there would be little to complain about. What is objectionable is the excessively punitive sentencing regime prescribed for the new offence, in which substantial prison sentences may be imposed for tragic driving errors that are not even grave enough to be categorised as "dangerous driving".

The new offence will doubtless muddy the waters in borderline cases that might previously have been charged as CDDD. Rather than struggle to prove dangerous driving in a fatal accident case where the precise level of fault (or its apportionment) is not entirely clear, the CPS may be tempted to prosecute only for CDCD, or accept a plea to that offence. Some offenders who might otherwise have been convicted of CDDD may benefit from this.²⁴ Others, who might previously have

¹⁸ This will however be limited to six months, until such time as the increased sentencing powers of magistrates' courts comes into force.

¹⁹ If tried summarily, the penalties are the same as for the new s.2B offence.

²⁰ Lord Lyell, a former Attorney-General, was one of the most forceful opponents of the new measures. Supporters included a number of MPs who had been moved by tragic stories of children killed on the roads of their constituencies. Some, such as Peter Bone MP (*Hansard*, HC (March 8, 2006)), appear to have supposed that drivers guilty only of momentary inattention would never be prosecuted for such an offence.

²¹ (2007) 27 L.S. 288.

²² In *Simmonds* [1999] R.T.R. 257 the Court of Appeal recognised that the consequences of careless driving may properly be taken into account in sentencing for that offence, rejecting a contrary view formerly advanced in *Kravec* [1985] R.T.R. 1. See also *King* [2001] EWCA Crim 709; [2001] Crim. L.R. 493.

²³ Aggravating factors might include those identified in *Cooksley* and *Richardson* in connection with CDDD, such as a bad driving record, disqualification or failing to stop after the accident.

²⁴ But not necessarily: as explained below, they cannot be confident of receiving a lighter sentence under the guidelines recently proposed by the SGC.

escaped with a minor conviction for careless driving under s.3,²⁵ will feel the heat of the new law.

The new s.3ZB offence has attracted less controversy, perhaps because it targets those who deliberately break the law by ignoring disqualification orders or the need to obtain insurance, etc. It may also snare the odd motorist who has simply forgotten to renew his insurance (this being a matter of strict liability), but such offenders are not its principal targets. Lack of sympathy for disqualified or uninsured drivers should not however blind us to the fact that this new offence corrupts the usual principles governing causation. It appears that D may be convicted of “causing” death without his actual driving being at fault. If D’s uninsured car is involved in a collision with V’s motorcycle and V is killed, D will automatically be guilty, even if the accident was entirely V’s fault.²⁶ It is clear from the authorities²⁷ that D may still be “driving” even when his vehicle is stationary. It may be no defence, therefore, that D was waiting patiently at traffic signals when V rode into the back of his car.²⁸

Sentencing guidelines and practice

Sentencing guidelines for CDDD were provided by the Court of Appeal in *Richardson*,²⁹ in which the guidelines previously laid down in *Cooksley*³⁰ were amended in line with recent statutory increases in the maximum sentences available.³¹

The revised guidelines identify four sentencing bands, each based on a first time offender and subject to a discount of up to one-third in the event of a prompt guilty plea (although this may now be reduced in cases where evidence of guilt is overwhelming):

1. If there are no aggravating circumstances, 12 months to 2 years’ imprisonment.
2. In cases of intermediate culpability, two to four-and-a-half years.
3. In cases of higher culpability, four-and-a-half to seven years.
4. In cases involving the most serious culpability, 7 to 14 years.

In each case, the prison sentence must be coupled with disqualification for a minimum of two years, after which D must take an extended test before regaining his licence.

Aggravating factors include not only conduct relating to the culpability of the driving itself (such as drug abuse, racing, and ignoring warnings from passengers)

²⁵ See, e.g. *Squires* [2007] EWCA Crim 2391.

²⁶ This is already true of the offence under the Theft Act 1968 s.12A (see *Clifford* [2007] EWCA Crim 2442) but that offence does not purport to hold D responsible for “causing” V’s death.

²⁷ *Skelton* [1995] Crim. L.R. 635; *Edkins v Knowles* [1973] Q.B. 748.

²⁸ Unless it can be argued that V would have died in any event: e.g. D’s car, driven by D’s wife, breaks down and she pulls onto the side of the road. D who is disqualified, gets into the driver’s seat and manages to restart it, at which moment V crashes into the back of the car and is killed; but V would still have been killed even if D had remained in the passenger seat.

²⁹ [2006] EWCA Crim 3186; [2007] 2 All E.R. 601.

³⁰ [2003] EWCA Crim 996; [2003] 2 Cr. App. R. 18.

³¹ These were raised from 10 to 14 years by the Criminal Justice Act 2003 s.285, although the Court of Appeal in *Cooksley* had opined that the 10-year maximum was quite enough.

and subsequent misconduct (for example, hit and run cases), but also various chance factors, such as multiple deaths resulting from the accident.

The guidelines recognise that there may be “truly exceptional” cases in which immediate imprisonment might not be appropriate, but do not suggest examples. The court in *Richardson* “could see no advantage in identifying such exceptional situations, which by definition will only arise very rarely”.³² At the other end of the scale, the offences in question are all serious offences for the purpose of the Criminal Justice Act 2003 s.224, which makes imprisonment or detention for public protection under ss.225 or 226 an appropriate penalty in some such cases.

These judicial guidelines will eventually be supplanted by guidelines issued by the SGC. A consultation document was published by the SGC as this article was about to go to press.³³ The SGC’s proposals differ from those of the Court of Appeal in that they suggest three sentencing “bands” in place of the four bands currently in use. The proposed new bands correspond quite closely with bands two, three and four from the *Richardson* guidelines and include “starting points” within those bands of three, five and eight years’ imprisonment. The first band would however disappear, on the basis that most marginal cases which currently squeeze into that band will in future be prosecuted as CDCD. If, however, cases of borderline culpability are still prosecuted as CDDE, judges will be directed to sentence as for the “most serious” type of CDCD offence, which means of course that there are still four bands after all.

In respect of the new CDCD offence,³⁴ the SGC’s proposals closely follow those previously floated by the Sentencing Advisory Panel.³⁵ If implemented, there would again be three bands, and a starting point within each band. Controversially (but in my submission rightly) custodial sentences would not be imposed on those whose fault element involves nothing more than momentary but tragic inattention. Such offenders would instead be punished by a community order in addition to the disqualification that is mandatory in all cases.³⁶ More serious cases might however merit imprisonment for up to two years, with a proposed starting point of 36 weeks.

³² In *Attorney-General’s Reference (No.74 of 2005)* [2005] EWCA Crim 3120; [2006] 2 Cr. App. R. (S.) 16, a suspended prison sentence was upheld by the Court of Appeal after the trial judge had openly expressed “surprise and dismay” over the conviction itself. D’s taxi struck and killed V, a drunken pedestrian who had deliberately stepped out into the road in front of him. D’s principal fault (identified by CCTV images) was that his brake lights were seen to operate just three quarters of a second later than experts would have expected in the case of a fully alert driver. The Attorney-General had argued that a sentence of immediate imprisonment was called for. D’s appeal against conviction was later dismissed in *Modhvardia* [2006] EWCA Crim 1099. The court acknowledged that his driving may have been “at or towards the lowest level of culpability for dangerous driving” but declined to interfere with the jury’s verdict. It did not matter that the accident was primarily one of V’s own making. As the Court of Appeal famously ruled in *Hennigan* (1971) 55 Cr. App. R. 262, D may be guilty of causing death, even if he was only one-fifth to blame for it. See also *Legrys* [2007] EWCA Crim 1605.

³³ *Causing Death by Driving*, January 9, 2008.

³⁴ As to sentencing for the CDCDI offence, see pp.13–14 of the SGC’s proposals.

³⁵ *Consultation on Death by Driving Offences*, January 25, 2007. See also the Sentencing Advisory Panel’s subsequent advice to the SGC, *Driving Offences—Causing Death by Driving* (2008), pp.33–36.

³⁶ One may question whether mandatory disqualification really is warranted in a case involving a tragic error by a driver with a long and impeccable driving history, but in today’s climate it probably cannot be opposed.

The most serious cases of CDCD, involving driving that “falls not far short of dangerous driving” would attract sentences of between 36 weeks and three years’ imprisonment, with a starting point of 15 months. This would also, in effect, become the lowest of four sentencing bands for CDDD,³⁷ but is potentially harsher than the existing band of 12 months to 2 years, even though the fault level required has been lowered to that of mere careless driving. This “double whammy” appears to have passed unnoticed as pressure groups instead take the SGC to task for “going soft on killer drivers” by not requiring imprisonment in the least serious of CDCD cases.

As for the new s.3ZB offence, in which there may be no dangerous or careless driving at all, the SGC’s proposed guidelines link the assessment of offender culpability to the nature of the prohibition on driving. In the absence of aggravating factors, a mere lack of insurance would justify a community order, whereas the starting point in respect of a disqualified driver would be 12 months’ imprisonment.³⁸

Road traffic and other involuntary homicides

Sir Igor Judge P., giving the judgment of the court in *Richardson*, rightly warned that:

“... some proportion needs to be maintained between the levels of sentences for these offences [i.e. road traffic homicide], and the sentences which are thought appropriate for other crimes of violence resulting in death, such as, for example, the sentences for manslaughter following a deliberate, but single violent blow, and manslaughter arising from gross negligence, which is not identical to but certainly not far removed from negligent conduct which falls ‘far below’ expected standards, which is, of course, the criminal ingredient for dangerous driving.”³⁹

Unfortunately, nothing more was said of such comparisons in *Richardson*, and they do not feature anywhere in the SGC’s consultation proposals. There is no comparably wide ranging judgment or SGC Guideline on sentencing for involuntary manslaughter, and it is sometimes said that the huge range of circumstances that may be encountered in such cases makes the provision of general guidance almost impossible. Comparable cases can however be found, and when comparisons are made it becomes clear that sentences imposed on motoring offenders have become disproportionately severe.

Fatal “health and safety” infringements

Cases involving fatal work or business related accidents arising from a culpable neglect of safety precautions are in many ways analogous to those in which death is caused by negligence on the roads. Manslaughter charges are not always pressed in such cases, but in the event of a conviction a typical sentence is 18 months’ imprisonment, even where there are a number of aggravating features, such as persistent neglect of safety warnings and the deliberate prioritising of profit above

³⁷ *Causing Death by Driving*, pp.12 and 16.

³⁸ For more detail, see *Causing Death by Driving*, pp.17–18.

³⁹ [2006] EWCA Crim 3186; [2007] 2 All E.R. 601 at [14].

safety—factors that might indicate a starting point of three years in a comparable CDDD case.

*Attorney-General's Reference (No.86 of 2006)*⁴⁰ provides an example. D was the founder and managing director of a company which manufactured kitchen work surfaces from stone and marble. An employee was killed when using a stone-cutting machine. He had received inadequate training and essential safety features built into the cutting machine had been deactivated in order to avoid delays and speed up production. D was responsible for this. He told his works manager:

“If we implemented health and safety to the letter of the law it would cost too much. The company couldn't afford it and it would close us down. We had to think about production first.”

The Court of Appeal quashed a suspended sentence as unduly lenient, given that D had deliberately disregarded the safety of his employees and had paid little regard to health and safety issues at work. A sentence of 15 months' immediate imprisonment was substituted.⁴¹

In contrast, a sentence in the region of 18 months would now be considered appropriate for CDDD *only* in the absence of any significant aggravating features. In *Bailey*,⁴² for example, D misjudged an overtaking manoeuvre, forcing an oncoming car to brake; but because that car's brakes were faulty its wheels locked and the driver lost control, suffering fatal injuries. The Court of Appeal noted that D had not been guilty of any deliberate course of dangerous or aggressive driving, was of previous good character, and had an impeccable driving record. He had made a momentary and uncharacteristic error of judgement, which was not the sole cause of the accident. A sentence of two years' imprisonment (with three years' disqualification) was reduced to 18 months.

Multiple deaths are likely to result in higher penalties. In *Topasna*⁴³ D, a bus driver of previous good character, caused five deaths through a catastrophic blunder in which he pressed hard on the accelerator instead of the brake pedal when driving a new vehicle, and then froze helplessly as it lurched forwards. Expert evidence identified this as a classic case of “pedal panic” in which a driver's terror prevents him from correcting his mistake. As the Court of Appeal observed, there was no malice and no significant period of bad or irresponsible driving, nor were there any of the usual aggravating factors of alcohol or excessive speed. Because of the multiple deaths, however, a sentence of five years' imprisonment (reduced from seven-and-a-half years by virtue of his guilty plea) was upheld.

In comparison, *Kite*⁴⁴ (a prosecution arising from the infamous Lyme Bay disaster in which four young canoeists died) involved persistent and wilful neglect of basic safety procedures. D, who ran an outward bound centre and organised

⁴⁰ [2006] EWCA Crim 2570; [2007] 1 Cr. App. R. (S.) 101.

⁴¹ D had eventually pleaded guilty, but only after a trial at which the jury failed to agree. See also *Davies* [2006] All E.R. (D) 201 (Nov); *Dean* [2002] EWCA Crim 2410 and *Crow* [2001] EWCA Crim 2968; [2002] 2 Cr. App. R. (S.) 49. In *Crow* the Court of Appeal “exceptionally” suspended a sentence of 15 months, even though the sentencing judge had identified a number of aggravating features, including a high degree of recklessness and failure to heed explicit warnings.

⁴² [2007] All E.R. (D) 195 (Mar).

⁴³ [2006] EWCA Crim 1969; [2007] 1 Cr. App. R. (S.) 76.

⁴⁴ [1996] 2 Cr. App. R. (S.) 295.

the fatal voyage, ignored explicit written warnings from his own staff as to the risks he was taking, and was convicted (along with his company) of manslaughter, but his sentence (after a contested trial) was reduced on appeal to just two years' imprisonment.

The momentary error in *Topasna* scarcely seems to merit a sentence comparable to that in *Kite* and certainly not one that was (in light of D's guilty plea) nearly four times more severe. But examples of heavier sentences for negligent manslaughter can be found. In *Rodgers*,⁴⁵ D and a colleague installed a used gas fire in a flat that he rented out to two teenage boys. The appliance was wrongly installed and could not vent through the flue provided. Both boys died from carbon monoxide poisoning. This was not an isolated case, because D's bodged gas fittings had caused problems before. He was well aware of the applicable regulations requiring such work to be done by professional gas fitters, but sought to save a few pounds by doing the work himself. The Court of Appeal upheld a sentence of five years' imprisonment, on a guilty plea. D's co-defendant received three years. There is however a difference between this case and *Topasna*, because it involved reckless disregard of the tenants' safety and the deliberate commission of a criminal offence.

Deaths caused by deliberate assaults

When CDDD cases are contrasted with cases of constructive manslaughter, there is a more obvious imbalance in sentencing. A motorist who allows his attention to be distracted from the road ahead is certainly at fault and if he causes a fatal accident he must expect to be liable for it, but his culpability surely falls far below that of one who kills in the course of a violent and unprovoked assault, particularly where several blows are struck or where a weapon is used. In sentencing terms, however, the courts appear to draw little distinction between such cases.

The starting point when sentencing in a manslaughter case involving a "single blow of moderate force" has for many years hovered somewhere in the region of 18 months, or 12 months in the event of a prompt guilty plea.⁴⁶ This is the same starting point as that now deemed appropriate in basic CDDD cases such as *Bailey*, where there are no aggravating features. More serious assaults lead to heavier sentences, but the recent steep increases in sentences for CDDD offences have not been matched where constructive manslaughter is charged. Consider the following cases.

In *Sykes*,⁴⁷ D pushed V to the ground when V attempted to intervene in a fight between D and her boyfriend. D then hit V about the head and kicked her several times as she lay on the ground. V suffered three fractured ribs and internal bleeding from which she died. D was charged with murder but a plea of guilty to manslaughter was accepted. A sentence of 18 months' imprisonment was approved on appeal.

In *Roberts*,⁴⁸ D was driving in Cambridge and having previously become lost he was struggling to follow another car driven by a friend. The area was crowded and groups of pedestrians sauntered in the street. D stopped his car in the middle of

⁴⁵ [2004] EWCA Crim 3115; [2005] 2 Cr. App. R. (S.) 19.

⁴⁶ *Coleman* [1992] 95 Cr. App. R. 159; *Edwards* [2001] EWCA Crim 862; [2001] 2 Cr. App. R. (S.) 125; *Binstead* [2005] EWCA Crim 164; [2005] 2 Cr. App. R. (S.) 62.

⁴⁷ [2002] EWCA Crim 1271.

⁴⁸ [2005] EWCA Crim 1303; [2006] 1 Cr. App. R. (S.) 31.

the road. V, who was crossing the road, made a remark which D misheard and considered insulting. He got out of his car, pulled V aside and struck him “with tremendous force”, smashing V’s left maxilla and zygomatic bones with a single punch. V fractured his skull as he fell to the ground. D made no effort to assist him. He got back into his car and drove off, as V lay dying in the road. The whole incident was recorded on CCTV, which disproved D’s original version of the incident, according to which he had acted in self defence when V threatened him with a bottle. As in *Sykes*, D faced a charge of murder, but his plea of guilty to manslaughter was accepted and a sentence of five years’ imprisonment was initially imposed. On appeal, Lord Woolf C.J. described D’s offence as “a bad case of its type” and as “a gratuitous and unprovoked attack, in which D violently attacked a wholly innocent victim”. Despite this, D’s sentence was halved.

An even more serious case was *Sutton*⁴⁹ in which D and his friends kidnapped V, “a decent inoffensive man” who was drunk at the time, tied him up, put him in the boot of their car and threw him off a bridge into a river in the early hours of a cold March morning. They drove off, without making any effort to ascertain whether V was alive or dead. He died. As in *Sykes* and *Roberts*, a plea of manslaughter was accepted on a charge of murder, and for this offence a sentence of five years’ imprisonment was upheld on appeal.⁵⁰

One more example must suffice. In *Parnham*⁵¹ D beat his wife to death in a ferocious attack with an iron bar, hitting her over 70 times and raining 44 blows on her head alone. He lied repeatedly to the police and when his attempt to manufacture evidence of a break-in was disproved he falsely claimed to have been acting in self defence. Charged with murder, but somehow convicted only of constructive manslaughter (to which he had offered a plea of guilty), his original sentence of six years was quashed as “manifestly excessive”. A sentence of four years was substituted.⁵²

A striking feature common to all four cases, each of which involved an initial charge of murder, is that the sentences imposed did not even come close to the kind of sentence that is routinely imposed in bad cases of CDDD.

To find CDDD cases attracting comparable penalties, one need only look to cases of “intermediate” or “higher” culpability. In *Poel*,⁵³ D attempted to retune a new radio in the cab of his HGV and reacted too slowly to the fact that traffic in front of him on the motorway was stopping. He braked too late and although the resulting impact would not ordinarily have been fatal, the driver of the van in front was not wearing a seat belt and was killed when thrown forwards by the impact. D’s original three-year sentence on a guilty plea was reduced to two years on appeal, but this reflected a number of mitigating factors, including an impeccable 27-year driving record, his own serious injuries and his honourable behaviour and remorse after the accident.

⁴⁹ [2006] EWCA Crim 421.

⁵⁰ A further sentence was imposed for the kidnapping. Lesser penalties were imposed on D’s associates. See, e.g. *Mann* [2006] EWCA Crim 2297 (four years).

⁵¹ [2003] EWCA Crim 416.

⁵² A six-year sentence was however upheld in *Kime* [1999] 2 Cr. App. R. (S.) 3, in which D struck and killed an elderly man whom he thought had been laughing at him as he argued with his girlfriend.

⁵³ This was one of several appeals conjoined with *Richardson* [2006] EWCA Crim 3186; [2007] 2 All E.R. 601.

This sentence was perhaps lenient in comparison to that upheld in *Payne*,⁵⁴ where D crashed into the vehicle ahead whilst using a mobile phone and received a sentence of four years' imprisonment, despite his guilty plea. The sentence in *Payne* was identical to that imposed in *Parnham*.⁵⁵ Each case involved a guilty plea and a single death, but in terms of culpability there was, surely, no comparison.

Dangerous (but non-fatal) driving

Dangerous driving carries a maximum penalty of two years' imprisonment (plus disqualification, etc.), which has not been increased in line with the latest increases for the "causing death" offences.⁵⁶ The worst cases of deliberately criminal, aggressive and dangerous driving do not necessarily kill anyone, but those responsible, many of whom are serial offenders, and pose a serious risk of reoffending, rarely receive sentences comparable with those imposed even in the lowest sentencing band for CDDD.

The different philosophy that prevails in such cases is well illustrated by *Hammond*,⁵⁷ in which D lost control of his car at between 60 and 65mph on a bend in a 30mph zone. It flew through the air for 30m, uprooting a palm tree, smashing through a garden shed and some fencing, and came to rest upside down in the car park of the garden centre. He then made his way home on foot. A sentence of nine months' imprisonment (after trial) was quashed on appeal and replaced with a sentence that ensured his immediate release. In the view of the Court of Appeal:

"This was a particularly bad piece of **driving** . . . and there was a major accident, albeit involving no other vehicle or injury to any person other than [D]; but that was . . . wholly fortuitous; and there was substantial damage, both to [D's] vehicle and to neighbouring property. . . . Given the Recorder's view that the offence could only be met with a custodial sentence—*although it has to be said this was a very finely balanced decision*—all that was needed here was a short prison sentence both to punish [D] and to reflect the public interest in deterring people from driving in this dangerous and irresponsible manner which could have had quite disastrous consequences. A sentence of three months would have achieved that purpose as easily as one of nine months."

Hammond does not however illustrate the worst kind of dangerous driving offence. In *Watson*,⁵⁸ D deliberately drove his limousine at a traffic warden who (after previously warning him) had issued him with a ticket. The warden jumped out of

⁵⁴ [2007] EWCA Crim 157; [2007] 2 Cr. App. R. (S.) 45.

⁵⁵ [2003] EWCA Crim 416.

⁵⁶ A proposed increase to a maximum of five years was floated in 2000 and endorsed by the Court of Appeal in *Cooksley* (per Lord Woolf C.J. at [10]) but was never enacted. The court also opined that no increase was needed in the 10-year maximum then applicable to CDDD. The government ignored both suggestions, and we now have a maximum penalty for CDDD that is *seven times* higher than that for dangerous driving.

⁵⁷ [2006] EWCA Crim 2595.

⁵⁸ [2007] EWCA Crim 1595. See also *Joseph* [2001] EWCA Crim 1195; [2002] 1 Cr. App. R. (S.) 20 in which D drove his car at a traffic warden, struck him and weaved down the road at speed for 150yds in an attempt to dislodge the terrified warden from the bonnet of the vehicle. A sentence of 15 months (after trial) was reduced to 10 months on appeal.

the way, but D drove at him a second time, mounting the pavement in a determined attempt to run his victim down. As Butterworth J. noted in the Court of Appeal, D's conduct was significantly aggravated by the fact that his victim was a public servant, carrying out the duties required of him, but D's 20-month sentence (imposed after a contested trial) was nevertheless reduced to 12 months' imprisonment.⁵⁹

In *Juneja*⁶⁰ a student tried to outrun the police at speeds of up to 90mph in an untaxed car with no MOT certificate. He swerved and accelerated through city traffic with three passengers in his car and smoke trailing from its tyres. Other drivers were forced to brake and swerve to avoid him. He overtook a line of cars and went through red traffic lights, ignoring police sirens and flashing lights. He eventually overturned the car on a roundabout and crashed into a road sign. Despite this deliberate and horrifically dangerous driving, he was spared a custodial sentence and received a 12-month community penalty instead.⁶¹

A firmer stand was however taken in *Slim*.⁶² D, a disqualified driver with numerous convictions for serious road traffic offences, took a car without the owner's consent. When a police patrol car activated its lights, he deliberately reversed into it at about 30mph. He then accelerated away at speeds of up to 80mph on roads where the maximum speed limit was 30mph. He jumped several red lights, drove the wrong way around a roundabout and made turns where he was not permitted to do so. When cornered in a cul-de-sac, he rammed another police car which was attempting to prevent his escape, injuring an officer. He was eventually arrested and pleaded guilty to aggravated vehicle taking, dangerous driving and driving whilst disqualified, for which a total sentence of 24 months (18 months for the dangerous driving) was reduced to 22 months on appeal.

Conclusion

Motor vehicles are dangerous things and deliberately bad, aggressive or irresponsible driving, including drunken driving, merits serious punishment, especially (but not only) where it causes death.⁶³ Tragic mistakes or miscalculations are another matter. In my submission, we need to reconsider whether a substantial prison sentence can ever be appropriate in the absence of criminal intent or recklessness. Dangerous incompetence may merit a long period of disqualification, but that is another matter.

We should also reconsider the relationship between the penalties for road traffic homicides and those imposed in comparable cases. As the law now stands, doctors or air traffic controllers who make a fatal error in the course of their

⁵⁹ See also *Chivers* [2005] EWCA Crim 2252; *Perbez (Alam)* [2006] EWCA Crim 2563. More serious penalties may be imposed under the Offences Against the Person Act 1861 where serious injury is caused: see *Attorney-General's Reference (No. 19 of 2007)* [2007] EWCA Crim 1312.

⁶⁰ Unreported, December 1, 2006, Crown Court at Leicester. See also *Holliday* [2006] EWCA Crim 2215, in which a six-month sentence imposed on similar facts was reduced to three months.

⁶¹ This was not a case in which the Attorney-General could refer the sentence to the Court of Appeal.

⁶² [2005] EWCA Crim 2734.

⁶³ For a recent example of grossly irresponsible and ultimately lethal driving that fully merited the heavy prison sentences imposed, see *Barney* [2007] EWCA Crim 3181.

work may be convicted of an unlawful homicide only if their mistake was grossly, criminally negligent, but they risk immediate imprisonment for *any* fatal error or misjudgement when driving home from work. Moreover, the punishment they would face if convicted of such an offence on the basis of a grave driving error may easily be greater than what they might receive if they got out of the car and killed another road user in an unprovoked road rage assault. As long as nobody is killed, they may also be reasonably confident of a more lenient penalty if they lead the police in a terrifying high speed chase on busy roads or narrowly fail to run over a traffic warden who has issued them with a parking ticket.

In my submission, many of those who have campaigned so effectively for stricter laws against “killer drivers” would be surprised and dismayed by such comparisons. A major rethink is required.

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Public Nuisance Injunctions Against On-Street Sex Workers?

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LT Antisocial behaviour orders; Injunctions; Local authorities; Prostitution; Public nuisance

Summary: *The article discusses the contemporary use of public nuisance injunctions by local authorities in an attempt to “clean up” red light areas. In particular, it considers the civil and criminal law interface in this context, and raises some concerns regarding the utilisation of the public nuisance injunction to provide yet another “quick fix” to tackle a complex social problem. Overall, the article points to the plethora of multi-agency partnerships at the local level and the resultant diverse and often conflicting initiatives, and argues that the use of public nuisance injunctions against sex workers does not make for a coordinated and coherent approach to tackle on-street sex work.*

Background

Since 1998 local authorities have been actively involved in crime prevention policy making; a statutory responsibility to incorporate crime prevention into all policies was imposed on them by s.17 of the Crime and Disorder Act (CDA). The Act also provided for interagency work between the police and the local authority; crime prevention strategies were to be produced jointly and both organisations were to be entitled to apply jointly or individually for prohibitory anti-social behaviour orders (ASBOs) through the civil courts against those who persistently behave anti-socially in the community causing harassment, alarm or distress.¹ The ASBO had a deterrent value in the form of the threat of up to five years' imprisonment upon breach.² However, while local authorities cautiously began to make use of the new functions and powers afforded to them under the CDA,³ it was predominantly police forces that applied for prohibitory ASBOs to exclude sex workers from red-light areas.⁴

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¹ CDA 1998 s.1, as amended by the Police Reform Act 2002 s.61 and the Anti-Social Behaviour Act 2003.

² CDA 1998 s.1(10).

³ E. Burney, *Making People Behave: Anti-Social Behaviour, Politics and People* (Cullompton: Willan Publishing, 2005), pp.89–90.

⁴ See S. Campbell, *A Review on Anti-Social Behaviour Orders*, Home Office Research Study 236 (2002).

West Midlands Police was amongst the first to seek ASBOs against sex workers and was quick to publicise the success of the order as an effective deterrent in the Ladywood area of Birmingham.⁵ Therefore, it came as some surprise when only two years later Birmingham City Council (the local authority area within which West Midlands Police operate) took alternative steps to tackle sex work in the Ladywood area; rather than issuing more ASBOs the council opted for an alternative prohibitory tool—the public nuisance injunction (PNI).⁶ However, while at first blush events in Ladywood may have appeared uncoordinated, it was partnership work. Birmingham, an area bearing the Home Office accolade of “trailblazer”⁷ in crime prevention, had promptly established an Anti-Social Behaviour Unit and an Inter-Agency Action Group⁸ which resulted in a two-pronged approach: West Midlands Police (in consultation with Birmingham City Council) utilised the ASBO against on-street sex workers, while Birmingham City Council (with West Midlands Police support) issued 20 PNIs to target the same group of offenders by virtue of their powers under s.222 of the Local Government Act 1972.⁹ Equally prohibitory, and potentially just as exclusive as the ASBO, the terms of the PNIs forbid women from soliciting for one year and from entering the Ladywood area.¹⁰

Somewhat ironically, in 2001 Jones and Sagar raised the point that the ASBO was not necessary to fill “a gap” in the law as government ministers had asserted and that in fact several alternative legal measures including PNIs existed which could be used to address on-street sex work.¹¹ It was argued that the PNI was easily capable of prohibiting on-street sex work and that breach of the civil injunction could result in incarceration (breach of an injunction resulting in a maximum of two years’ imprisonment). However, given that both the PNI and the ASBO could lead to imprisonment for selling sex on-street—an activity which is a low level criminal offence in the eyes of the law and punishable by fine only under the Street Offences Act 1959¹²—it was argued that the PNI was inappropriate to tackle on-street sex work. At the time however, the authors certainly did not envisage the decision of Birmingham City Council to use PNIs to tackle street prostitution

⁵ T. Orr-Munro, “Curbing Street Sex”, *Police Review*, July 28, 2002. The force’s assertions as to the ASBO’s ability to provide a long-term solution to on-street sex work generated some debate, particularly given that the causes of on-street sex work had not been addressed; see H. Jones and T. Sagar, “The Crime and Disorder Act 1998: Prostitution and the Anti-Social Behaviour Order” [2001] *Crim. L.R.* 873.

⁶ Birmingham City Council, Legal Services Briefing Note, *Crime and Disorder, Anti-Social Behaviour 2002/2004*.

⁷ <http://www.birmingham.gov.uk> [Accessed February 20, 2008].

⁸ Birmingham City Council, Legal Services Briefing Note, *Crime and Disorder, Anti-Social Behaviour 2002/2004*, paras 3.2 and 3.4.

⁹ <http://www.respect.gov.uk/members/article.aspx?id=7938> [Accessed March 5, 2008].

¹⁰ Birmingham City Council, Legal Services Briefing Note, *Crime and Disorder, Anti-Social Behaviour 2002/2004*, para.4.11. It is worth noting that cities had previously used s.222 to oust drug dealers and evict undesirable tenants, see Burney, *Making People Behave: Anti-Social Behaviour, Politics and People* (2005), p.133.

¹¹ Jones and Sagar, “Crime and Disorder Act 1998” [2001] *Crim. L.R.* 873.

¹² The Street Offences Act 1959 having been amended by the Criminal Justice Act 1982 s.71.

only a year or so later. Indeed, the authors reasoned, as had Addison and Lawson-Cruttenden,¹³ that despite the probability that the use of PNIs to control gangs in the United States had been the inspiration for the ASBO, and while PNIs and ASBOs arguably shared similar potential in tackling anti-social behaviour, it was unlikely that the “ancient” PNI would be resurrected; the Government would want to put its own punitive tool (the ASBO) to good use. However, following the much publicised work of Birmingham City Council’s legal team to address on-street sex work in the Edgbaston/Ladywood area, both the civil ASBO and the civil PNI are today promoted by the Government as effective measures capable of tackling street prostitution.¹⁴

Although this use of the PNI against sex workers may be just an isolated example, it is certainly an event which merits some exploration—not least because, as already noted, the Government continues to promote the PNI to address on-street sex work. Thus it is important to take a closer look at the PNI within the current legal and policy framework. However, equally important, the use of the PNI brings forth broader issues raised by practices of this kind: namely, the way in which the common law of public nuisance can be used or abused, and the wider issue of civil orders as an easier (but potentially rights-eroding) substitute for criminal law. Whilst this phenomenon is familiar from discussions regarding ASBOs, it is also represented by the less well-known and, arguably, even more problematic use of PNIs. Therefore, the first section of this article attempts to shed some light on the PNI¹⁵ which has, according to the Government, several advantages for local authorities in their battle to combat anti-social behaviour—over and above that of the ASBO.¹⁶ This article goes on to question the extent to which the civil law should be utilised to provide a remedy for behaviour that Parliament has already deemed criminal. Lastly, the utility of the PNI is assessed as it resides within today’s extremely complex multi-agency arena and a policy framework that is supposedly geared towards achieving a coordinated and coherent approach.

The public nuisance injunction

The purpose of this article is not to present a detailed account of the development of the criminal law on public nuisance because this has already been done,¹⁷ although, as indicated above, it would be wrong to say that this area of law is “well trodden” ground. Indeed, this is an area of law that has been neglected in contemporary discussions on sex worker control; therefore this section of the article briefly outlines how the civil injunction came to provide a remedy to prevent criminal activity regardless of the fact that the behaviour committed may already be

¹³ N. Addison and T. Lawson-Cruttenden, “Law and Disorder”, *Police Review*, February 12, 1999, p.16.

¹⁴ See <http://www.respect.gov.uk/members/article.aspx?id=7942> [Accessed February 19, 2008].

¹⁵ Birmingham City Council’s Legal Team recognises that very “little is known” about the PNI: Birmingham City Council, Legal Services Briefing Note, *Crime and Disorder: Anti-Social Behaviour* (January 2003), para.4.10. Other commentators such as Addison refer to the “ancient” law on public nuisance, see N. Addison, “Public Nuisances”, *Police Review*, April 17, 1998, p.22.

¹⁶ <http://www.respect.gov.uk/members/article.aspx?id=7938> [Accessed March 5, 2008].

¹⁷ See J.R. Spencer, “Public Nuisance - A Critical Examination” (1989) 48 C.L.J. 55 for a detailed historical account.

deemed criminal under statute. The following discussion is particularly important because as Spencer states:

“Everything in public nuisance runs contrary to modern notions of certainty and precision in criminal law—and indeed, the civil law as well.”¹⁸

The definition of the offence of public nuisance according to *Archbold* is that a person will be guilty of public nuisance where acts or omissions “endanger life, health, property, morals or comfort of the public” or “obstruct the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects”.¹⁹ Although any person found guilty of the offence is liable to an unlimited fine and even life imprisonment,²⁰ the penalty applied obviously depends on the sentencing powers of the court and the gravity of the nuisance. In most civil proceedings an injunction will be the primary remedy sought. Spencer explains that what was once a private action in the criminal courts developed into a public action brought by the Attorney-General in the civil courts where injunctions were sought “to supplement criminal proceedings rather than as a substitute for them”.²¹ Injunctions proved an effective remedy to prevent “irreparable damage”²² by the time the offence came to trial, and to provide “rapid justice in emergencies”.²³ According to Spencer, by the end of the 19th century public nuisance cases had, for example, displaced the usual means of prosecutions to deal with health hazards and obstructions and proved very effective when tackling problems associated with sewerage systems, sanitation and pollution. Furthermore, at the beginning of the 19th century large corporations were considered incapable of committing criminal offences; therefore at one time injunctions were also capable of plugging a gap in the law. It thus became quite usual to use PNIs as preventative devices and also to provide a remedy where it was difficult to secure a prosecution by other legal means.²⁴ Again, to borrow Spencer’s illustration, an injunction could prove a much more effective remedy in prohibiting the building of a housing estate which is in contravention of local byelaws than subsequently seeking prosecution for a statutory offence which Parliament had classified as being punishable only by fine.²⁵ Gradually, however, with the development of statute law, the “gap” in the law was closed and consequently the PNI became far less used than it had been.

Given the incredibly vague definition of public nuisance, it is hardly surprising that where the PNI has been enlisted to deal with nuisance, the law in this area has continued to develop. In particular, judicial clarification has been sought with regard to the public/private distinction: how many people must be affected to constitute a public nuisance? A leading modern authority on the criminal offence of public nuisance is *Attorney-General v PYA Quarries Ltd*²⁶ where Romer J. described public nuisance as any nuisance “which materially affects the reasonable comfort

¹⁸ Spencer, “Public Nuisance” (1989) 48 C.L.J. 55.

¹⁹ *Archbold on Criminal Pleading, Evidence and Practice*, 2007 edn (2006), paras 31–40.

²⁰ See Jones and Sagar, “Crime and Disorder Act 1998” [2001] Crim. L.R. 873 at 879.

²¹ Spencer, “Public Nuisance” (1989) 48 C.L.J. 55 at 66.

²² Spencer, “Public Nuisance” (1989) 48 C.L.J. 55 at 66.

²³ Spencer, “Public Nuisance” (1989) 48 C.L.J. 55 at 67.

²⁴ Spencer, “Public Nuisance” (1989) 48 C.L.J. 55 at 76–77.

²⁵ Spencer, “Public Nuisance” (1989) 48 C.L.J. 55 at 72.

²⁶ [1957] 2 Q.B. 169.

and convenience of life of a class of Her Majesty's subjects".²⁷ As regards the "class" of subjects which must be affected, Romer J. stated that this was a question of fact in every case; although not every person in the class need be affected, he considered it necessary to show that a cross-section of the class had been affected.²⁸ Lord Denning also added:

"... the nuisance should be so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large."²⁹

Not unexpectedly, given the lack of a definitive answer from the court, subsequent case law found that a "class" could range from hundreds of residents in *Shorrock*³⁰ to only a handful in *Johnson*.³¹ The trend seemed to be set that the courts deemed an offence to be a public nuisance where the interests of the community were served—rather than where the community generally had been affected by the conduct of the defendant. For example in *Norbury*³² it was found that obscene telephone calls to 494 women who were randomly selected from a telephone directory were a public nuisance. However, the House of Lords has recently overruled the decisions of *Johnson* and *Norbury* and reminded us that the law on public nuisance concerns the community as a whole rather than named individuals within a community.³³

Furthermore, the broad definition of public nuisance has resulted in a wide variety of acts and omissions falling within its scope. Thus, for example, whereas the PNI was used in 1914 to address highway obstructions (such as a theatre queue),³⁴ the breadth of the offence has enabled the PNI to be used to tackle more contemporary undesirable behaviour such as glue sniffing on local authority property³⁵ and drug dealing on a housing estate.³⁶ It is easy to understand therefore why the civil PNI has been recently referred to as a "catch all"³⁷ remedy and, given today's community safety agenda which adopts a zero tolerance approach to anti-social behaviour,³⁸ it is also understandable why the PNI has enjoyed resurgence.

²⁷ [1957] 2 Q.B. 169 at 184.

²⁸ [1957] 2 Q.B. 169 at 184.

²⁹ [1957] 2 Q.B. 169 at 191.

³⁰ [1994] Q.B. 279.

³¹ [1996] 2 Cr. App. R. 434.

³² [1978] Crim. L.R. 435.

³³ *Goldstein and Rimmington* [2005] UKHL 63; [2006 1 A.C. 459 at [37].

³⁴ *Lyons v Gulliver* [1914] 1 Ch. 631.

³⁵ *Sykes v Holmes* [1985] Crim. L.R. 791.

³⁶ *Nottingham City Council v Zain* [2001] EWCA Civ 1248; [2002] 1 W.L.R. 607.

³⁷ A. Ashworth, commenting on *Goldstein*; *R. v R* [2004] Crim. L.R. 303 at 304.

³⁸ See generally for discussions regarding community safety/zero tolerance: A. Crawford, *Crime Prevention and Community Safety - Politics, Policies and Practices* (1998); R. Hopkins Burke, *Zero Tolerance Policing* (1998); G. Hughes, *The Politics of Crime and Community* (2007); M. White, "Blair's Blitz on Crime", *Guardian*, September 29, 1998.

Evidential advantages

The increased use of this most flexible remedy has undoubtedly been facilitated by s.222(1) of the Local Government Act 1972 which empowers local authorities to apply for injunctions to promote or protect the interests of the inhabitants where the authority considers it expedient to do so. Civil rules of evidence apply.³⁹ Just as the ASBO is concerned with the impact of the behaviour on the community rather than the behaviour itself,⁴⁰ it is the lawfulness of the consequence of the act or omission which gives rise to the injunction rather than the act itself. Hence in the context of on-street sex work it is the disturbance caused to the public rather than the act of soliciting or loitering that gives rise to the injunction. The prerequisite knowledge for the issue of an injunction is simply that the defendant “knew or ought to have known” that there was a real risk that his or her actions would create the nuisance that in fact occurred.⁴¹

The Home Office has been quick to point out the advantages PNIs have over ASBOs for local authorities in tackling anti-social behaviour.⁴² Like the ASBO, the PNI can be tailored to the individual. Both can be used exclusively to prohibit individuals from entering designated areas and both can contain a variety of prohibitions to restrain the offending behaviour in question. However, unlike the ASBO, the injunction may be perpetual⁴³; a sex worker may be prohibited from entering a red light area indefinitely and she may be ordered not to solicit or loiter again.⁴⁴ Also, while it is the case that breach of the ASBO and the PNI involves a flouting of the court’s judgment and this attracts significant maximum penalties of imprisonment (two years for the PNI and five years for the ASBO), the PNI is arguably easier to obtain. Both orders are civil and thus hearsay evidence and past convictions can be adduced into court (any protection afforded by s.101 of the Criminal Justice Act 2003 is not available⁴⁵) to determine whether the threshold for making an order or an injunction has been satisfied. However with regard to the ASBO in *R. v Crown Court of Manchester Ex p. McCann*⁴⁶ the House of Lords held that the evidence admitted must convince the court beyond reasonable doubt that the order is needed. Whether or not the courts would consistently demand a higher standard of evidence to secure an ASBO continues to be a concern for some,⁴⁷ particularly given that Lord Hutton in *McCann* spoke of the necessity of hearsay evidence to:

³⁹ <http://www.respect.gov.uk/members/article.aspx?id=7942>. Also, the increased use of the PNI can be linked to the Criminal Law Act 1977 which made the offence of public nuisance triable either way.

⁴⁰ See Jones and Sagar, “Crime and Disorder Act 1998” [2001] Crim. L.R. 873.

⁴¹ *Shorrock* [1994] Q.B. 279.

⁴² See <http://www.respect.gov.uk> [Accessed February 20, 2008].

⁴³ See <http://www.respect.gov.uk/members/article.aspx?id=7942> [Accessed March 5, 2008].

⁴⁴ It should however be noted that as regards the PNI, appropriate warning letters must have been issued first, see Birmingham City Council, Legal Services Briefing Note, *Crime and Disorder: Anti-Social Behaviour* (January 2003), para.2.4.

⁴⁵ For a more detailed discussion on the evidential requirements of the ASBO see Addison and Lawson-Cruttenden, “Law and Disorder”, *Police Review*, February 12, 1999 and M. Rowen, “Anti-Social Behaviour Orders” (1999) 163 J.P. September 18.

⁴⁶ [2002] UKHL 39; [2003] 1 A.C. 787.

⁴⁷ See, e.g. G. Pearson, “Hybrid Law and Human Rights - Banning and Behaviour Orders in the Appeal Courts”, (2006) 27 *Liverpool Law Review* 125.

“ . . . strike a fair balance between the demands of the general interest of the community . . . and the requirement of the protection of the defendant’s rights.”⁴⁸

However, in the context of sex workers, it was held in *Potter*⁴⁹ that the standard of proof required to secure an ASBO was in practice a criminal standard and that the hearsay evidence which had been adduced from “unidentified” people fell short of the required threshold.⁵⁰ Ultimately, this means that the quality of evidence required to secure an ASBO against sex workers is more demanding than perhaps the Government anticipated. However, as the Government points out, the standard of proof to secure a PNI is a civil standard and hearsay evidence may be adduced into court (also that witnesses may be more willing to attend court to give evidence for serious persistent criminal behaviour such as prostitution).⁵¹ Interestingly, while the Government promotes the PNI to tackle sex work and anti-social behaviour generally, there is mounting concern regarding the appropriateness of the PNI to tackle criminal/undesirable activity.

A case for abolition

Questions regarding the law on public nuisance have continued to circulate around two main issues: first, the breadth and vagueness of the law in this area; and secondly, the increasing use of the offence by prosecutors who opt to charge a defendant under the law of public nuisance to secure a stiffer penalty than that available under statute for the offence committed. In 1978 questions were raised about the types of behaviour encompassed by public nuisance: a case commentary on *Norbury* noted that the obscene telephone calls deemed to be a public nuisance were “strikingly different from the typical case of public nuisance which is obstruction of the highway”.⁵² Furthermore, the point was made that:

“ . . . an offence which covered such a wide range of different matters with no obvious boundaries are only doubtfully compatible with the principle of legality - that no one should be punished for an act which was not declared by law to be an offence before the act was done.”⁵³

⁴⁸ [2002] UKHL 39; [2003] 1 A.C. 787 at [113] cited in Pearson, “Hybrid Law and Human Rights” (2006) 27 *Liverpool Law Review* 125 at 137.

⁴⁹ [2003] EWHC Admin 2272.

⁵⁰ The case held that a prostitute’s conduct could be considered on its own or in conjunction with that of other street prostitutes in establishing whether harassment, alarm or distress had been caused. Practitioners and academics were left grappling with the ruling that a prostitute could be subject to an ASBO by merely being present in a red light area given that the cumulative effect of sex workers congregating in a residential area can be taken into account.

⁵¹ <http://www.respect.gov.uk/members/article.aspx?id=7942> [Accessed February 19, 2008]. It is also noteworthy that the numbers of ASBOs issued only increased significantly when they became available on conviction via the Crime and Disorder Act 2003, see Hughes, *The Politics of Crime and Community* (2007), p.124.

⁵² [1978] Crim. L.R. 435.

⁵³ [1978] Crim. L.R. 435 at 436.

A year later David Feldman's article⁵⁴ discussed similar concerns which had been raised in the case of *Gouriet v Union of Post Office Workers*.⁵⁵ Here the House of Lords took the opportunity to clarify the position on the role of private citizens to enforce criminal law. In his discussion of the use of injunctions to assist the criminal law, Lord Wilberforce stated:

"... if Parliament has imposed a sanction (e.g. a fine of £1) without an increase in severity for repeated offences, it may seem wrong that the courts, civil courts, should think fit, by granting injunctions, breaches of which may attract unlimited sanctions, including imprisonment, to do what Parliament has not done."⁵⁶

However, Feldman reminds us that the criminal is being sent to prison not because he has committed £1-worth of crime, but because he deliberately disobeyed a clear order from the High Court of Justice that he should not commit that crime. He is being sent to prison for contempt of court, not for the statutory crime. Feldman rightly points out that while Lord Wilberforce did raise some concerns he was certainly not saying that the courts should not have this level of power to prohibit behaviour, whether it is backed up with criminal law or not. Instead Lord Wilberforce accepted that the injunction has its use but he warned that "it is a jurisdiction of great delicacy and is one to be used with caution".⁵⁷ Clearly Lord Wilberforce's thinking was that injunctions are to be used exceptionally, for example in cases of emergency. Feldman however went a step further and suggested that injunctions with unlimited sanctions might be too serious for certain types of offences, but he pointed out that a statutory limitation on the types of criminal behaviour which could or should be restrained by injunction was difficult because "even a trivial act can assume great significance if publicised".⁵⁸

Several years after Feldman's article, Spencer sharpened the debate when he questioned whether "public nuisance law is an archaic monster which should be painlessly destroyed by Parliament on the advice of the Law Commission?"⁵⁹ His argument stemmed from the fact that virtually the entire area traditionally the province of public nuisance prosecutions had been comprehensively covered by

⁵⁴ D. Feldman, "Injunctions and the Criminal Law" (1979) 42 M.L.R. 369.

⁵⁵ [1977] 3 All E.R. 70. The case concerned a Union's executive decision to call on members to refuse to handle mail to South Africa as part of a week of action against apartheid.

⁵⁶ [1977] 3 All E.R. 70 at 83 cited in Feldman, "Injunctions and the Criminal Law" (1979) 42 M.L.R. 369 at 370.

⁵⁷ [1977] 3 All E.R. 70 at 83. Although a consequence of using a public nuisance injunction is that a person could be liable to two trials and sentences for the same act, Feldman points to the judgment of Lord Denning M.R. in *Island Records Ltd v Corkindale* [1978] Ch. 122 at 135F–G. where the court considered it to be proper practice to take into account the sentence imposed by the earlier court. At fn. 6. However, as regards the ASBO, it is worth noting that the Sentencing Advisory Panel has recently proposed that sentencing on breach of an ASBO should take into account the seriousness of the offence to be determined by an assessment of the actual intended or foreseeable harm involved and the culpability of the offender. See Sentencing Advisory Panel, *Consultation Paper on Breach of an Anti-Social Behaviour Order (ASBO)* (2007), para.47, <http://www.sentencing-guidelines.gov.uk/docs/ASBO%20consultation%20paper%202007-08-8-Final.pdf> [Accessed March 5, 2008].

⁵⁸ Feldman, "Injunctions and the Criminal Law" (1979) 42 M.L.R. 369 at 371.

⁵⁹ Spencer, "Public Nuisance" (1989) 48 C.L.J. 55 at 56.

statute—almost everything that endangered public health and safety had become punishable as a specific statutory offence. Logically then, Spencer argued that the PNI should have been rendered obsolete, and that over the last 100 years the law had been, to a certain extent. Yet, he observed that almost all the prosecutions for public nuisance during the mid decades of the 20th century had been either where the defendant's behaviour amounted to a statutory offence typically punishable with a small penalty and where the prosecutor had wanted:

“... a bigger or extra stick to beat him with or where the behaviour is not so obviously criminal at all and the prosecutor [could] not think of anything else to charge him with.”⁶⁰

Spencer's assertions certainly have some value in the context of the use of PNIs against sex workers; it is well known that the offences of loitering and soliciting are punishable by fine only under the Street Offences Act 1959⁶¹ and thus the legislation offers little deterrent value. However, as Ashworth questioned in his commentary on *Goldstein* in the Court of Appeal,⁶² the law on public nuisance may be a “useful stop gap” for prosecuting behaviour that is annoying to the public and which results in a low maximum penalty, but is this course of action right? Should the law contain this “catch all” offence? And, given that the offence is so broad and vague, is it not appropriate and right that the court should be bound by the statutory maximum for the offence committed rather than handing out discretionary penalties in this way?⁶³ Particularly, as Ashworth goes on to point out, that in 1976 the Law Commission argued for greater certainty of the definition and made the point that:

“... if new forms of wickedness should arise, the approach most consistent with the rule of law is for Parliament to create new offences . . .”⁶⁴

The House of Lords has recently shed light on some of the issues raised by Ashworth. In *Rimmington and Goldstein*⁶⁵ the House considered the essential elements of the offence of public nuisance. As already noted, Lord Bingham in the leading judgment considered that the public generally or an unnamed section of it had to be affected.⁶⁶ Furthermore, with regard to the appropriate use of public nuisance law Lord Bingham stated that he was swayed by Spencer's argument that the expansion of statutory law had rendered the offence obsolete.⁶⁷ Nevertheless, Lord Bingham, Lord Rodger and Baroness Hale all reiterated what has been said many times in the House of Lords, namely that the court's purpose was not to conduct a law reform exercise—the court did not have the power to abolish offences or create new ones, this was a matter for Parliament.⁶⁸ However, Lord Bingham

⁶⁰ Spencer, “Public Nuisance” (1989) 48 C.L.J. 55 at 77.

⁶¹ The penalty of imprisonment being removed under s.71 of the Criminal Justice Act 1982.

⁶² Ashworth, [2004] Crim. L.R. 303.

⁶³ Ashworth [2004] Crim. L.R. 303 at 304.

⁶⁴ Ashworth [2004] Crim. L.R. 303, cited at 305.

⁶⁵ [2005] UKHL 63; [2006] 1 A.C. 459.

⁶⁶ [2005] UKHL 63; [2006] 1 A.C. 459 at [37].

⁶⁷ [2005] UKHL 63; [2006] 1 A.C. 459 at [37].

⁶⁸ [2005] UKHL 63; [2006] 1 A.C. 459 at [31], [54] and [58] respectively.

reasoned that in the interim, while there may be some circumstances where the law should resort to the crime of public nuisance, these should be limited:

“... good practice and respect for the primacy of statute do in my judgement require that the conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is a good reason for doing otherwise.”⁶⁹

Furthermore, Lord Rodger stated that the Crown should not devise a strategy to avoid statute.⁷⁰ However, given that the Home Office continues to encourage the use of the civil law in the context of PNIs against sex workers, it does not appear likely that Parliament will be taking any steps soon to make securing an injunction more difficult or to abolish the all-encompassing offence.

Thus, of more importance perhaps, is the court's judgment regarding whether the law on public nuisance was so vague or ill-defined as to render its interpretation by the courts too uncertain to satisfy Art.7(1) of the European Convention on Human Rights (ECHR) (no punishment without law and no heavier penalty imposed than the one that is applicable at the time the offence is committed). Lord Bingham reasoned that the standard demanded by Art.7(1) was that the law should be *sufficiently* clear as opposed to absolutely clear, to enable the defendant to know what conduct is forbidden before it occurs, and in His Lordship's opinion, the offence of public nuisance met that standard.⁷¹ Thus despite the fact that European law holds that certainty is needed, to the extent that the behaviour should at least be described with reference to its effect,⁷² once again the offence of public nuisance, like anti-social behaviour under the CDA, will remain intact regardless of the fact that characteristics of conduct are not stipulated and therefore there is no recognisable objective standard which can be applied to establish the offence. And so, it is of little surprise that in spite of this ruling on the law of public nuisance, and that of *McCann*⁷³ with regard to ASBOs, the issuing of PNIs and other “hybrid”⁷⁴ mechanisms of control such as banning orders⁷⁵ will continue to be a cause of concern for many commentators who are unwilling to put the pertinent issue of compliance with Arts 6 (right to a fair trial) and 7, to bed.⁷⁶ Pearson, for example, as Ashworth before him,⁷⁷ has recently argued that the courts have failed to protect our human rights; the courts have too readily accepted the

⁶⁹ [2005] UKHL 63; [2006] 1 A.C. 459 at [30].

⁷⁰ [2005] UKHL 63; [2006] 1 A.C. 459 at [54].

⁷¹ [2005] UKHL 63; [2006] 1 A.C. 459 at [33].

⁷² See *Hashman and Harrup v United Kingdom* [2000] Crim. L.R. 195, cited in Ashworth, [2004] Crim. L.R. 303 at 305.

⁷³ [2002] UKHL 39; [2003] 1 A.C. 787.

⁷⁴ See, e.g. Jones and Sagar, “Crime and Disorder Act 1998” [2001] Crim. L.R. 873; Ashworth, [2004] Crim. L.R. 303 and Pearson, “Hybrid Law and Human Rights” (2006) 27 *Liverpool Law Review* 125.

⁷⁵ See Pearson, “Hybrid Law and Human Rights” (2006) 27 *Liverpool Law Review* 125 for a discussion of *Gough and Smith v Chief Constable of Derbyshire* [2002] EWCA Civ 351; [2002] Q.B. 1213 which concerned football banning orders.

⁷⁶ e.g. Burney, *Making People Behave: Anti-Social Behaviour, Politics and People* (2005); A. Ashworth, “Social Control and ‘Anti-Social Behaviour’: The Subversion of Human Rights?” (2004) 120 L.Q.R. 263; Pearson, “Hybrid Law and Human Rights” (2006) 27 *Liverpool Law Review* 125.

⁷⁷ Ashworth, “Social Control and ‘Anti-Social Behaviour’” (2004) 120 L.Q.R. 263.

preventative aim of civil orders which, in reality, have a serious punitive effect on the subject of the order (exclusion for example) and punitive consequences upon breach.⁷⁸ The same can be said with regard to injunctions.

The extent to which civil hybrid laws are eroding human rights in the name of community protection remains an extremely contentious issue. Interference with human rights requires very strong justification, and it must be proportional. In the context of injunctions and orders that curtail the movements of sex workers on the basis that it is necessary to protect the public from their behaviour, surely the question for the court should be—is the behaviour so *unreasonable* as to curtail an individual's freedom of movement—for one, two, three or more years? In *Percy v DPP*⁷⁹ a conviction under s.5 of the Public Order Act 1986 was quashed because it was incompatible with rights contained in Art.10 which provides for freedom of expression. The presumption was that the appellant's conduct was protected by Art.10 unless and until it was established that a restriction on the individual's freedom of expression was strictly necessary in a democratic society. The incompatibility of s.5 of the Public Order Act was not in question here, rather the conviction was quashed on the grounds that the judge had erred in weighing up the proportionality of the interference and thus the conviction was found to be incompatible with Art.10.

The problem is, however, in determining the limited circumstances where PNIs should be used and in determining the terms of the injunction where they are used; in the context of on-street sex work the courts are likely to be influenced by a long legislative history that deems on-street sex work, a self-evident public nuisance which is injurious to members of the community.⁸⁰ The “community” is also

⁷⁸ Pearson continues to contend that ASBOs and banning orders are essentially criminal in nature. Drawing on European case law, Pearson asserts that when deciding whether a proceeding is criminal or civil in nature the courts should take into account the severity of the potential penalty (*Engel v Netherlands (No.1)* (1976) 1 E.H.R.R. 647) and the nature of the offence itself (*Garyfallou AEEF v Greece* (1997) 28 E.H.R.R. 344; *Lauko v Slovakia* (2001) 33 E.H.R.R. 40); Pearson, “Hybrid Law and Human Rights” (2006) 27 *Liverpool Law Review* 125 at 140.

⁷⁹ [2001] EWHC Admin 1125; [2002] Crim. L.R. 835.

⁸⁰ The Vagrancy Act of 1824 (as amended by the Metropolitan Police Act 1829) was employed to tackle the idle, disorderly and loose (which included common prostitutes) but this required either a confession or a credible witness. However, the Metropolitan Police Act enabled a police officer to apprehend anyone disturbing the peace or acting suspiciously without warrant but this again was dependent on the evidence of a witness. Yet, by 1847 with the introduction of the Town Police Clauses Act, a constable could take into custody, without warrant, any person who “within his view” had committed such an offence (which included under s.28 common prostitutes/nightwalkers). Thus, for well over 150 years it has been legally accepted in England and Wales that the nuisance caused by street prostitution is self-evident and it continues to be legally regulated as a self-evident social nuisance today. The Street Offences Act 1959 drew on the recommendations of the Wolfenden Committee which reported in 1957 and which considered that the visibility of prostitution was a great cause of public concern, the sight of which affronted a “normal citizen's” sense of decency: Wolfenden, *Report on the Committee of Homosexual Offences and Prostitution*, 1957, Cmd 247, paras 12 and 225–227. More recently, in *Potter* [2003] EWHC Admin 2272 Auld L.J. contended that street prostitution in residential areas was clearly capable of causing or being likely to cause harassment, alarm or distress. This presumption is similarly echoed in the Government's current strategy where it is accepted that sex markets impact greatly on residents and businesses; see Home Office, *The Development of a Coordinated Strategy on Prostitution, Partial Regulatory Impact Assessment* (2004), para.2.1.

increasingly demanding. Pearson directs us to the work of Brownlee who reminds us that today's "predatory other" discourse has served to increase the public's sense of insecurity and thus the social reaction to law-breaking has intensified.⁸¹ This in turn has increased the community's demand for punishment and it is true to say that as regards the use of the ASBO, Gardener et al.'s lack of faith in the courts to prevent it from being used aggressively as a tool of intolerance was not misplaced.⁸² Still, it should not be forgotten that the offence of soliciting and loitering has been deemed in law a low grade criminal offence—and certainly there is nothing in legislation to suggest that the behaviour of sex workers warrants the type of exclusive prohibitions contained in the PNIs issued against sex workers in Birmingham. Such repressive terms are arguably disproportionate to the nuisance caused by sex work and are particularly controversial given that sex workers were subjected to the prohibitory injunctions because the City Council has innovatively (or some might say cunningly) made use of archaic law that is so incredibly ill-defined. Without doubt, the debate on the rights and wrongs of civil prohibitory injunctions and orders will go on. With specific regard to injunctions against sex workers, the next section of this article furthers discussion in this area as it turns to question the actual utility of the PNI to tackle on-street sex work and considers its place within the current policy framework.

Public nuisance injunctions against sex workers—to what end?

In weighing up the extent to which an individual's human rights should be curtailed to protect the general interests of the community, it is important that the courts pause to consider the impact of the injunction. According to Birmingham City Council, the issuing of 20 injunctions resulted in the numbers of sex workers in the Ladywood area being reduced from 50 to less than five.⁸³ However, there is of course a valid argument that the Edgbaston/Ladywood sex workers are likely to have displaced to other areas to access clients, as is often the case with exclusionary crime prevention approaches,⁸⁴ and this was certainly the case after sex workers were warned that PNIs were to be issued against them in Vancouver.⁸⁵ Nevertheless, as is often the case with initiatives to tackle on-street sex work, displacement is synonymous with success—it is somewhat ironic that the exclusive tactics of Street Watch in Balsall Heath (a civilian/police partnership) drove prostitutes from the targeted area two miles into the suburbs of Edgbaston in the first place.⁸⁶

⁸¹ I. Brownlee, "New Labour - New Penology? Panic Rhetoric and the Limits of Managerialism in Criminal Justice Policy" (1998) 25 *Journal of Law and Society* 313 cited in Pearson, "Hybrid Law and Human Rights" (2006) 27 *Liverpool Law Review* 125 at 319.

⁸² J. Gardener et al., "Clause 1—The Hybrid Law from Hell?" (1998) 31 *Criminal Justice Matters* 25.

⁸³ Birmingham City Council, Legal Services Briefing Note, *Crime and Disorder, Anti-Social Behaviour* 2002/2004, para.4.13.

⁸⁴ See, e.g. P. Hubbard, "Community Action and the Displacement of Street Prostitutes: Evidence from British Cities" (1998) 29 *Geoforum* 269; T. Sagar, "Street Watch: Concept and Practice, Civilian Participation in Street Prostitution Control" (2005) 45 *Brit. J. Criminol.* 98.

⁸⁵ J. Lowman, "Street Prostitution Control: Some Canadian Reflections on the Finsbury Park Experience" (1992) 32 *Brit. J. Criminol.* 1.

⁸⁶ T. Sanders, "The Risks of Street Prostitution: Punters, Police and Protesters" (2004) 41 *Urban Studies* 1703.

Similarly, ASBOs have been denounced as an inappropriate solution to tackle on-street sex work in red light areas because the orders have the potential to lead to displacement.⁸⁷ However, another important point to make when considering the potential impact of the PNI is that contemporary crime prevention and community safety work consists of several tiers of multi-agency partnerships which implement a variety of multi-agency strategies, and, therefore, to what extent does the PNI make a useful contribution within the current policy approach?

A vexing problem for many commentators is that orders and injunctions are liable to remove sex workers (both those subject to orders and injunctions and those who seek to avoid them) out of the reach of front-line services, offering on-going practical, material and emotional support.⁸⁸ Indeed, while Birmingham City Council had issued warnings to the women targeted (a prerequisite of the PNI) and invited sex workers to avoid legal proceedings via voluntary referral to appropriate agencies,⁸⁹ one in four were found to have breached the PNI,⁹⁰ and if the Council is right about the numbers of women working the area being reduced from 50 to less than five, then many were likely to have displaced themselves.

However, while arguments such as displacement and interference with welfare-based work have been brought to the attention of the Home Office,⁹¹ the current government strategy⁹² and guidance from the Association of Chief Police Officers⁹³ is to continue to issue ASBOs and other exclusionary orders against persistent sex workers but link them to mechanisms of support. The shortcomings of this approach with regard to the ability of the ASBO to work in tandem with inclusive initiatives have been debated in detail elsewhere.⁹⁴ However, it is important to point out that in just the same way that inclusive projects have first to exist locally if ASBOs are to be linked to them, the same is true regarding PNIs. Significant funding is needed to implement and maintain sex worker services and expensive sex worker initiatives will not always attract the allocation of precious local resources within the moral community. Thus, while the current approach in England and Wales is to encourage local Crime and Disorder Reduction Partnerships and Community Safety Partnerships to provide services that are tailored to meet the needs of sex workers, this will be easier said than done. In many areas, partnerships will lack the funds and possibly the will to set up the kinds of service provision recommended by Hester and Westmarland (drop-in centres, counselling, outreach,

⁸⁷ H. Wright and T. Sagar, "Out of Sight, Out of Mind" (2000) 150 N.L.J. 1792. Jones and Sagar, "Crime and Disorder Act 1998" [2001] Crim. L.R. 873.

⁸⁸ M. Hester and N. Westmarland, *Tackling Street Prostitution: Towards A Holistic Approach*, Home Office Research Study 279 (2004); T. Sagar, "Tackling On-Street Sex Work: Anti-Social Behaviour Orders, Sex Workers and Inclusive Inter-Agency Strategies" (2007) 7 *Criminology and Criminal Justice* 153.

⁸⁹ Birmingham City Council, Legal Services Briefing Note, *Crime and Disorder: Anti-Social Behaviour* (January 2003), para.4.9.

⁹⁰ Birmingham City Council, Legal Services Briefing Note, *Crime and Disorder, Anti-Social Behaviour 2002/2004*, para.4.12.

⁹¹ Hester and Westmarland, *Tackling Street Prostitution* (2004).

⁹² Home Office, *The Development of a Coordinated Strategy on Prostitution, Partial Regulatory Impact Assessment* (2004).

⁹³ T. Brian, T. Davis and A. Phillips, *Policing Prostitution: ACPO's Policy Strategy and Operational Guidelines for Dealing with Exploitation and Abuse through Prostitution*, (ACPO, 2004).

⁹⁴ Sagar, "Tackling On-Street Sex Work" (2007) 7 *Criminology and Criminal Justice* 153.

education, etc.).⁹⁵ Also, as Hughes asserts, the partnerships are under immense pressure to focus on anti-social behaviour and to concentrate on what can be easily counted.⁹⁶

Unfortunately, the success of sex worker initiatives is not easy to measure. Exit from sex work is a complex process; research indicates that a woman's exit from the street is non-linear—it can take many attempts.⁹⁷ Arguably, exclusionary approaches such as the PNI and ASBO do not make for a coherent approach where welfare and health-based services struggle to assist a group of women who are “hard to reach” and who have diverse needs.⁹⁸ The threat of injunctions and orders, or the issuing of injunctions and orders in any targeted area will arguably serve to undermine the work that is being carried out at grass roots level. Thus, while the Government and ACPO appear to recognise that there is a problem on the ground in that inclusive and exclusionary initiatives can work against each other, the strategy which aims to circumvent potential problems on the ground by linking the orders to support services tackling issues such as drug and alcohol misuse remains questionable. Not least because non-conformists face punishment if they refuse to adhere to the terms of their injunction or order—the coercive nature of the current approach has not gone unnoticed or without criticism.⁹⁹ The outcome of what has been termed an inherently contradictory strategy¹⁰⁰ remains to be seen.

Nevertheless, further measures to compel sex workers into rehabilitation are contained in cl.71–73 of the Criminal Justice and Immigration Bill 2007. Clause 71 proposes that “persons”¹⁰¹ (not common prostitutes) should only face prosecution if they loiter or solicit for the purposes of prostitution¹⁰² “persistently”.¹⁰³ It is also proposed that persistent offenders should not be fined but rather ordered to meet a supervisor (appointed by the court) on three occasions within a six-month period to address the conduct constituting the offence and to identify ways of preventing engagement in such future conduct.¹⁰⁴ If offenders fail to meet with the appointed supervisor then they will be deemed not to have become rehabilitated in

⁹⁵ Hester and Westmarland, *Tackling Street Prostitution* (2004).

⁹⁶ Hughes, *The Politics of Crime and Community* (2007), p.124.

⁹⁷ E. McLeod, “Working with Prostitutes: Probation Officer's Aims and Strategies” (1979) 9 *British Journal of Social Work* 453; H. Ward and S. Day, “Health Care and Regulation: New Perspectives” in G. Scambler and A. Scambler (eds), *Rethinking Prostitution: Purchasing Sex in the 1990s* (1997), pp.139–163; Hester and Westmarland, *Tackling Street Prostitution* (2004) and J. Pitcher, “Support Services for Women Working in the Sex Industry” in R. Campbell and M. O'Neill (eds), *Sex Work Now* (2006).

⁹⁸ See Pitcher, “Support Services for Women Working in the Sex Industry” (2006), p.235.

⁹⁹ e.g. B. Brooks-Gordon, *The Price of Sex* (2006) and J. Phoenix, “Regulating Prostitution: Different Problems, Different Solutions, Same Old Story” (2007) 6 *Community Safety Journal* 7; M. Melrose, “The Government's New Prostitution Strategy: A Cheap Fix for Drug-Using Sex Workers?” (2007) 6 *Community Safety Journal* 18.

¹⁰⁰ Phoenix points out that the strategy which aims to assist women will actually end up punishing women: Phoenix, “Regulating Prostitution” (2007) 6 *Community Safety Journal* 7.

¹⁰¹ Criminal Justice and Immigration Bill 2007 cl.71.

¹⁰² Criminal Justice and Immigration Bill 2007 cl.71.

¹⁰³ Criminal Justice and Immigration Bill 2007 cl.71. Conduct is deemed persistent where a person loiters or solicits for the purposes of offering services as a prostitute on two or more occasions within a three-month period.

¹⁰⁴ Criminal Justice and Immigration Bill 2007 cl.72.

respect of the conviction.¹⁰⁵ Since the introduction of the Bill, Ministers have also proposed that any prostitute who breaches the court order should be detained in prison for 72 hours.¹⁰⁶ However, arguably, imprisonment for missing meetings is a punitive step. To borrow the words of Will Higham of the Prison Reform Trust, the measure “... fails utterly to understand that vulnerable people with chaotic lives can’t be asked to walk a tightrope”.¹⁰⁷ Whilst an in-depth exploration of the issues surrounding enforced rehabilitation to tackle drug and alcohol abuse is beyond the remit of this article, as already noted, there are some who firmly believe that compulsory rehabilitation is futile.¹⁰⁸ Indeed, there is no guarantee that compulsory rehabilitation will have the desired effect and reduce the numbers of sex workers on the streets and thus assist in the protection of the communities which are adversely affected. However, if the proposals do enter the statute book, undoubtedly the law will (at least initially) become much more attractive—particularly to tackle repeat offenders where history has shown that fines (currently imposed under the Street Offences Act) are meaningless. Nevertheless, given the lack of certainty as to the success of the measures, it is important to note that the ASBO is not classified at law as a criminal penalty, and therefore rehabilitation orders may still be supported by an ASBO, for example on prosecution. As for the potential for the PNI to be used against sex workers in the future, again, the PNI is not a criminal penalty and thus a sex worker could be the subject of a rehabilitation order and an injunction simultaneously.

A final point to make is that the tiers of multi-agency partnerships introduced under New Labour and the devolved nature of crime prevention which makes for localised definitions of what is a public nuisance or indeed anti-social behaviour, arguably renders the certainty of law problematic. The current state of affairs is that sex workers may find themselves the subject of a PNI in one area and excluded from entering a city centre for several years and, in another, may merely face a small fine under the Street Offences Act 1959, or in the future become subjected to a rehabilitation order. Unfortunately, the measures contained in the Criminal Justice and Immigration Bill 2007 may do little to address the lack of national consistency as to how sex workers are dealt with in practice in the long term. Particularly in the context of the future of the PNI, it is worth remembering that it is the local authority which is the applicant, and the decision to make an application will vary according to the local authority agenda. For example, injunctions may still be issued against sex workers where a local community is particularly vociferous¹⁰⁹ or where an authority aims to “clean up” a public space or redevelop it.¹¹⁰ Indeed, this

¹⁰⁵ Criminal Justice and Immigration Bill 2007 cl.73.

¹⁰⁶ J. Doward, “Prostitutes Face Jail Under Tougher Law”, *Observer*, August 12, 2007, <http://observer.guardian.co.uk/politics/story/0,,2147225,00.html> [Accessed February 19, 2008].

¹⁰⁷ Doward, “Prostitutes Face Jail Under Tougher Law”, *Observer*, August 12, 2007.

¹⁰⁸ See, e.g. Phoenix, “Regulating Prostitution” (2007) 6 *Community Safety Journal* 7 and Melrose, “The Government’s New Prostitution Strategy” (2007) 6 *Community Safety Journal* 18.

¹⁰⁹ Or at least how vociferous *some* members of the community are. In the author’s research area of Cardiff it could not be said that the majority, or even a significant proportion of the community were concerned with on-street sex work, but the members who were upset by the on-street activity were so concerned that they took to the streets in Street Watch Patrols to oust women out of the area, see Sagar, “Street Watch” (2005) 45 *Brit. J. Criminol.* 98.

¹¹⁰ P. Hubbard, “Cleansing the Metropolis: Sex Work and the Politics of Zero Tolerance” (2004) 41 *Urban Studies* 1687.

kind of independent action is set to become more likely given that the Government proposes greater community empowerment and greater local authority control in matters of community safety.

The Government's White Paper *Strong and Prosperous Communities* aims to give local people and local communities more power to improve their lives.¹¹¹ Councillors are set to become "champions" of community interests,¹¹² and to ensure that local priorities are acted on councillors will be placed under a duty to consider and respond to all community issues that are raised before them.¹¹³ Furthermore, the local priorities that appear in the Local Area Agreement will be mirrored in the local Crime and Disorder Reduction Strategy.¹¹⁴ Nevertheless, steering all the different agencies that are involved in so many partnerships makes even achieving local consistency problematic. However, more importantly, even where consistency at the local level is achieved, it might be questioned whether community empowerment and greater local authority input will make for more exclusionary policies against sex workers. Communities are bombarded with rhetoric from central government regarding the need for members of the public to "take back" their communities and they are told that they do not have to tolerate undesirable behaviour,¹¹⁵ and of course, as this article has highlighted, local authorities are adopting an expanding policing role¹¹⁶ which appears to lean towards policies of zero tolerance and the exclusion of sex workers. If this is so, it is argued that when implementing strategies of zero tolerance at the local level it is not enough that the local authority recognises (as the Government's supposedly coordinated strategy recognises, and the proposals in the Criminal Justice and Immigration Bill purport to recognise) that support mechanisms for sex workers are crucial, because tools of zero tolerance such as PNIs will always make it more difficult for grass roots services to reach out to sex workers and thus deliver the necessary levels of support.¹¹⁷ Basically, there has to be some recognition that PNIs and other mechanisms such as ASBOs do not make for a coherent and consistent approach.

Concluding remarks

If the judgment of the House of Lords in *Rimmington and Goldstein* were to result in the PNI being used for the sort of behaviour that was originally intended, or moreover if the law on public nuisance was abolished, this would hardly be debilitating for local authorities where they wish to clean up areas or act on behalf of local communities to reduce the social disturbances associated with on-street

¹¹¹ Department for Communities and Local Government, *Strong and Prosperous Communities*. TSO, 2006. Cm 6939-I, Cm 6939-II.

¹¹² Cm 6929-1, section 2.

¹¹³ Cm 6929-1, section 2.

¹¹⁴ Cm 6939-I, para.5.11; Cm 6929-II, paras A15 and A20. It is proposed that all local authorities be under a statutory duty to prepare Local Area Agreements which will involve input from the Local Strategic Partnership, having regard to the Sustainable Community Strategy and other statutory partnerships.

¹¹⁵ e.g. <http://www.respect.gov.uk> [Accessed February 20, 2008].

¹¹⁶ For a more detailed discussion see T. Sagar and J. Croxall, *Local Authorities, Communities and Sex Workers* (forthcoming).

¹¹⁷ Pitcher, "Support Services for Women Working in the Sex Industry" (2006), p.254.

sex work. Local authorities can still use their powers under s.222 of the Local Government Act 1972 to stop the individual from committing a particular offence where criminal proceedings proved inadequate to bring the problem to an end. However, the crime targeted could not be one of public nuisance if the crime did not exist, nor could an injunction be used to stop a non-existent offence. Accordingly, local authorities would have to revert to using the many statutory laws which are more defined, for which a criminal standard of proof is required, and to which the stick to beat the offender has been adjudged appropriate by Parliament.

Without doubt civil remedies can offer a range of advantages that the criminal law cannot match in either scope or flexibility. It is not surprising therefore that there is no indication to date that local authorities will refrain from using, or threatening to use the PNI against sex workers.¹¹⁸ By utilising the civil law, punishments can be meted out to offenders while bypassing the criminal law's cumbersome and time-consuming constraints. Yet, of course, the criminal law's cumbersomeness and time constraints are there to serve a purpose. As Ashworth contends, human rights have little significance where they are "simply . . . 'weighed' against the public interest and then discarded, and also because it implies that the defendants are 'outside' the community".¹¹⁹ However, the rights of the community have always "trumped" the rights of the sex worker—the outsider. Nevertheless, arguably, as long as it is the visibility of sex workers that is at issue for local authorities rather than sex worker welfare, on-street sex work will continue in the Ladywood area of Birmingham—an area that in the run up to the issuing of the PNIs against sex workers appeared on the list of the top 10 poorest parliamentary constituencies.¹²⁰ Strategies of zero tolerance may oust sex workers from a targeted area for a time but they do not provide a long-term solution.¹²¹ More often than not, as the breaches of a quarter of the injunctions issued against sex workers in Ladywood and the breaches of ASBOs in that same area indicate,¹²² such strategies stand to return sex workers to the clutches of the criminal justice system.

¹¹⁸ There is no wording to this effect either on Birmingham City Council's website or indeed the many Home Office/Government sites such as Respect, <http://www.respect.gov.uk> [Accessed February 20, 2008]. In fact, the very opposite is true, the use of PNIs to tackle street sex work is very much encouraged.

¹¹⁹ Ashworth, "Social Control and 'Anti-Social Behaviour'" (2004) 120 L.Q.R. 263 at 290–291.

¹²⁰ "Report Reveals Britain's 10 Most Poor Areas", *Society Guardian*, February 18, 2002, <http://www.guardian.co.uk/society/2002/feb/18/social/exclusion> [Accessed February 19, 2008].

¹²¹ The work of Street Watch in Balsall Heath was held up as a success, see M. Lean, "The Red Lights go Green in Birmingham" (1996) *For a Change Magazine*, <http://www.forachange.net/browse/1504.html> [Accessed March 5, 2008]. However, as already noted, the actions of Street Watch led to the displacement of sex workers into Edgbaston/Ladywood, Sanders, "The Risks of Street Prostitution" (2004) 41 *Urban Studies* 1703. Several years later the deployment of ASBOs in the Ladywood area were thought to be "the" effective deterrent; see Orr-Munro, "Curbing Street Sex", *Police Review*, July 28, 2002, but still, the City Council had to issue PNIs little more than a year later.

¹²² With regard to PNIs see Birmingham City Council, Legal Services Briefing Note, (2004), para.4.12; Jones and Sagar, "Crime and Disorder Act 1998" [2001] Crim. L.R. 873, which highlighted breaches of ASBOs by sex workers in Birmingham.

“Up-Skirts” and “Down-Blouses”: Voyeurism and the Law

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(LT) Indecent photographs of children; Outraging public decency; Video recordings; Voyeurism

Summary: *The criminal courts have increasingly been called upon to consider the legal position where a person covertly films up women’s skirts in order to obtain images of their underwear, genitals or upper-thigh area. The criminalisation of such activity is not straightforward and a number of issues arise from how the courts have treated this behaviour, including whether this is an area where legislative amendment is required.*

Up-skirts and down-blouses: an emerging issue

In recent years a small, but growing, number of people have been caught trying to film up the skirts of women and girls. This kind of behaviour is colloquially known as “up-skirt” or “down-blouse” photographing which is a simple descriptor of the behaviour. An “up-skirt” picture is a picture taken by a man¹ using a covert camera directed up a female’s skirt. “Down-blouse” photography is where a man similarly uses a covert camera to photograph females from above, with the camera focusing on the female’s blouse in the hope of taking an image of the bra, cleavage or indeed breasts.

Technology has altered the way in which this behaviour can be performed. There have, in the past, been reported instances of men trying to look up skirts using low-tech devices such as mirrors.² However the behaviour would appear to have become more prominent as technology has developed. It is, of course, not known whether the behaviour became more common or whether it was just simply noticed more often, but cases across the world increasingly involved hiding a video camera in a bag positioned in such a way to ensure that an image could be taken.³ Although inexpensive personal video cameras have been in existence since the 1980s, it has

¹ In this article the masculine will be used to refer to the perpetrator and the feminine to indicate the victim since research appears to show that the vast majority of voyeurs are male (see J.M. Metz, “From scopophilia to Survivor: a brief history of voyeurism” (2004) 18 *Textual Practice* 415 at 416).

² Metz, “From scopophilia to Survivor” (2004) 18 *Textual Practice* 415 at 426.

³ L.E. Rothenberg, “Re-thinking Privacy: Peeping Toms, Video Voyeurs and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in Public Space” (2000) 39 *American University Law Review* 1127 at 1129–1130.

been argued by one commentator that this did not mark the ignition point for the outbreak of such behaviour but rather the internet did.⁴

On one level there would appear to be some truth in this, with another commentator noting that in 2004 a search for voyeurism led to 730,000 hits on Google⁵ (today the figure has reached in excess of 2 million hits⁶) but it is submitted that the evidence is not conclusive. Whilst the growth in the number of internet sites demonstrates that there is a demand for voyeuristic material it does not automatically mean that the voyeuristic behaviour is increasing. Whilst we know that the internet has revolutionised the way that deviant sexual behaviour is conducted,⁷ we do not know, as yet, how it has impacted on this behaviour. Many of the images on the internet appear to be staged. This is not unusual, with many adult-entertainment sites using "creative licence" in their products so that professional films are, for example, passed off as amateur films or "chance encounters" are, in fact, carefully staged.⁸ Similarly many images on sites hosting voyeuristic material would appear to be of too high-quality for them to have been taken in truly voyeuristic circumstances.

Leaving aside the place of the internet in propagating such behaviour it is clear that technology has certainly allowed the behaviour to develop. High-quality devices have become increasingly sophisticated and smaller, allowing for more opportunities to take such images. Perhaps the most notable piece of technology in this area is the camera-equipped mobile telephone. A person holding a mobile telephone will not often trigger any suspicions (in part because, for example, a person standing above others in a shopping mall may look as though he is texting rather than taking a photograph) and yet the technology on mobile telephones means it is quick and simple to take and distribute such images. A person could, from his telephone, email an image to himself and then delete all traces of the image and distribution so that if asked to account for his behaviour by a security guard it would appear as though nothing untoward has happened.

The use of mobile telephones to take surreptitious photographs was most notable in Japan where it caused considerable disquiet and scandal but it has also featured heavily in other countries, including the United Kingdom, where it is now becoming increasingly common for organisations to prohibit mobile telephones on their premises.⁹

What does this behaviour amount to? It has been traditionally argued that such behaviour was a nuisance¹⁰ but psychologists consider it to be much more than this.

⁴ D. Kremenetsky, "Insatiable 'Up-Skirt' Voyeurs Force California Lawmakers to Expand Privacy Protection in Public Places" (2000) 31 *McGeorge Law Review* 285 at 287.

⁵ J.M. Metz, "Voyeur Nation? Changing Definitions of Voyeurism, 1950-2004" (2004) 12 *Harvard Review of Psychiatry* 127.

⁶ Of course not every "hit" is necessarily a website devoted to voyeurism since it would include scholarly articles and certain media reports discussing the phenomenon. That said, a significant proportion of them do appear to be websites purporting to host voyeuristic material.

⁷ Perhaps most notably child pornography: see E. Quayle and M. Taylor, "Paedophiles, pornography and the Internet" [2002] *British Journal of Social Work* 863-875.

⁸ See, e.g. D. Bennett, "Pornography-dot-com: Eroticising privacy on the Internet" (2001) 23 *The Review of Education/Pedagogy/Cultural Studies* 381 at 388.

⁹ See, e.g. G. Parry, "Camera/video phones in schools" (2005) 17 *E. & L.* 73.

¹⁰ *Setting the Boundaries: Reforming the law on sex offences—volume 1*. Home Office. 2001, para.8.3.

It is considered to be a form of paraphilia, a term meaning “sexual perversion or deviation”.¹¹ There are several examples of paraphilias but DSM-IV¹² recognises one, voyeurism, that appears to be related. Voyeurism is defined as:

“... intense sexually arousing fantasies, sexual urges or behaviours involving the act of observing an unsuspecting person who is naked, in the process of disrobing or engaging in sexual activity.”¹³

Of course the behaviour discussed above does not fit neatly into this definition of voyeurism in that up-skirt pictures do not involve a person being naked, disrobing or engaging in sexual activity. However the rest of the definition holds true and it has been gradually recognised that this clinical definition may need widening, with some suggesting:

“[Voyeurism] can also be defined as an overwhelming desire to observe a person of the preferred gender and age in some stage of undress ... or in similar intimate or private situations.”¹⁴

This perhaps reflects the fact that voyeurism covers a broad range of behaviour and indeed some are arguing that the term should be considered an overarching behavioural definition covering a variety of distinct behaviours.¹⁵ In terms of the behaviour discussed in this article this becomes relevant because up-skirt pictures relate to a very specific form of behaviour. Indeed some have argued that it should have its own label, with some suggesting “paraphilic scopophilia” would be appropriate, although this is somewhat controversial since many texts do not differentiate between “scopophilia” and “voyeurism”, something which receives support from the dictionary.¹⁶

For our purposes, it is necessary to use a term other than “voyeurism” since this now bears a definition in law¹⁷ which, as will be seen, arguably does not cover the behaviour discussed in this article. Since scopophilia is a controversial label for this behaviour it is suggested that the phrase “up-skirt” which has achieved colloquial recognition should be used instead.

Initial legal response

Within England and Wales the principal legal response has been to use the common-law offence of outraging public decency. It was not until 2007 that someone expressly challenged the applicability of outraging public decency to

¹¹ *Oxford English Dictionary*, online edition.

¹² *Diagnostic and Statistical Manual of Mental Disorders* (Version 4). Produced by the American Psychiatric Association this is arguably the most authoritative classification of psychiatric conditions.

¹³ *Diagnostic and Statistical Manual of Mental Disorders*, para.302.82

¹⁴ K. Freund, “Courtship Disorder” in W.K. Marshall, D.R. Laws and H.E. Barbaree (eds), *Handbook of Sexual Assault* (1990), p.196.

¹⁵ See Metz, “Voyeur Nation?” (2004) 12 *Harvard Review of Psychiatry* 127 at 128–129.

¹⁶ See *Oxford English Dictionary* (online edition) which suggests that voyeurism is another term for scopophilia.

¹⁷ Sexual Offences Act 2003 s.67.

this behaviour¹⁸ although the courts had previously implicitly approved its use.¹⁹ Thomas L.J., giving the judgment in *Hamilton*, spent a considerable period of time rehearsing the history of the offence and, whilst it is undoubtedly interesting and relevant to legal historians, it is submitted that much of the immediate history is not directly relevant to this discussion. The key issue that arose from this detailed rehearsal of the offence was whether there was a requirement that two people saw the act that amounted to public indecency.

It has been clear for some time that the requirement for at least two people to see the act was meant to demonstrate that the act had occurred in public and, therefore, could be capable of outraging the public rather than a single victim.²⁰ More than this, it is necessary for the act to take place in an area to which the public has access, so that an act before two people in a private dwelling would not meet the criteria.²¹ However it is also clear that it does not matter whether the people who saw the act were actually outraged.²² This is particularly relevant in the context of up-skirt photographs where people may see the act as “a laugh”.²³

The real issue of substance in *Hamilton* was whether it is necessary for two people to see the act of photographing or be capable of seeing the act. This again is important in respect of up-skirt pictures where the conduct is often covert, indeed some psychologists argue that the secrecy of the activity is a fundamental part of the sexual arousal.²⁴ The appellant had submitted that the historic cases show that at least one person must see the act and it must be in circumstances where others were capable of seeing the act even if in fact they did not.²⁵

Although the Court of Appeal accepted that the historical cases had so far all involved at least one person seeing the act, it held that this was an evidential point rather than a rule of substantive law. The court held that the purpose of the “two-man rule” was simply to ensure that the act took place in circumstances where members of the public *could* be outraged and it was not necessary for anyone to witness the act.²⁶ The court then went on to state that the decision of the jury in *Hamilton* was that it was possible that people could have witnessed the act.

Is it possible to reconcile this ratio with earlier contemporary cases, perhaps most notably the decision in *R. (on the application of Rose) v DPP*?²⁷ Here the applicant was acquitted of an offence of outraging public decency, the circumstances being that he and his girlfriend had oral sex in the foyer of a bank at 01.00. The only person to witness the act did so the next morning when viewing CCTV footage. Stanley Burnton J. held that the conviction could not be sustained as the public element must be satisfied at the time of the act and not subsequently.²⁸

¹⁸ *Hamilton* [2007] EWCA Crim 2062.

¹⁹ See, e.g. *Tinsley* [2003] EWCA Crim 3505 which was an appeal against sentence imposed for outraging public decency after taking up-skirt images.

²⁰ *Halsbury's Laws*, para.764.

²¹ P. Rook and R. Ward, *Sexual Offences: Law and Practice*, 3rd edn (2004), p.412.

²² D.C. Ormerod, *Smith & Hogan's Criminal Law*, 11th edn (2005), p.966.

²³ e.g. it is known that a considerable amount of up-skirt pictures are taken in nightclubs. A group of boys may find this amusing but this would be irrelevant.

²⁴ G.C. Davison, J.M. Neale and A.M. Kring, *Abnormal Psychology*, 9th edn (2004).

²⁵ *Hamilton* [2007] EWCA Crim 2062 at [35].

²⁶ *Hamilton* [2007] EWCA Crim 2062 at [39].

²⁷ [2006] EWHC Admin 852; [2006] 1 W.L.R. 2626.

²⁸ [2006] EWHC Admin 852; [2006] 1 W.L.R. 2626 at [29].

It was accepted in *Rose* that it was possible that people walking past the foyer would be capable of seeing the act²⁹ but it was held that there was no proof that anyone was actually passing the foyer at that time of the night. It is perhaps this that allows the two cases to be reconciled since in *Hamilton* the Court of Appeal stated that whether it was possible for an act to be seen was a matter of fact for the jury³⁰ and it held that the video demonstrated that there were people around who may have seen the appellant. Presumably the logic of *Rose* was that the District Judge³¹ was not satisfied that there were people capable of seeing the act. Precisely how, in circumstances such as *Rose*, it will be possible to prove this to the prosecution standard is perhaps more open to question.

A slightly different point, but one that is expressly raised in *Hamilton*, is that the test is not merely that the perpetrator is seen but that the perpetrator is seen doing the relevant *act*. In our context this means that it must be possible that people will see that the perpetrator is actually trying to film up someone's skirt. Given that this is a covert activity this may be somewhat difficult, especially when it is remembered that technological advancements are making it easier to disguise the activity. The court in *Hamilton* made reference to the facts of *Tinsley* where the contents of a bag spilled out as an example of how such evidence may be gathered, or that a security guard may see him manoeuvring the bag. Where, however, does this leave situations where the bag is secured or where technological solutions such as detachable lenses, etc. are used? Presumably if the prosecution cannot prove that at least two people could see the offender actually filming up-skirt pictures then a conviction could not be sustained even though the recording proves what the offender has been doing.

There are other problems with the use of this offence. It is commonly accepted that to comply with the European Convention on Human Rights offences must be defined with sufficient clarity to ensure that a person knows the limits of the law. It has been suggested that the offence of outraging public decency does not meet this test³² but in *S and G v United Kingdom*³³ the European Commission on Human Rights refused an application to challenge this offence. It is somewhat surprising that a challenge to this offence has not been successful although this may be as a result of the particular facts of the case. It is unlikely that an application in respect of up-skirt images would be successful either with the courts undoubtedly suggesting that a person should be aware that such an activity is criminal. However this does not alter the fact that many of the circumstances surrounding the detail of this offence are largely unknown, something evident by the discussion about whether people must be capable of being outraged at the time of the act. It is submitted that it would be more appropriate for the law to adopt a clearer method of tackling this behaviour.

The way in which the offence is punishable is also problematic. As a common-law offence, and one that covers a broad range of activity, it has never been brought

²⁹ [2006] EWHC Admin 852; [2006] 1 W.L.R. 2626 at [11].

³⁰ *Hamilton* [2007] EWCA Crim 2062 at [40].

³¹ In *Rose* the matter was heard summarily so the District Judge (Magistrates' Court) would be the tribunal of fact.

³² Ormerod, *Smith & Hogan's Criminal Law* (2005), p.967.

³³ Application 17634/91.

within the protective environment created by statute³⁴ and indeed the scope of its sentence has never been fully defined. As an offence that is broadly based upon the premise that it is a nuisance, any sentence imposed tends to ignore the psychological issues it presents. It will be remembered that DSM-IV classifies voyeurism, including up-skirt pictures, as a deviant sexual behaviour. It has been remarked that an issue with this form of behaviour is its "recurrent and insistently and involuntarily and repetitive nature".³⁵ In other words the behaviour is likely to reoccur and this raises issues of treatment and control. The issue of treatment has long been controversial in sexual offending³⁶ but it is clear that some assistance needs to be given. This does raise issues in terms of the sentence imposed. A common judicial reaction in these circumstances appears to be the imposition of a short custodial sentence and yet it is known that this is of little or no benefit to a sex offender in need of treatment.³⁷

Prison sex offender programmes are reserved for those serving medium-to-long sentences. A short custodial sentence is unlikely to lead to a community sex offender programme either for similar reasons of resource. Perhaps the better solution would be the imposition of a community sentence or suspended sentence of imprisonment where, in both cases, conditions can be imposed in respect of a treatment programme.³⁸ In this way an offender has some chance of receiving treatment that may help address his deviant behaviour but whilst it is charged as an offence of outraging public decency it is unlikely that this position will be reached.

In terms of controlling repeat offending the fact that it is not a sexual offence for the purposes of the Sexual Offences Act 2003 means that it is not possible to impose a sexual offences prevention order (SOPO). A similar effect could be achieved through the use of an anti-social behaviour order (ASBO³⁹) since up-skirt behaviour must, it is submitted, come within the definition of anti-social behaviour. However an ASBO and SOPO are not identical in effect and certainly the latter would ordinarily involve more attention by a multi-agency public protection panel which may be useful in addressing the offender's behaviour. Without addressing the causes of the offending behaviour there is a danger that all an ASBO would do is return an offender to court more speedily.⁴⁰

Voyeurism

In *Hamilton*, one of the submissions challenged whether the acts were covered by the offence of voyeurism.⁴¹ The court specifically declined to decide on this point because it was considered that it was not relevant.⁴² The reasoning of the court

³⁴ e.g. it is not a "sexual offence" within the meaning of the Sexual Offences Act 2003 nor does it come within the "dangerousness" provisions of the Criminal Justice Act 2003.

³⁵ Metzl, "From scopophilia to Survivor" (2004) 18 *Textual Practice* 415 at 424.

³⁶ See generally W.L. Marshall (ed.), *Sexual offender treatment: controversial issues* (John Wiley & Sons, 2006).

³⁷ A point discussed in the Court of Appeal in *Tinsley* [2003] EWCA Crim 3505, when quashing a sentence of imprisonment.

³⁸ Criminal Justice Act 2003 ss.177(1), 189(1) and 190.

³⁹ Crime and Disorder Act 1998 ss.1 and 1C.

⁴⁰ A typical ASBO requirement could be the restriction of operating recording equipment in a shopping centre, or the carrying of a covert camera in a bag, etc.

⁴¹ Sexual Offences Act 2003 s.67.

⁴² *Hamilton* [2007] EWCA Crim 2062 at [28].

was based on the premise that the actions took place before the commencement of the Sexual Offences Act 2003. However the submission, that it is within the remit of voyeurism, is of interest as it does have implications for offences after its commencement.

The legal definition of voyeurism does not necessarily encompass all of the psychological definition discussed in the preceding sections of this article. Section 67 actually creates a number of distinct offences relating to voyeuristic activity but each has common elements, namely that the voyeurism is for the purposes of sexual gratification and involves observing,⁴³ recording,⁴⁴ operating equipment allowing another person to observe⁴⁵ or installing equipment or adapting a structure to allow a person to observe⁴⁶ a person doing a private act without their consent. For the context of this article the most relevant are s.67(1)—observing—and s.67(3)—recording—a person.

However voyeurism would only apply if observing or taking the up-skirt pictures involved a person doing a private act. The Act defines a “private act” as:

“... a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and-

- (a) the person’s genitals, buttocks or breasts are exposed or covered only with underwear,
- (b) the person is using a lavatory, or
- (c) the person is doing a sexual act that is not of a kind ordinarily done in public.”⁴⁷

Leaving aside the issue of lavatories—although it is known that some offenders have sought either to install equipment in a lavatory or indeed to hide in a lavatory⁴⁸—there are other difficulties with the use of voyeurism in the context of up-skirt pictures. The syntax of s.68(1), which is most relevant for us, says “a person is in a place . . . and the person’s genitals, buttocks or breasts are exposed or covered only in underwear”. This suggests that the person’s genitals, etc. are either exposed in this place or are covered only in underwear. If we take the typical example of someone seeking up-skirt pictures then this would involve manipulating a camera when a person is in a public space, such as a shopping centre. In that place—the shopping centre—the person’s genital, buttocks or breasts are not exposed or covered only in underwear, the victim is likely to be wearing a skirt or blouse too.

Quite clearly where a person is seeking to observe people in, for example, shop changing rooms or whilst on a sunbed⁴⁹ then the offence would apply. It is less clear that it would apply where people are simply standing on an escalator or walking up stairs. In those circumstances it cannot be said that the people are in a place where their genitals, etc. are covered only in underwear.

⁴³ Sexual Offences Act 2003 s.67(1).

⁴⁴ Sexual Offences Act 2003 s.67(3).

⁴⁵ Sexual Offences Act 2003 s.67(2).

⁴⁶ Sexual Offences Act 2003 s.67(4).

⁴⁷ Sexual Offences Act 2003 s.68(1).

⁴⁸ *Henderson* [2006] EWCA Crim 3264.

⁴⁹ See, e.g. *Turner* [2006] EWCA Crim 63; [2006] 2 Cr. App. R. (S.) 51.

Even assuming that the courts will interpret this provision in a wider fashion, deciding that it suffices if the offender is in a place where a person observes or records the victim's genitals, buttocks or breasts or covered only in underwear—and certainly there appears to be some evidence that courts of first-instance have taken this approach—the next issue to decide is what is meant by “reasonably expected to provide privacy”?

If people are walking in a public area can it be said that they are in a place where there is a reasonable expectation of privacy? Some commentators, whilst not addressing this specific point, have suggested the answer is “no”, arguing that where the public have general access then this is a public rather than private place.⁵⁰ It is less clear that this is what the Act requires. The Act talks about *circumstances* where there is a reasonable expectation to privacy and not necessarily simply a place. It could be argued that a victim, even in a public place, does not expect someone to look up her skirt or down her blouse. Is that an expectation of privacy? Certainly it has been argued that:

“In Western society, one of the most fundamental and universal expectations of privacy involves the ability to control exposure of one's body.”⁵¹

This is undoubtedly true and the issue of exposure has been a controversial issue through the years. It could be argued convincingly that privacy is an issue but even if the stretched logic covers a person in a public place there is one other barrier: s.67 talks about doing a private *act*. Whilst it would be possible to construe privacy to include personal exposure, and it may be possible to stretch “place” to cover public places, it would be difficult to argue that the act—in the example above, shopping—is a private act, it is a public act. It may be that a person should have a right to privacy whilst doing this public act but that is not what s.67 appears to require. It is submitted that bringing up-skirt behaviour within the offence of voyeurism is stretching things too far.

A new offence

Whilst it appears that voyeurism is unlikely to be effective for criminalising up-skirt pictures, it is clear from the first part of this article that the offence of outraging public decency could be used. However it was also noted that there are some significant difficulties in its use, especially where it is not possible to identify whether at least two people were capable of seeing the offender taking the up-skirt pictures. It should be noted that the premise of this section of the article is that it is appropriate for this matter to be the subject of criminal sanction. It is submitted that this is more than just a nuisance and that a victim does suffer consequences of the crime.⁵²

Several countries have begun to consider their response to these issues and many have responded with new legislation to combat up-skirt photographs.⁵³ In some

⁵⁰ Rook and Ward, *Sexual Offences: Law and Practice* (2004), pp.401–402.

⁵¹ Rothenberg, “Re-thinking Privacy” (2000) 39 *American University Law Review* 1127 at 1135.

⁵² K.J. Burton, *Voyage forward for Queensland: Unauthorised taking of photographs and making of film and its subsequent publication on the Internet* (2005), p.3, <http://eprints.qut.edu.au/archive/00004179> [Accessed February 19, 2008].

⁵³ Burton, *Voyage forward for Queensland* (2005), pp.7 *et seq.*

countries, for example New Zealand, they have introduced specific legislation to tackle up-skirt images⁵⁴ and in others it has formed part of a wider voyeurism offence.⁵⁵

It is perhaps this latter form that is the most appropriate for England and Wales to adopt. It is suggested that the intention of the Government with the voyeurism offence was to criminalise peeping⁵⁶ and that this should include up-skirt pictures, yet the preceding section of this article suggested that, in fact, this may not have occurred. For the reasons set out above it would be preferable for this activity to have the certainty of a statutory offence and it would seem easiest to amend the voyeurism offence. Interestingly the New Zealand model can act as a model for the change. The statute (amending the penal code⁵⁷) was obviously influenced (somewhat ironically) by the UK provision because the first part of their offence mirrors in close terms the (UK) voyeurism offence.⁵⁸ However the New Zealand legislature recognised the difficulty that “private act” imposed and a second offence was introduced which criminalises recordings of:

“... a person’s naked or undergarment-clothed genitals, public area, buttocks or female breasts which is made—

- (i) from beneath or under a person’s clothing, or
- (ii) through a person’s outer clothing in circumstances where it is unreasonable to do so.”⁵⁹

Leaving aside the slightly problematic subpara. (ii),⁶⁰ this does appear an appropriate way of tackling the menace of up-skirt photography. The offence requires an absence of consent but there is no requirement for a person to be in a private place, nor indeed is there any reference to privacy.⁶¹ This carries distinct advantages: it recognises the inherent right of people to limit exposure of their person whilst at the same time avoiding debates as to the nature of the clothing worn.⁶² It is submitted that this can be justified because of the intrusion that is involved in covertly recording up-skirt pictures. The *mens rea* requirement for recording such images is intention or recklessness.⁶³ The use of recklessness may be somewhat controversial and it is more likely that an offence in this jurisdiction would be restricted to intentional recording or observation—especially since there appears to be little evidence to suggest this problem is caused by anyone other than those deliberately seeking the images—although, in common with other offences in the

⁵⁴ See Crimes (Intimate Covert Filming) Amendment Act 2006.

⁵⁵ See the position in New South Wales (Australia) in Burton, *Voyage forward for Queensland* (2005), p.11.

⁵⁶ *Setting the Boundaries: Reforming the law on sex offences—volume 1*. Home Office. 2001, para.8.3.

⁵⁷ Crimes Act 1961.

⁵⁸ Crimes Act 1961 s.216G(1)(a).

⁵⁹ Crimes Act 1961 s.216G(1)(b).

⁶⁰ As it may be difficult to define the circumstances when this would apply.

⁶¹ Which is restricted to the para.(a) offence.

⁶² An issue highlighted by Kremenetsky, “Insatiable ‘Up-Skirt’ Voyeurs” (2000) 31 *McGeorge Law Review* 285 at 291, when he considers the disadvantages of basing an action on privacy.

⁶³ Crimes Act 1961 s.216H.

Sexual Offences Act 2003 it is likely a case could be made that recklessness would suffice as to the absence of consent.

New Zealand also provides an offence on the distribution of such images.⁶⁴ This is an interesting issue because it is likely that the harm caused by up-skirt photography is enhanced where the images are distributed, at least where the victim is identifiable by others. A comparison could be drawn with the area of child pornography where research has shown that psychological harm is caused to victims who are aware that images of themselves are being used to stimulate sexual fantasies across the world and that they can never be sure as to who has seen the images.⁶⁵

The current voyeurism offence in the United Kingdom does not tackle the distribution of such images and yet it was noted above that there are a significant number of websites that are now dedicated to such material.⁶⁶ One possible argument is that the distribution of such images is criminalised under existing legislation⁶⁷ but it is likely that it would be neater to introduce a specific offence relating to their dissemination by their creator.

Child victims

The final issue to consider is that of indecent photographs of children. One of the photographs in *Hamilton* related to a child and it was decided before trial to amend the indictment to include a charge of taking an indecent photograph of a child.⁶⁸ Although convicted of this charge the question arises whether an up-skirt photograph of a child automatically qualifies as an indecent photograph of a child within the meaning of the Protection of Children Act 1978.

At the heart of this issue is the question as to what “indecent” means. The term is not defined in the Protection of Children Act 1978 and the definition adopted by the courts has been quite controversial. In *Stamford*⁶⁹ it was held that indecency and obscenity were at different points on the same scale, and that they were to be measured according to contemporary standards of decency. In *Graham-Kerr*⁷⁰ the court held that context was irrelevant: the jury must simply look at the photograph itself and decide whether it is decent or indecent.⁷¹ It has been noted that this can cause difficulty in respect of “legitimate” photographs where a family taking photographs of their child in a bath have to rely on an obiter statement that it would not be in the public interest to prosecute in these circumstances.⁷²

⁶⁴ Crimes Act 1961 s.216J.

⁶⁵ e.g. a victim who is now a student attending university will be caused anxiety sitting in the lecture theatre wondering if anyone has seen the images: T. Palmer, *Just one click* (2004).

⁶⁶ See p.371 above.

⁶⁷ e.g. Communications Act 2003 s.127 (sending an indecent or obscene communication) or even the Obscene Publications Act 1959 although this would require a tribunal of fact to decide that each image the subject of a charge is obscene. This is certainly not guaranteed in every case.

⁶⁸ *Hamilton* [2007] EWCA Crim 2062 at [1].

⁶⁹ [1972] 2 Q.B. 391.

⁷⁰ (1988) 88 Cr. App. R. 302.

⁷¹ This approach had earlier been adopted in respect of the Post Office Act 1953 (*Kosmos Publications v DPP* [1975] Crim. L.R. 345) and it was later confirmed that the passing of the Human Rights Act 1998 did not alter this approach (*Smethurst* [2002] 1 Cr. App. R. 6).

⁷² See D.C. Ormerod's comment on *Smethurst* at [2001] Crim. L.R. 657 at 658.

None of this, it is submitted, adequately sets out what indecent means. We know that it is in the eye of the jury but are there any limits as to their discretion? In *Oliver*⁷³ the Court of Appeal, for the purposes of sentencing, accepted that it would be useful to use a modified COPINE typology of indecent photographs to classify their seriousness. The original scale⁷⁴ had 10 points within it but the Court of Appeal stated that the first three levels would not be included because:

“... it seems to us, neither nakedness in a legitimate setting, nor the surreptitious procuring of an image, gives rise by itself, to a pornographic image.”⁷⁵

The original COPINE scale included, at level three, “surreptitious photographs of children . . . showing either underwear or varying degree of nakedness”⁷⁶ and this was under the label “erotica”. In *Hamilton* one of the charges related to an up-skirt picture of a 14-year-old schoolgirl and this led to a charge being made of taking an indecent photograph of a child.⁷⁷ The court was silent as to the propriety of this and simply referred to it in passing, perhaps because the court had, on an earlier occasion, specifically considered this issue. In *Henderson*,⁷⁸ the appellant was convicted, inter alia, of taking an indecent image of a child in that he had taken an up-skirt picture of a child also aged 14. The court, in that case, described the photograph as showing “the upper thighs from below”.⁷⁹ The issue of relevance during that appeal was whether an up-skirt image could properly be categorised as indecent. In *Henderson* the court stated it could because it was for a jury to decide what was indecent, but can it truly be said that a surreptitious photograph showing the upper thighs of a schoolgirl is an indecent photograph of a child?

Some have argued that a distinction needs to be drawn between child pornography (“the sexually explicit reproduction of a child”) and child erotica (“any material, relating to children, that serves as a sexual purpose for a given individual”).⁸⁰ It is notable that COPINE level three is classified as “erotica”⁸¹ and the original authors note that it is not unusual for the law to draw a distinction between indicative, indecent and obscene images, with indicative images being classed as “material depicting clothed children, which suggests a sexual interest in children”.⁸² This must cover up-skirt images and it would seem to fall squarely within the comments of the Court of Appeal in *Oliver*, i.e. it is not indecent.

However this is not the first time that the courts have caused confusion in this area. In *O’Carroll*⁸³ the appellant, a prominent paedophile campaigner, was

⁷³ [2002] EWCA Crim 2766; [2003] 1 Cr. App. R. 28.

⁷⁴ M. Taylor, G. Holland and E. Quayle, “Typology of Paedophile Picture Collections” (2001) 74 *Police Journal* 97.

⁷⁵ *Oliver* [2002] EWCA Crim 2766; [2003] 1 Cr. App. R. 28 at [10].

⁷⁶ Taylor et al., “Typology of Paedophile Picture Collections” (2001) 74 *Police Journal* 97 at 102.

⁷⁷ Contrary to Protection of Children Act 1978 s.1(1)(a).

⁷⁸ [2006] EWCA Crim 3264.

⁷⁹ [2006] EWCA Crim 3264 at [7].

⁸⁰ K. Lanning, *Child Molesters: A Behavioural Analysis* (1992), pp.24–25.

⁸¹ Taylor et al., “Typology of Paedophile Picture Collections” (2001) 74 *Police Journal* 97 at 102.

⁸² Taylor et al., “Typology of Paedophile Picture Collections” (2001) 74 *Police Journal* 97.

⁸³ [2003] EWCA Crim 2338.

convicted of importing indecent photographs into the country.⁸⁴ The images were described by the court as showing "young naked children engaging in naked outdoor activity such as playing on a beach"⁸⁵ and it was his submission that they were not indecent. Reference to the original COPINE scale would place this either at level two ("pictures of naked or semi-naked children in appropriate nudist settings") or level three ("surreptitiously taken photographs of children in play areas . . .") depending on who took the photographs. In either situation they would appear to lie within the proposition put forward by the Court of Appeal in *Oliver*. However the Court of Appeal rejected this argument, stating it was solely for the jury to decide whether an image was indecent, noting:

"A dictum of a judge in one case in this court as to what constitutes a 'pornographic image' cannot bind a jury as to what in another case is indecent material . . ."⁸⁶

Whilst from a strict point of stare decisis this is correct,⁸⁷ it does not of course follow that the dictum was wrong. It is perhaps surprising that nobody other than O'Carroll has sought to challenge a conviction on the basis of the obiter comments in *Oliver*. The Court of Appeal continues to create a degree of confusion in this area since in *Carr*⁸⁸ the appellant was convicted of offences relating to the taking of indecent images of children, including several thousand up-skirt images. The Court of Appeal quashed the (concurrent) sentence imposed in respect of the up-skirt pictures and imposed no separate penalty. It did not quash the conviction, which could cause confusion since the court is accepting that it amounts to an offence⁸⁹ but one that should not be punished because it is outside of the scale created in *Oliver*.

It is suggested that the obiter comments in *Oliver* are correct and that an image within COPINE levels one to three is indicative (and thus relevant to psychological assessment of the offender's behaviour) but not pornographic and should, therefore, not be considered an indecent photograph of a child. Law enforcement, quite correctly, dislikes the term "child pornography", preferring the term "abusive images of children"⁹⁰ and this perhaps shows the true purpose of the 1978 legislation. That is not to say, of course, that this behaviour should not be the subject of criminal sanction, it should. The preceding sections of this article have demonstrated that the criminal law does, and should, tackle those who seek to take up-skirt images, but is the behaviour any different when the victim is under or over 18? It is submitted that it is not, and that in both cases it is clearly the paraphilia of scopophilia or voyeurism and that it should be tackled in this way. The courts could easily differentiate between victims under a certain age through sentencing and it is submitted that this would be more appropriate.

⁸⁴ Contrary to Customs and Excise Management Act 1979 s.170(2)(b).

⁸⁵ *O'Carroll* [2003] EWCA Crim 2338 at [2].

⁸⁶ *O'Carroll* [2003] EWCA Crim 2338 at [17].

⁸⁷ These were appeals against sentence and not against conviction.

⁸⁸ [2003] EWCA Crim 2416.

⁸⁹ Although it should be noted that the appeal was against sentence so there is some question as to whether the court could, in any event, have quashed the conviction.

⁹⁰ M. Taylor and E. Quayle, *Child Pornography: An Internet Crime* (2003), pp.2-7.

Conclusion

Technology has allowed deviant behaviours to become more noticeable and arguably intensifies the number of people involved in the activity. There has been concern for many years that up-skirt pictures were being facilitated by the technological revolution, most notably through the proliferation of camera-equipped mobile telephones and cheap digital cameras.

England and Wales, as a common-law jurisdiction without a penal code, is able to react to technological changes by relying on stretching the definitions of common-law crimes, for example outraging public decency, to cope with emerging behaviours. However, stretching the law in this way brings several problems, not least the fact that it can cloud the certainty of law. Common law crimes rarely capture specific behaviour in an appropriate manner and issues of punishment are often unaddressed. The decision in *Hamilton* is welcome to the extent only that it ensures that this behaviour is caught by the criminal law since it is submitted it is not a petty nuisance.

However this analysis has demonstrated that the offence of outraging public decency has limits and may not apply to all offenders who take up-skirt pictures. It is submitted that the voyeurism offence contained within s.67 of the Sexual Offences Act 2003 should be amended to take account of this behaviour. The New Zealand model acts as a starting point for this amendment and demonstrates how the law could seek to tackle those who deliberately take such images without the consent of others. This law should also apply to those who seek to take up-skirt images of children. Currently these are dealt with under the Protection of Children Act 1978 but it must be doubted whether this is the most appropriate legal remedy taking account of what is known about this deviant behaviour.

Case and Comment

Editor: Professor David Ormerod, LL.B.

Commentaries by Professor David Ormerod, LL.B., Professor Andrew Ashworth, Q.C., D.C.L., F.B.A., Andrew J. Roberts, LL.B., M.Phil., N. W. Taylor, LL.B., M.Phil., B.J. Fitzpatrick, B.A., Neil Kibble, LL.B., LL.M.

Sentencing Cases and Commentaries by D. A. Thomas, Q.C., LL.D.

Code C of Codes of Practice to PACE

Whether requirement for written record to be made of comments made by defendant outside context of interview where statements made during commission of public order offence

LT Causing harassment alarm or distress; Exclusionary discretion; PACE codes of practice; Police interviews; Police records; Statements; Unfair evidence

DPP v Lawrence

Divisional Court: Auld L.J. and Collins J.: July 16, 2007; [2007] EWHC 2154 (Admin).

Police officers stopped a car containing the appellant and others. The officers, on speaking to them, formed the opinion that they had grounds to search them for drugs. The appellant allegedly then became aggressive and abusive and repeatedly told the police officers to “fuck off”. The officers allegedly warned him about his behaviour, and told him that they would arrest him if he did not stop it. He did not stop it, and they arrested him and took him to the police station. It was not clear whether the appellant said anything when charged with an offence of disorderly conduct contrary to s.5 of the Public Order Act 1986 other than that he denied the charge. It was common ground that he was not interviewed before or after being charged. In due course, as a result of informal advance prosecution disclosure, the appellant was notified before trial of the police officers’ proposed evidence in the form of copies of their witness statements, and had an opportunity at the hearing, if he wished to take it, to contradict it. However, at the close of the prosecution opening, the justices, having been informed that the appellant’s advocate intended to apply under s.78 of the Police and Criminal Evidence Act 1984 (PACE) to exclude evidence from the officers as to what the appellant had said at the scene, decided to determine that issue without first hearing any evidence from the police officers or Lawrence. The issue for the justices turned on PACE Code C Pt 11, which was headed “Code of practice for the detention, treatment and questioning of persons”, and more particularly, para.11.13. Part 11 of Code C, of which para.11.13 formed a part, was directed at the stage at which a person detained by the police was interviewed about the offence he was alleged to have committed, or at the stage when there was or might have been an exchange between such a person and a police officer about that alleged offence. He argued that there had been a breach of the “verbal” provisions of Pt 11.13 with the consequence that for the justices to admit evidence of what the appellant had allegedly said to the officers at the scene would have such an adverse effect on the fairness of the proceedings that the justices should, in the exercise of their power under s.78, exclude it. Secondly, it was maintained that it was unfair of the police not to interview the appellant

so as to give him an opportunity to deny, which he did, the language attributed to him, or not to offer him any other opportunity to show him their notebooks and invite him to adopt the same procedure. The justices were of the opinion that the appellant's words, part of his alleged conduct in committing the offence, were caught by para.11.13 because, in the absence of an interview, he had had no opportunity at an early stage before trial to comment on the words attributed to him. They accordingly decided they should exclude the evidence as unfair under s.78. The prosecution offered no evidence and the justices dismissed the charge. The prosecution appealed by way of case stated. On appeal the prosecution argued that Pt 11 of Code C applied to statements not themselves constituting an offence or part of it, but made subsequently by a person suspected of it to a police officer on or during arrest, after arrest, en route to a police station or whilst in detention in police custody.

Held, allowing the appeal, there was no basis as a matter of interpretation for extending para.11.13 of Code C beyond its confines of protecting a suspect against fabrication by a police officer of self-incriminatory statements after the alleged commission of the offence and not as part of it. The provisions of Code C Pt 11, were not directed at what a suspect was alleged to have said as part of his conduct constituting the offence, but at what he was alleged to have said of a self-incriminatory nature on or after arrest for it. Otherwise, all offences of a public order nature in which words spoken were a necessary or possible constituent of the offence, in whole or in part, would engage Pt 11 of Code C, quite independently of and before any possibility of an interview, or "unsolicited comments outside an interview" could arise. Those offences would include the public order offences to be found in ss.1–5 of the 1986 Act, and those involving the stirring-up of racial hatred in ss.17–22 of the Act. In the instant case, the respondent had had the opportunity when charged to contradict what was alleged against him. He had seen the witness statements of the officers in good time before the hearing, and would have had an opportunity at trial to challenge their evidence if the justices had given him an opportunity to do so. The case would be remitted to the justices.

[Reported by Dilys Tawse, Barrister]

Talbir Singh for the claimant.

R. de Mello and *D. Bazini* for the defendant.

Commentary. As Auld L.J. notes, the purpose of Pt 11 of Code C is to militate against "verballing", the manufacture of self-incriminating statements and their attribution to an accused. This purpose is to be realised by the keeping of appropriate records of a suspect's relevant actions and words. The significance of proper record-keeping is illustrated by a variety of decisions, including *Keenan* [1990] 2 Q.B. 54, *Canale* [1990] Crim. L.R. 329, and *Delaney* (1988) 88 Cr. App. R. 338. In *Keenan*, Hodgson J. (at 69–70) suggested that where an appropriately serious breach of the Codes in relation to verballing took place, it would often be appropriate to exclude the evidence in question. He noted (at 70):

"If the rest of the evidence is strong, then it may make no difference to the eventual result if [the judge] excludes the evidence. In cases where the rest of the evidence is weak or non-existent, that is just the situation where the temptation to do what the provisions are aimed to prevent is greatest, and the protection of the rules is most needed."

However, the present case makes clear that the protections against verballing are to apply principally to the stage at which a suspect is interviewed (an interview itself is defined in Code C para.11.1A as “the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences . . .”) and also to other exchanges between the suspect and the police about that alleged offence which may not take place in the formal parameters of an interview (Code C para.11.13 refers to “. . . unsolicited comments, which are outside the context of an interview but which might be relevant to the offence”). Where the contentious utterances of the suspect form *part of the offence*, as in the present case, Pt 11 of Code C does not apply.

If the decision were different, the result would be that in the context of any offence which one might loosely refer to as a “speech crime”—more specifically, where particular words constituted *an element of the offence charged*—suspects would be entitled to the various protections offered by Pt 11 of Code C, including the opportunity to scrutinise the police’s written account of what was said, and to record their own agreement or disagreement as appropriate. Auld L.J. also notes that if words constituting an offence would give rise to these entitlements for a suspect, then acts constituting an offence ought to give rise to similar entitlements. Neither of these outcomes can have been the legislative intention. There are various offences of which words may constitute an element. Auld L.J. mentions the offences in ss.1–5 of the Public Order Act 1986; the offences involving stirring up racial hatred in ss.17–22 of the 1986 Act; and sedition. There are many others, for example making threats to kill under s.16 of the Offences against the Person Act 1861, or indeed assault or any offence constructed on the commission of an assault, presumably including manslaughter (see the rejection by the House of Lords in *Ireland* [1998] A.C. 147 of the suggestion in *Meade and Belt* (1823) 1 Lew. 184 that words alone could not constitute an assault).

An aspect of the defendant’s case was that he had not had the opportunity to contradict the allegations against him in the manner that would have obtained if he had been presented with the record of an interview or analogous exchange in accordance with Pt 11 of Code C. However, as Code C did not apply, there was no entitlement of this nature. Moreover, the court notes the defendant’s opportunity to respond to the allegations at the point of charge, and that he had access to the statements of the police officers in a timely manner and could have sought to rebut the prosecution’s evidence at trial. This might indeed have necessitated him giving testimony on his own behalf. However, there would be no problem such as that in *Keenan* [1990] 2 Q.B. 54, in which K’s giving evidence could not cure the defect of an earlier breach of Code C caused by improper record-keeping. The improper record-keeping in such circumstances would have led to K, in essence, being required to forego his right to silence in order to conduct a meaningful defence. In the present case there was simply no defect, because there was no requirement to make a record in the first place.

The court concludes with a sensible observation relating to situations where there is a s.78 challenge to evidence of statements of an accused, and magistrates have heard the evidence and pursued the issue of its unfairness to the point of choosing to exclude it. Such a bench should, the court suggests, seek the views of the parties and consider whether any consequential substantive hearing ought to be taken by a differently constituted bench.

[B.F.]

Firearms

Possessing a firearm with intent to endanger life—whether conditional intent to use in lawful self-defence was a defence—where person in possession not in immediate danger of attack—where possessed with intent to pursue some lawful purpose other than self-defence, but conditional intent to use in self-defence

 Intention; Possession of firearms with intent; Self-defence

R. v Salih (Guner)

Court of Appeal (Criminal Division): Hooper L.J., Pitchford and Dobbs JJ.: November 21, 2007; [2007] EWCA Crim 2750.

S was convicted of possession of a pistol and ammunition with intent to endanger life, contrary to the Firearms Act 1968 s.16. The gun was found in his pocket at a police station. The Crown case was that he was involved in dealing in guns and carried the pistol for protection. The defence case was that he had effectively inherited the weapon when he took over the running of a shop from a relative and that his only intent was to hand it in under a gun amnesty.

On appeal, it was argued that the judge should have directed the jury that they should acquit if they concluded that the *only* reason why S had been in possession of the pistol may have been that he intended to use it if necessary for lawful self-defence, on the basis of *Georgiades* (1985) 89 Cr. App. R. 206. In support of this submission, counsel argued that, given that it was said in *Bentham* (1972) 56 Cr. App. R. 618 that it was not necessary to show an intention immediately to endanger life; and that the section did not require an unconditional intention, then if the primary submission was not correct, a person lawfully in possession of a shotgun who accepted that he might use it should armed raiders attack his house would be guilty of the offence.

Held, dismissing the appeal, (1) *Georgiades* made it plain that it would only be in rare cases that self-defence would provide a defence to a charge under s.16. In *Stubbs and Thomas* [2007] EWCA Crim 1714 (a refused renewed application for leave to appeal) the court stated that the trial judge had been right to hold that the defence was available only if the risk of serious harm was imminent. The effectiveness of legislation designed to prevent the carrying of firearms (or offensive weapons) would be seriously impaired if anyone who reasonably feared that he or she might at some time be unlawfully attacked was allowed to carry a weapon. If at the moment at which the defendant was alleged to be in possession of a firearm, he or she anticipated an imminent attack and was carrying the weapon for defence against a specific danger, that may be different. *Georgiades* established that if a defendant was acting in self-defence at the moment when he was alleged to be in possession of a firearm, then he would not be guilty. But if the possession with intent to endanger life was alleged to have occurred at some time before that moment and at a time when he or she was not in immediate fear of attack, then, in accordance with *Stubbs and Thomas*, *Georgiades* did not apply.

(2) The answer to counsel's argument based on conditional intent was provided by *Mahnik v DPP* [1989] Crim. L.R. 451 (a case not cited in argument). In that (offensive weapon) case, Bingham L.J., as he then was, drew a distinction between individuals who armed themselves with an offensive weapon and those concerned with security and law enforcement. By analogy, the public policy reasons which

prohibited a person from possessing a firearm with intent to endanger life (or an offensive weapon) even though he or she might only use the firearm in lawful self-defence did not apply to a person in lawful possession of a firearm whose intent was to use the firearm for purposes other than to endanger life, albeit he or she might have the conditional intention adverted to in *Bentham*.

Cases considered: *Georgiades* (1989) 89 Cr. App. R. 206; *Bentham* (1972) 56 Cr. App. R. 618; *Stubbs and Thomas* [2007] EWCA Crim 1714; *Malnik v DPP* [1989] Crim. L.R. 451.

[Reported by Richard Percival, Barrister]

Christopher Blaxland, Q.C. for the Crown.

Mark Gadsden for the appellant.

Commentary. The court takes what is, it is submitted, on policy grounds an entirely predictable interpretation of the section. Section 16 provides:

"It is an offence for a person to have in his possession any firearm or ammunition with intent by means thereof to endanger life . . . or to enable another person by means thereof to endanger life . . . whether any injury . . . has been caused or not."

The mischief at which the section is aimed, as *Archbold*, para.1738 puts it:

"[I]s that of a person possessing a firearm ready for use, if and when occasion arises, in a manner which endangers life. The prosecution are not required to prove an immediate or unconditional intention to endanger life."

The court is right, it is submitted, to reject the appellant's argument that the jury need to be directed that they should not convict if the *only* reason why the defendant is in possession of the pistol may be for self-defence. First, that places too much emphasis on the potential unlawful use of the weapon. The primary purpose of s.16 is not to protect against causing unlawful injury or life endangerment; it is an offence designed to protect against the harm posed by people carrying guns, being prepared to use them. If a defence of possession for self-defence were to be allowed it is highly likely that it would be pleaded in many if not most trials. The purpose of the section would be entirely frustrated because more people would be carrying guns to protect themselves in self-defence, so they would say, against all these people who were now carrying guns, who would also claim to be carrying the weapons only to protect themselves, being aware that there were more people who were carrying guns, etc.

What *Georgiades* recognises is a very limited exception to the offence. If the defendant is already under attack or is facing an *imminent* attack, he is allowed to defend himself, and that must include being allowed to arm himself to do so. If necessary, that would include a firearm. He would then be not guilty of unlawful possession of the firearm. However, the trigger (no pun intended) for the justified non-criminal possession is the fact that he is *there and then* engaged in defending himself or others or preparing to meet an imminent attack. The plea of self-defence which the defendant would be raising would justify his act of possession, as well as any reasonable force he uses, but until the circumstances warrant acts of self-defence (i.e. actual or imminent attack), the defendant cannot rely on the prospect of possible future attacks. The Court of Appeal

has reiterated on numerous occasions how rarely the exceptional *Georgiades* defence will apply.

[D.C.O.]

Infanticide

Whether mens rea of infanticide consists of an intention to kill or cause grievous bodily harm—Infanticide Act 1938 s.1(1)

LT Infanticide; Intention; *Mens rea*

R. v Gore

Court of Appeal: Hallett L.J., Silber and Wilkie JJ.: July 4, 2007; [2007] EWCA Crim 2789.

The appellant pleaded guilty to an offence of infanticide contrary to s.1(1) of the Infanticide Act 1938. The body of the deceased child had been found in sand dunes near to the appellant's home some hours after she had given birth without assistance. Expert evidence was to the effect that the child had died from neonatal anoxia, which may have arisen due to lack of attention following delivery. On that basis, the particulars of the indictment had alleged that the appellant had caused the death by wilfully omitting to attend to the child or to seek medical attention following birth. Whilst the appellant had been advised that there was a potential defence available to her based on her mental state, she expressed her wish to plead guilty and was fully aware of the implications of her ultimate and informed decision to do so.

The Criminal Cases Review Commission referred the case to the Court of Appeal on the basis that it was satisfied (*inter alia*) that the appellant's defence had been prejudiced by the drafting of the indictment, which had made no reference to any intention to kill or cause grievous bodily harm; and that this had had a consequential impact on the advice which the appellant had received. Central to the reference was a submission that s.1 of the 1938 Act should be narrowly construed, so that a woman might only be guilty of infanticide if all the ingredients of murder were proved, particularly an intention to kill or cause really serious bodily harm.

Held, dismissing the appeal, that given the appellant's repeated and expressed desire and intention to plead guilty to the offence, whatever advice she received, inclusion of the words "with the intention of killing or causing grievous bodily harm to the child" (if such was required as a matter of law) in the indictment would have made no difference to her. However narrowly or broadly defined the *mens rea* of the offence of infanticide should be, she had rejected the possibility of a defence on the grounds of her mental state; and there being no reason to suppose that she would have taken any other course had the indictment been drafted differently, she could not have been prejudiced by any alleged defect.

Obiter dictum: There was no requirement that all the ingredients of an offence of murder be proved before a defendant could be convicted of infanticide contrary to s.1(1) of the 1938 Act. Parliament had intended to create a new offence of infanticide which covered situations much wider than offences that would otherwise amount to murder. The *mens rea* of the offence was contained expressly in the first few words of s.1(1), namely a requirement of proof that the act or

omission was wilful. There was no reference to any intention to kill or cause serious bodily harm; and if there was such a requirement, then use of the word “wilful” would be superfluous. Further, the section created an offence in subs.(1) and it also provided a partial defence and possible alternative verdict to murder in subs.(2). If s.1(1) had been intended to be used only where the mental element for murder was proved, then s.1(2) would be superfluous since the offence created by s.1(1) could always have been left open to the jury as an alternative charge to murder. Furthermore, the consequence of the wider interpretation of s.1 was that infanticide covered a wider range of cases. A distressed young mother in a similar position to the appellant in the present case was not forced to confront the stark truth that, for whatever reason, however disturbed she may have been at the time, she killed her child intending to kill or cause really serious harm. Nor would such a young woman, if she did not accept that she had such an intention, have to face a murder trial. No useful purpose would therefore be served by restricting the ambit of the offence.

[Reported by Stephen Leake, Barrister]

Alistair Webster, Q.C. and Paul Turner for the appellant.

Paul Reid, Q.C. for the respondent.

Commentary. The scope of infanticide has been the subject of much debate in recent decades, with claims that its medical basis is ill-founded, or that it unfairly medicalises some women, or that the restriction to killing children under 12 months should be loosened, or that it should be merged with diminished responsibility, and so forth. But there has been hardly any discussion of the principal point raised by this reference: whether the offence of infanticide only applies where the *mens rea* of murder was present.

Historical research suggests that when the two Infanticide Acts were passed, in 1922 and 1938, Parliament's concern was solely to ensure that offences of child-killing by women that would otherwise be murder could now be treated as infanticide, either by returning this verdict on an indictment for murder or by charging it in the first place. The history indicates that the preoccupation of reformers was to avoid the long-standing dilemma for juries and judges in these cases, of having to choose between a murder verdict and a verdict that would be a distortion of the law: see the classic article by D. Seaborne-Davies, “Child-killing in English Law” (1937) 1 M.L.R. 203 at 276. Glanville Williams, who took a special interest in this corner of the criminal law, discussed infanticide solely in the context of murder: *Textbook of Criminal Law*, 1st edn (1978), pp.631–632. There appears to have been no discussion of the position of a woman whose killing of the child would only have been manslaughter (by unlawful act).

However, Hallett L.J. demonstrates (at [34]) that it is possible to interpret s.1(1) of the 1938 Act as extending to such cases. First, the prosecution need only prove that the woman caused the death “by any wilful act or omission”: this does not require an intent to cause death or grievous bodily harm, but simply an intentional act (or omission) of some kind. Secondly, although s.1(1) goes on to state that the woman is guilty of infanticide “notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder”, the proper reading of the word “notwithstanding” is that there can be a conviction for infanticide even if the offence otherwise amounted to murder, and not only in circumstances in which the

offence would otherwise amount to murder. Thirdly, if s.1(1) were to be interpreted as meaning that the offence of infanticide could only be committed where the crime would otherwise have been murder, there would be no need for s.1(2), which provides that a jury may return a verdict of infanticide where the offence would otherwise have been murder.

Logical as these points appear to be, there seems to be an element of strain in the court's reasoning. The possibility of reducing manslaughter to infanticide has not been canvassed in the leading textbooks, and it might be thought rather late, some 70 years after the 1938 Act, to give it this expansive meaning. Reporting on his research into infanticide and other child-killing cases in the early 1980s, Professor Mackay noted:

"In the fifth case D asphyxiated her seven-week-old child by stuffing tissue paper into its throat. A psychiatric report stated that D suffered from a manic illness that would fall within both infanticide and diminished responsibility. However, the D.P.P. decided not to charge infanticide as he considered this to be available only in cases where the alleged actions, in the absence of any mental disturbance caused by birth, would amount to murder. In his opinion the lack of evidence of any evidence of intent precluded an infanticide charge so D pleaded guilty to manslaughter and received three years' probation." R.D. Mackay, "The Consequences of Killing Very Young Children" [1993] Crim. L.R. 21 at 28.

Perhaps the DPP was wrong, in the early 1980s, but this seems to have been the prevailing view in the profession for many years. It should be added (a) that Hallett L.J. appears to misunderstand the thrust of Professor Mackay's research at para.23 (only his case D is relevant); and (b) that Professor Mackay's more recent research for the Law Commission reveals no cases of manslaughter being reduced to infanticide: *Murder, Manslaughter and Infanticide*, Law Com. No.304 (2006), Appendix D.

The Court of Appeal's reinterpretation is, however, a benevolent one. It is desirable that infanticide (assuming its continued existence) should be capable of being charged both in cases where the offence might otherwise have amounted to murder and in cases where the offence would only have been manslaughter. A proposal to change the law in this direction has been made in recent years but, again, only by a kind of side-wind. The Criminal Law Revision Committee was, following a public consultation, exercised by the problem of a woman who merely attempted to kill her young child soon after the birth and who might therefore find herself charged with attempted murder. Their solution was to recommend attempted infanticide "as an alternative verdict to attempted murder or attempted manslaughter" (CLRC, 14th Report, *Offences against the Person* (1980), para.113). This appears to be the first mention of reducing a manslaughter offence to infanticide, and it then found its way into the Committee's recommendations more generally: "the act or omission is such as would otherwise amount to murder or manslaughter" (para.19(b)). This recommendation was incorporated into the draft criminal code of 1989, cl.64(1) of which begins:

"A woman who, but for this section, would be guilty of murder or manslaughter of her child is not guilty of murder or manslaughter, but is guilty of infanticide, if her act ..."

This was not a major issue in the latest homicide reform proposals from the Law Commission, but it was discussed. In *Murder, Manslaughter and Infanticide*, Law Com. No.304 (2006), the Commission recommends "that the offence/defence of infanticide

should apply to both first degree murder and second degree murder” (para.8.42). This is proposed on the ground that otherwise there would be an “unjust anomaly” if a woman whose offence was second degree murder were convicted of that offence, whereas a mother whose offence was otherwise first degree murder had her offence reduced to infanticide. But does not the same argument apply to manslaughter, as the CLRC evidently thought (but did not fully spell out)? Why should the mother whose offence would otherwise be unlawful act manslaughter not have the benefit of the infanticide offence? This matter might fruitfully be addressed in the Ministry of Justice’s consultation on homicide law reform. In the meantime, the Court of Appeal appears to have moved the law in this direction by judicial interpretation.

[A.J.A.]

Privilege

Evidence—privilege—incrimination—defendant pleading guilty to offence of terrorism—plea entered on basis of prosecution opening note—defendant giving evidence on behalf of co-accused—defendant refusing to answer questions relating to offence to which he had pleaded guilty—judge finding defendant in contempt of court—invocation of protection of privilege—whether protection available where compulsion to answer questions creating no material increase to risk of incrimination

 Co-defendants; Criminal proceedings; Foreign proceedings; Guilty pleas; Privilege against self-incrimination; Witnesses

R. v. Khan

Court of Appeal (Criminal Division): Moses L.J., Pitchers and Treacy JJ.: October 16, 2007; [2007] EWCA Crim 2331.

The defendant pleaded guilty to conspiracy to enter into or become involved in an arrangement as a result of which money or other property would be made available for the purposes of terrorism. The prosecution case was that he had been an influential member of an organisation which was involved in terrorist activities aimed at securing an Islamic state in Kashmir. The count to which he had pleaded guilty concerned his activities on behalf of the organisation in the United Kingdom, Canada and the United States of America. He faced parallel proceedings in the United States, where he had been indicted on similar, but not identical, charges. His plea of guilty had been entered on the basis that he accepted all the allegations made against him in the prosecution case as set out in the opening note and position statement, and took no issue with the prosecution on any issue of fact relevant to sentencing. His co-accused, S, pleaded not guilty and was tried before a jury. The defendant gave evidence for S. The thrust of the evidence he gave on behalf of S was that he alone had been responsible for the actions which the prosecution had sought to impute both to him and S jointly. However, during his evidence-in-chief, he claimed privilege in response to certain questions. The judge accepted the claim in relation to those questions, provided that it was relied upon to avoid having to make further admissions of criminality. The prosecution stated that it would dispute any claim to privilege. The judge responded:

“... [I]f any of the matters covered by the indictment to which he has pleaded guilty forms the subject matter of questions that he refuses to answer questions

about, you will have the clearest direction from me that that will constitute a contempt of court.”

The judge reiterated his original warning during cross-examination and drew a distinction between those matters which the defendant had already admitted by virtue of his guilty plea and the basis of that plea contained in the position statement, and those matters which fell outside the scope of his plea of guilty and that position statement. Notwithstanding those warnings, the defendant refused to answer questions about matters which were plainly the subject-matter of his plea of guilty when understood in the context of the position statement. The judge found the defendant to be in contempt of court. He ruled that the defendant had already incriminated himself as to the issues raised in cross-examination by his own guilty plea and he was therefore not entitled to rely on the protection against self-incrimination. He noted that he had no doubt that the defendant had chosen to answer some questions which were undoubtedly covered by the possible proceedings in the United States, whilst refusing to answer questions on others for wholly opportunistic and cynical reasons. The defendant appealed.

The issue arose as to the extent to which the defendant could rely on privilege in refusing to answer questions during the course of evidence he gave on behalf of a co-defendant.

Held, dismissing the appeal, the privilege was designed to provide protection for a person from being compelled by the state to convict himself out of his own mouth. The protection was afforded to one who had a reasonable ground for apprehending a real and appreciable danger of incrimination. It followed that protection could not be invoked where the compulsion to answer questions created no material increase to an existing risk of incrimination. If the compulsion to answer questions did not increase the risk of incrimination or strengthen the case against a defendant, there was no basis for affording that defendant protection against the questioning. The privilege was designed to provide protection in relation to questions which might incriminate. If the danger of incrimination had already arisen and was independent of any questions which a person was required to answer, it was not possible to see why that person should be entitled to any protection at all. If his position was made no worse by answering a question, then there could be no basis for him to invoke the privilege.

In the instant case, it was impossible to see how, had the defendant answered the questions asked of him, his position would have been worse than it already was in relation to potential criminal proceedings in the United States. He had not only admitted his guilt on the relevant count but had also admitted all those facts set out against him in the prosecution opening note. In those circumstances, to answer questions about whether his plea of guilty was truthful or not or about the subject-matter of the opening note made no difference whatever to the position he had himself voluntarily created. Any future case would flow entirely from his confession and the terms in which it was made. It would be absurd if the defendant could resist any attempt to test his evidence in favour of S by seeking protection against a danger which he had already created before he was asked any questions at all, either on behalf of S or by the prosecution. It would have been quite wrong to permit the defendant to manipulate the court process by claiming protection against a danger which he had already created for himself. When he had been required to answer questions about those matters which he had already admitted,

he was not being placed under any compulsion to incriminate himself—he had done that already.

Per curiam: It is dangerous to assess the strength of the claim to privilege on the basis of the motive of the person seeking to invoke it. There will be many cases where it will be “convenient” for a defendant to rely upon the privilege. Often his motives will be mixed. But even if the motives are mixed that is no basis for refusing the protection against self-incrimination. The court should not refuse protection merely because it suspects the good faith of the person seeking to deploy the privilege. After all, the principle applies to one who wishes to avoid conviction as much as to the innocent who wishes to avoid the inconvenience of a prosecution.

Khan v Khan [1982] 1 W.L.R. 513; *R. (on the application of the Crown Prosecution Service) v Bolton Magistrates’ Court* [2003] EWHC 2697 (Admin); [2004] 1 W.L.R. 835 applied. *Den Norske Bank ASA v Antonatos* [1999] Q.B. 271 distinguished.

[Reported by Vanessa Higgins, Barrister]

Lawrence McNulty for the defendant.

Andrew Edis, Q.C. and Annabel Darlow for the Crown.

Commentary. The court’s judgment, on a relatively straightforward matter, is surprisingly muddled. Although the concepts of legal professional privilege and privilege against self-incrimination are distinguishable (see *Phipson on Evidence*, 16th edn (2005), para.23-15), they are used interchangeably throughout. What was, in fact, at issue was the appellant’s privilege against self-incrimination; the immunity that he was claiming did not relate to any communication with a legal adviser. The appellant had entered a guilty plea and the issue of his privilege against self-incrimination arose in the context of his evidence as a witness for his co-defendant. Although a witness may be compelled to answer questions put to him in cross-examination, this is subject to the privilege against self-incrimination. The classic statement on the extent of the privilege (to which the court made no reference) is provided in *Boyes* (1861) 1 B. & S. 311. There it was said that the privilege exists where there is a “reasonable ground to apprehend danger to the witness from his being called to answer”. In other words, the appellant could only claim privilege in relation to any risk that answering questions might reasonably have left him open to further charges or punishment.

The judgment contains little by way of illustration of the matters on which the appellant was cross-examined. However, the law is clear and if the trial judge properly concluded that the matters on which he was questioned fell within the scope of his position statement, the appellant could not claim the privilege. However, against the backdrop of a relatively brief position statement relating to a guilty plea, whether or not the matters on which the appellant is questioned go beyond the confines of that statement may generally involve fine judgments. In circumstances such as those found in the present case, it may, as a matter of good practice, be preferable to deal with sentencing before a defendant is permitted to proffer testimony for or against a co-accused. Where a defendant gives evidence against a co-accused the fact that there is no possibility of a reduced sentence may help to ensure that the evidence he gives is reliable. On the other hand, where he gives evidence for a co-accused, until sentence is determined, the defendant might have a legitimate claim to privilege on the basis that information that he provides under cross-examination might adversely affect the sentence that is handed down. To this extent, requiring him to answer questions put to him in cross-examination might expose him to the risk of a degree of

punishment which he would not otherwise have faced had he been able to rely on the privilege.

[A.J.R.]

Rape

Fresh evidence—evidence of complainant making numerous false complaints—effect on credibility—whether conviction unsafe

(LT) Admissibility; Credibility; Cross-examination; False statements; Fresh evidence; Rape; Victims

R. v C

Court of Appeal (Criminal Division): Sir Igor Judge P., Pitchford J. and Sir Richard Curtis: October 16, 2007; [2007] EWCA Crim 2551.

The complainants, K and L, were sisters. They made allegations against the defendant of rape and indecent assault. At the defendant's trial, K was cross-examined about a number of false allegations, including allegations of sexual offences, which she had made against other people. The allegations made by L were very similar. In cross-examination, L confirmed that she had wanted to stay with her sister and that she had been aware that K wanted to leave their father's house. She denied that K had told her what she should say when she was interviewed or that she and K had made up the allegations so that they could leave home together. The essence of the defendant's defence was that the evidence given against him represented a complete fabrication. In 2000, the defendant was convicted of two counts of rape and indecent assault in respect of both complainants. In 2002, the Criminal Cases Review Commission was invited to consider the safety of the convictions on the basis that K had made a false allegation of rape against her brother in 2001. At that stage, there was no evidence to suggest that the allegation was false. Accordingly, the Commission decided that there was no basis upon which to refer the case to the Court of Appeal. However, in 2006, the defendant again invited the Commission to conduct a review of his conviction on the basis that K had been cautioned for wasting police time following allegations of sexual abuse that she had made against her stepfather. An investigation undertaken by the Commission demonstrated that K had a proved tendency to make false allegations that she was a victim of sexual crime. Such allegations included reports that she had been raped by her brother, a customer at her place of work, a boyfriend and her stepfather. The Commission referred the defendant's case to the Court of Appeal, pursuant to s.9 of the Criminal Appeal Act 1995. Even after the defendant's convictions were referred, K made a false allegation of rape against a former boyfriend.

Held, allowing the appeal, a moment's glance at the facts would demonstrate that the new material would severely undermine any confidence that any jury could have had in K's evidence; the credibility of K was damaged beyond repair. The defendant's conviction for rape and indecent assault on K were flawed. They had to be quashed. Moreover, the fresh evidence would have had a direct impact not only on the jury's judgment of the allegation made by K, but also those made by L, simply because of their close relationship and the desire she had expressed

to stay with K ahead of any consideration. There was also a telling similarity in the accounts which they had given. In the circumstances of the present case, the convictions relating to L could not safely be upheld and so too would be quashed.

Per curiam: Rape is a repulsive crime. It requires substantial punishment. No one doubts that the victims of rape should be treated with every possible consideration by the criminal justice system. On the other hand, just because rape is a repulsive crime, a false allegation can have dreadful consequences, obviously and immediately for an innocent man who has not perpetrated the crime; but also, and this is not to be overlooked, because every occasion of a proved false allegation has an insidious effect on public confidence in the truth of genuine complaints, sometimes allowing doubt to creep in where none should, in truth, exist. There cannot be very many cases, although the present case may be one of them, where the offence of attempting to pervert the course of justice, on the basis of a false allegation of rape, certainly one which is set out in detailed formal statement or pursued to the door of the court, should not be prosecuted for what it is. It is only in the rarest of cases that a police caution sufficiently addresses either the criminality of a false allegation of serious crime or (and this is no less important) the possibility of the need for appropriate treatment which will address the problems which have led the complainant to fabricate the allegation she has made.

[Reported by Vanessa Higgins, Barrister]

Jonathan Cooper for the defendant.

Warwick Tatford for the Crown.

Commentary. The case is a stark and troubling reminder of the potentially appalling impact of false allegations of serious sexual offences. A series of detailed allegations that convinced police officers were shown by the CCRC to have been fabricated, leading to C's convictions being quashed.

There can be no doubting the importance of evidence of prior false allegations, particularly, as Sir Igor Judge P. observed, where the allegation has been made formally and in detail or has been pursued to the door of the court. As C. Fishman, *Jones on Evidence: Civil and Criminal*, 7th edn (1992), p.803 has noted:

"A false rape accusation reveals a flaw in character of a particular, and particularly dangerous, kind. Its relevance, in a case where the key question is whether the complainant is lying about rape this time, is palpable."

Evidence of prior false allegations is especially important where the case effectively rests on the credibility of the complainant and defendant. As Epstein argues:

"A witness's willingness to falsely accuse someone, thereby engaging the legal system, is confirmatory of a disregard for that system's requirement of truthful testimony and a willingness to abuse that same system." J. Epstein, "True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions" (2006) 24 *Quinnipiac Law Review* 609 at 656.

The principles underlying the admissibility of evidence of prior false allegations under the Youth Justice and Criminal Evidence Act 1999 are clear, having been laid down in *T and H* [2001] EWCA Crim 1877; [2002] 1 W.L.R. 632. The defendant sought leave to cross-examine the victim in order to establish that the victim had made

false statements in the past about both sexual and non-sexual matters. The trial judge wrongly concluded that the questions were questions about the victim's sexual behaviour within s.42(1)(c), and inadmissible under s.41(4). On appeal, Keene L.J. cautioned that where necessary courts would need to adopt a restrictive interpretation of s.41(4) if it would otherwise lead to the exclusion of relevant and significant evidence. The Court of Appeal emphasised that even if s.41(4) applied, it was necessary to decide whether the questions were about any sexual behaviour of the complainant. It was observed that:

"... [N]ormally questions or evidence about false statements in the past by a complainant about sexual assaults ... are not ones 'about' any sexual behaviour of the complainant. They relate not to her sexual behaviour but to her statements in the past ... the questions sought to be asked in both the present cases were not automatically excluded by s.41, even if they are seen as going principally to credibility." ([2001] EWCA Crim 1877 at [33] and [34])

Establishing the earlier allegations were false. Acknowledging the potential dangers, the court in *T* indicated that it was open to a judge to guard against abuse of the system, laying down a principle that has since been followed in this area. The defence need to seek a ruling from the judge that s.41 does not exclude the questions about false allegations. The defence must also have a proper evidential basis for asserting that any such previous statement was (a) made and (b) untrue. What constitutes a proper evidential basis is a difficult issue, and several judges have expressed real concerns about the danger of disputes on collateral matters. For example, in *E (Dennis Andrew)* [2004] EWCA Crim 1313; [2005] Crim L.R. 227, *E* was denied leave to cross-examine victims, aged six and four, about allegations they had made 15 months after the trial. Victim 1 had alleged abuse against a number of people, including her mother, an aunt and uncle, and another aunt and her son as well as physical abuse by an aunt and two others. Victim 2 alleged physical abuse on the part of some of the people mentioned by Victim 1 and by others. *E*'s argument was that it was wholly implausible that the children would have been abused by so many people and that the allegations were therefore almost certainly a fabrication or a fantasy. The Court of Appeal concluded that the evidential foundation had not been laid because none of the later allegations had been investigated. Compare *Garaxo* [2005] EWCA Crim 1170; [2005] Crim. L.R. 883 (refusal to assist police and reference by victim to getting a crime reference number for the "Social" capable of implying an improper motive for making the earlier allegation). Some commentators have argued that this decision is unduly permissive. In her comment on the case [2005] Crim. L.R. 883 at 884, Louise Ellison questioned the decision, doubting whether an inference of falsehood can safely be drawn from the mere fact of complainant withdrawal. It is probably the case that *Garaxo* marks the high point of admissibility. However, it can be argued that there was more in the case than a mere unwillingness to proceed. The requirement to provide an evidential foundation does not necessitate that *all* alternative inferences be eliminated, so that the *only* inference possible is that the allegation is false, merely that falsity is a reasonable inference to draw. In *V* [2006] EWCA Crim 1901, which involved the admissibility of three allegations of a sexual and non-sexual nature, the Court of Appeal regarded *Garaxo* as decided on its particular facts, and that "a failure to cooperate [with the police] may or may not justify a conclusion that an allegation is false, depending on the circumstances".

In their Home Office Online Report 20/2006, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials*, Temkin and Kelly recommend that only “demonstrably false accusations” should be admissible. According to the Report, attempts to introduce evidence of previous false allegations constituted one of the most common ways in which sexual history evidence was admitted. The Report stated that defence barristers sought to introduce such evidence to undermine the complainant’s credibility and that insufficient attention appeared to be paid to whether the previous allegations were demonstrably false. The Report also noted that it was very easy to allege that the complainant had made false or unproven complaints of rape in the past, and that there was some evidence that barristers and police officers were keen to find out whether previous complaints had been made to the police or others and to raise this matter in court. Within the profession there is some recognition that admissibility of false allegations may sometimes be sought too readily. In *Sexual Offences: Law and Practice* (2004) Rook and Ward acknowledge that:

“... [I]t is commonplace for the defence to suggest that a complaint is false if the matter has not proceeded to trial, even though there may have been many reasons why the case has been dropped, and the falsity of the complaint has not been established. In such circumstances, the jury may unfairly draw an adverse inference against the complainant.”

However, in noting that the falsity of the complaint “has not been established” they overstate the requirement.

Lessons from America. Ellison suggested in commenting on *Garaxo* that US courts impose a more stringent requirement; that there should be a strong factual foundation for concluding that the prior complaint is false. In fact, the US position is unclear:

“Notwithstanding the uniformity with which the cases require a preliminary determination of falsity, courts have varied widely with respect to the standard of proof required.” *State of Ohio v Boggs* (1992) 588 N.E.2d 813.

For example, in *State of Wisconsin v DeSantis* (1990) 456 N.W. 2d 600, the Supreme Court of Wisconsin held that the defendant should produce evidence at the pre-trial hearing sufficient to support a reasonable person’s finding that the complainant made prior untruthful allegations. The court concluded that the “reasonableness standard strikes the appropriate balance” between the competing policies and interests of the defendant and sexual complainants and is consistent with legislative intent.

Criminal Cases Review Commission. The present case underlines the importance of the work done by the Commission. It is not the first such case. See also *Warren* [2005] EWCA Crim 659 where the investigative work of the CCRC revealed significant evidence in relation to two false allegations in particular that had not been available to the defence at the time of the trial as a result of non-disclosure by the Crown. While the police incident report no-criming one of the earlier incidents in which the victim’s complaint was demonstrably false was disclosed to the defence, there was no disclosure of the complainant’s admission that she had fabricated the allegation. Consequently the defence made no application under s.41 in relation to the incident. The Court of Appeal concluded that had the evidence of the allegations been before the jury they might well have arrived at a different verdict and quashed the conviction.

Of course, not all evidence of prior false allegations is as unequivocal or as reliable as was the evidence in the present case and in *Warren*. Compare *Stephenson* [2006]

EWCA Crim 2325, where the defendant's argument was that he was not permitted to develop through cross-examination the contention that as a result of her miserable and exploited upbringing the complainant was inclined to make accusations of sexual abuse against all adult males with whom she came into contact. In the words of the defence case statement:

"Since that time [her childhood] the complainant has accused every adult male, with whom she had any significant contact, with sexually abusing her."

The Court of Appeal stressed that if there was a proper basis for suggesting that that is what had happened, the law allowed it to be explored before the jury. On the facts, however, the Court of Appeal observed that both of the allegations in respect of which applications had been made were ultimately accepted as true by the defence. Furthermore, the two "allegations" in respect of which applications had not been made, failed even to amount to allegations, let alone false allegations.

Satellite issues. Judges are understandably reluctant to open up disputed satellite issues that may distract the jury's attention from the central issue in the case, but it is important to recall Henry J.'s agreement, in *Funderburk* (1990) 90 Cr. App. R. 466, with the editors of *Cross on Evidence* that:

"... [W]here the disputed issue is a sexual one between two persons in private the difference between questions going to credit and questions going to the issue is reduced to vanishing point."

The recommendation that only demonstrably false allegations be admissible should be rejected on the grounds that it would impose an unfair burden on the defence and exclude potentially crucial evidence. However, the present case would also suggest that fuller investigation of allegedly false allegations *prior* to trial might reduce the number of cases in which the CCRC is obliged to carry out such an investigation *after* conviction and imprisonment. Such investigations have to consider not only the possibility that an allegation may have been made falsely, but also that an admission of fabrication may itself be false.

[N.T.K.]

Sentencing

Suspended sentence order—breach of community requirement of order—powers of Crown Court

LT Activation; Breach; Custodial sentences; Drug rehabilitation requirements; Sentencing powers; Supervision requirements; Suspended sentence orders; Unlawful sentences

R. v Phipps

Court of Appeal (Criminal Division): Hallett L.J., King J. and Judge Warwick McKinnon: November 7, 2007; [2007] EWCA Crim 2923.

The appellant pleaded guilty before the Crown Court to one count of burglary and asked for 14 further offences of burglary to be taken into consideration. The appellant was sentenced to a term of 12 months' imprisonment, with a suspended sentence order with a supervision requirement and a drug rehabilitation

requirement, for two years. The appellant had numerous previous convictions for burglary and was liable to a minimum sentence of three years' imprisonment under the Powers of Criminal Courts (Sentencing) Act 2000 s.111(2), unless the court was of the opinion that there were particular circumstances which would make it unjust to impose such a sentence in the circumstances. The sentencing judge found such circumstances to exist. The appellant left the drug rehabilitation centre which he was required to attend without permission and was eventually brought back before another judge of the Crown Court for a breach of the requirement of the order. The second judge stated that the appellant had thrown away the opportunity that he had been given. He revoked the suspended sentence order and sentenced the appellant to three and a half years' imprisonment.

Held, it was submitted that in revoking the suspended sentence order and resentencing the appellant, the judge erred in law. The Criminal Justice Act 2003 Sch.12 para.8 dealt with the powers of the court where there had been a breach of a community requirement attached to a suspended sentence order. It empowered the court to deal with an offender by ordering the suspended sentence to take effect with the original term unaltered or with a lesser term. Alternatively the court might amend the order by imposing more onerous community requirements, extending the supervision period or extending the operational period. Those provisions were to be compared with the powers of the court when dealing with a breach of a requirement of a community order as opposed to a community requirement attached to a suspended sentence order. This was governed by para.10 of Sch.8 to the 2003 Act, which empowered the court to deal with the offender "in any way in which he could have been dealt with for the offence by the court which made the order if the order had not been made".

The result was that the wholly deserved sentence passed by the second judge was not a lawful sentence. The court would quash the sentence of three and a half years' imprisonment and activate the original suspended sentence. The lesson of the case was that where a judge felt able to take a merciful course and not impose an immediate and substantial custodial sentence, which but for exceptional circumstances would have been merited, it is better to pass a community order, spelling out to the offender the consequences of a breach, rather than a suspended sentence artificially low in its terms, limited to a maximum period of 12 months, so that if there was a breach, the court's powers would not be limited as they had been in the case before the court.

E. Blackman for the appellant.

S. Vallaille for the Crown.

Commentary. This decision provides a useful illustration of the point made at the end of the judgment. A suspended sentence order with a community requirement (which is always obligatory) sounds more onerous than a simple community order, but its bark may often be worse than its bite. Breach of a suspended sentence order may be more likely to lead to the imposition of a custodial sentence, in view of Sch.12 para.8(3), which requires the court to activate the sentence in full unless it would be unjust to do so, but the custodial sentence can never exceed the term of the sentence which was originally suspended. Breach of a community order does not carry any statutory presumption that a custodial sentence will follow, but if the court decides to impose a custodial sentence following a breach of a community order, it is not

restricted in any way in respect of the length of the sentence imposed. The result seems to be that if the offence itself is one which would not in any event attract a sentence of more than 12 months (the maximum term which may be suspended) a suspended sentence order with the appropriate community requirements may convey to the offender the consequences of a possible breach; but if the appropriate custodial sentence for the offence would be greater than 12 months, it is better for the court to impose a simple community order, leaving the question of the length of any custodial sentence to be imposed on the breach of the order to be decided, in the event that a breach does occur, by the court which deals with the breach.

[D.A.T.]

Confiscation order—amount that may be realised—agreement between prosecution and defence as to amount to be paid—whether agreement consistent with statute

 Agreements; Certificates of inadequacy; Confiscation orders; Drug trafficking; Proceeds of crime; Realisable property

Telli v Revenue and Customs Prosecution Office

Court of Appeal (Civil Division): Ward, Moore-Bick and Moses L.JJ.: December 21, 2007; [2007] EWCA Civ 1385.

In 1996 a confiscation order was made against the appellant under the Drug Trafficking Act 1994 in the amount of £3,458,806, with a term of 10 years' imprisonment in default, subsequently reduced on appeal to eight, and further reduced to 5.6 years following the payment of a portion of the sum ordered. The appellant applied for a certificate of inadequacy in accordance with the Drug Trafficking Act 1994 s.17, on the basis that a statue which formed part of the property found to be available to meet any confiscation order had been repatriated by the Turkish Government as a stolen antiquity. In the absence of any possibility of realising the value of the statue, the appellant contended that his realisable property was inadequate for the payment of the amount outstanding. The outstanding balance at the time of the application was approximately £1.9 million. The application was refused by a judge of the High Court. The appellant appealed against the refusal of a certificate of inadequacy.

Held, (Moses L.J.) the confiscation order was made in 1996 as a result of an agreement between the Crown and the appellant. It was contended for the Crown that the appellant had agreed to pay the sum of £3,458,806 without any agreement as to the assets which he held. On the basis of the agreement, the application for a certificate of inadequacy was refused on the ground that the original order was based on a compromise made on the understanding that the appellant accepted that he would find £3,458,806. The language of the judge refusing the certificate of inadequacy used the language of compromise, as if the agreement could be regarded as analogous to the compromise of a civil action. The appeal raised the question whether that analogy could be drawn in the context of the statutory scheme under which the confiscation order was made. The 1994 Act had now been repealed and replaced by the Proceeds of Crime Act 2002. The 1994 Act required the Crown Court to determine, first, whether the defendant had benefited from drug trafficking. If the court was satisfied that the defendant had benefited, the court was required to quantify the amount of the benefit in accordance with s.4. Certain assumptions

were to be made. The process by which the court assessed a defendant's proceeds of drug trafficking was to be distinguished from the process for assessing the amount to be recovered under a confiscation order by virtue of s.5. Section 5 provided that the amount to be recovered under a confiscation order should be the amount the Crown Court assessed to be the value of the defendant's proceeds of drug trafficking, unless the court was satisfied that the amount that might be realised at the time the confiscation order was made was less than that amount. In that event, the amount of the confiscation order should be the amount appearing to the court to be the amount that might be realised or a nominal amount. The amount that might be realised at the time a confiscation order was made was the total value of all the realisable property held by the defendant. The effect of the provisions was that prima facie the court was required to award recovery of the full value of the defendant's proceeds of drug trafficking. The court had no power to make an order for any lesser sum unless it was satisfied that the total of the value at the time the confiscation order was made of all property held by the defendant was less than the value of the proceeds as assessed according to s.4. If a defendant failed to satisfy the court of the value of that realisable property, the court was bound to make a confiscation order in the full value of his proceeds. A defendant should not, if the statutory scheme was properly followed, be able to avoid an order recovering the full value of his proceeds unless he identified the realisable property he held. If he refused to do so, the court had no option but to order the full amount. It was not open to the Crown or the defendant to reach an agreement which purported to confer on the Crown Court an authority inconsistent with the court's obligations imposed by s.5. That was not to say that the Crown and the defendant could not reach an agreement as to the matters which formed the foundation of a confiscation order. It would be disastrous if it were otherwise. Throughout the period of the operation of the 1994 Act, agreements had been reached between prosecuting authorities and defendants without which proceedings in the Crown Court would grind to a halt.

It was important to emphasise that any agreement must be within the framework of the statutory scheme and not inconsistent with it. When the original confiscation order was made, the court issued a certificate in accordance with s.5 to the effect that the value of the defendant's proceeds of drug trafficking was £6 million and that the amount that might be realised at the time of the making of the order was £3,458,806. The certificate stated that relevant information regarding the amounts would be obtained from an officer of HM Customs and Excise. The only source of information at the time the order was made was a statement made by the officer under s.11; this was the only source consistent with the statute for determining the property which formed the basis of the valuation. The statement dealt with the proceeds received by the defendant and the value of his realisable property. This led to confusion. The essential function of the prosecutor's s.11 statement was to determine whether the defendant had benefited from drug trafficking and to assess the value of his proceeds. It was not part of the prosecutorial function to quantify the value of realisable property. That was because it was for the defendant to satisfy the court that the total value of the realisable property held by him (including gifts he had made) was less than the total value of his proceeds. For that reason, the prosecutor's statement need do no more than assess the full value of the proceeds, leaving the defendant to persuade the court that his realisable property was to be valued at a lower figure. The fact that a prosecutor's statement condescended to identify property held by the defendant and quantify its value did not in any way

alleviate the burden placed by the statute on the defendant to satisfy a court that the value of the realisable property was less than the proceeds of his drug trafficking. The confusion arose because the prosecution would generally seek to identify property held by the defendant at any time since conviction for the purposes of the required assumption under s.4(3). Although the property identified for that purpose was likely to be identical to the property identified for the purpose of assessing the value of realisable property on this s.6, the two purposes were distinct.

The prosecutor's statement contained many details of assets, including bank accounts and other property, which were identified with a view to establishing the value of the appellant's proceeds of drug trafficking. The statement concluded on this basis that the appellant had benefited at least to the amount of £3,458,806, but concluded that the appellant had various other assets available for realisation which could not be identified. The statement concluded with a request for the court to make a confiscation order in the sum that was assessed to be the appellant's proceeds from drug trafficking. It appeared that the officer preparing the statement did not accept that the realisable amount was less than the proceeds of drug trafficking for the purposes of s.5(3). The appellant identified 16 assets of various kinds which were valued at a total of £3,737,241, which included a statue valued at £2.2 million. It was contended that the total valuation of the realisable property for the purposes of the 1994 Act was £3,737,241, based on a valuation of assets which had been identified in the prosecutor's statement. That submission was not accepted. There was uncertainty about the valuation of the statue, and it was clear that the officer preparing the statement did not accept that the realisable assets were only those he had managed to identify; he took the view that the appellant had hidden assets either in the United Kingdom or elsewhere. The officer's conclusion that the appellant had hidden realisable assets was significant. The extent of a defendant's realisable assets at the time of conviction was likely to be peculiarly within his own knowledge. The statute required a defendant, if he could, to prove for the purpose of s.5(3) that the amount which might be realised at the time the confiscation order was made was less than the amount to be assessed to be the value of his proceeds of drug trafficking. Accordingly, if the defendant was found not to have disclosed the nature and extent of his realisable assets, a correct view of the statutory scheme was that he could not satisfy the court that the total value of all of his realisable property was less than the value of the proceeds of his drug trafficking. The court ought not therefore issue any certificate under s.5(3). If the Crown Court had accepted the information given by the officer in the prosecutor's statement, it ought not to have issued a certificate certifying that the amount which might be realised was less than the amount of the benefit. It was plain that that had been the Crown Court's conclusion. In the absence of any appeal against that conclusion, it could not be overturned and the court must now proceed on the basis that the total value of the appellant's realisable property was less than the value of the proceeds of his drug trafficking. However, the application for a certificate of inadequacy was to be considered in the context that the total value at the time of conviction of the appellant's realisable property included not only the assets which the officer had identified but those which the appellant had managed to conceal. The judgment of the court below on the application for the certificate of inadequacy was founded on the conclusion that the prosecution and defence had reached an agreement as to the amount which the appellant would pay without any identification of the assets whose valuation formed the total value at the time of all

the realisable property. The statutory scheme did not permit such a conclusion. In the absence of the identification of all the realisable property held by the defendant, a defendant would normally be unable to satisfy the court that the amount that might be realised at the time the confiscation order was made was less than the amount assessed to be the proceeds of his drug trafficking. Assets which he had hidden from the investigating officers might be equal to or in excess of the value of his proceeds of drug trafficking. No court could be satisfied that they were to be quantified at a lesser amount. The court suspected that, for many years agreements, had been reached according to which a judge had assessed the value of realisable assets as less than the benefit of drug trafficking without proper identification of the assets which formed part of that valuation. *R. (on the application of Customs and Excise) v L* [2007] EWHC 1191 (Admin) was an example. By the time a High Court judge was called upon to consider a certificate of inadequacy, he was bound by the conclusion of the Crown Court, even though it might have been based on an impermissible agreement; impermissible because the realisable assets had not been identified. The objection arose only where the realisable assets were agreed to be less than the value of the proceeds, without proper identification of those assets. In the instant case, the court was bound by the terms of the certificate granted by the Crown Court when the confiscation order was made. In dealing with the application for a certificate of inadequacy, it was incumbent on the court to assess the current value of the realisable property in order to determine whether it was inadequate to meet the outstanding sum. Once it was appreciated that the property held by the defendant included unidentified assets forming part of the total value of the realisable property at the time of the order, it was impossible for the appellant to establish that the realisable property was inadequate now to meet the payment of the outstanding order made in 1996. If the defendant failed to identify all the assets he held, no one would know their true value and by the time of the application for a certificate of inadequacy, the value of the assets which had not been identified might have increased. In the absence of a consideration of current value, no court could be satisfied that the realisable property was inadequate. If the assets remain unidentified, no conclusion could be reached as to their current value. The application would fail because the appellant was not able to establish the current value of all his realisable assets as he chose not to identify all of them. The appeal would be dismissed.

N. Johnson, Q.C. for the appellant.

B. Stancombe and R. Jones for the Revenue and Customs Prosecution Office.

Commentary: Although this decision was made under the terms of the Drug Trafficking Act 1994 in the context of an application for a certificate of inadequacy, it is plainly equally important in relation to confiscation orders made under the Proceeds of Crime Act 2002. Although there are many differences of detail between the two statutes, the essential scheme is the same. If the court is proceeding under the Proceeds of Crime Act 2002 s.6, it must decide whether the defendant has benefited from his criminal conduct. If the defendant has a criminal lifestyle, the court must normally make the assumptions provided by s.10 and calculate the benefit derived from his general criminal conduct. If the defendant does not have a criminal lifestyle, it must decide whether he has benefited from his particular criminal conduct. The court must then make a confiscation order in an amount equal to the defendant's benefit

from the conduct concerned, whether general or particular, unless the defendant shows that the available amount is less than the amount of the benefit. It is for the court to decide on the available amount (s.7(5)). Although the language is slightly different, the principle is the same; once the court has determined the defendant's benefit, the confiscation order must be made in that amount unless the defendant can persuade the court that his available assets and the value of any "tainted gifts" together amount to a lesser figure.

The court in this judgment points to the possible confusion arising from the details which may be set out in what is now called a "statement of information" made in accordance with s.16. The statement may well include a detailed account of those assets of the defendant which the prosecution have been able to identify. As the court points out in the judgment, the main purpose of including these details is to bring into operation the assumptions which the court is normally required to make in a "criminal lifestyle" case under s.10. The secondary purpose of setting out the details of the established assets of the defendant is to rebut any claim made by the defendant that his assets are less than the value of his benefit. Notwithstanding any details set out in the statement of information, it remains the position that the burden of persuasion that the defendant's available assets are less than his benefit rests on the defendant and it is not the prosecution's task to prove what they are. If the defendant fails to persuade the court that his assets are less than his benefit, the confiscation order must be made in the amount of his benefit.

The point made in the judgment is that confiscation proceedings are not civil proceedings and therefore it is not open to the prosecution to agree to settle confiscation proceedings by the payment by the defendant of an agreed amount. Agreements are not necessarily inconsistent with the statute, but the limit of the scope for agreements is that the prosecution may agree that it does not dispute the defendant's assertion that all his assets have been disclosed and that he does not have any further hidden assets. On the basis of such an agreement, it is open to the court to make the statutory finding that the available amount is less than the amount of the defendant's benefit. In the case with which the court was concerned, this did not happen. The prosecution's position, as evidenced by the prosecutor's statement, was that there had not been full disclosure of the defendant's assets but that the prosecution would nevertheless accept payment of the agreed amount. The effect of the decision is that the prosecution are not entitled to compromise and accept a payment of an amount less than the defendant's assessed benefit in these circumstances. The defendant has failed to discharge the burden of proving that the available amount is less than the value of his benefit and the order must be for the full value of his benefit.

[D.A.T.]

Trial

Professional embarrassment—defendant's counsel withdrawing from trial—fresh representatives seeking adjournment to prepare case—judge granting short adjournment—fresh representatives withdrawing from trial—defendant remaining unrepresented—cab-rank principle

 Adjournment; Cab rank rule; Defence counsel; Representation orders; Solicitors; Time for preparation of defence; Transfer; Withdrawal

R. v Ulcay

Court of Appeal (Criminal Division); Sir Igor Judge P., Pitchers and Openshaw JJ.; October 19, 2007; [2007] EWCA Crim 2379.

The defendant was charged with conspiracy to facilitate the commission of breaches of immigration law by individuals who were not citizens of the European Union. At the close of the prosecution case, his solicitors and counsel withdrew from the case on the ground of professional embarrassment, arising out the complete change in the defendant's instructions. Fresh counsel was granted a representation order under reg.16(2)(a) of the Criminal Defence Service (General) (No.2) Regulations 2001 (SI 2001/1437). However, the judge refused to permit an extended adjournment, concluding that a shorter time was sufficient to allow counsel properly to prepare the case. Counsel withdrew. Fresh representatives similarly withdrew on failing to secure an extended adjournment. The defendant was convicted. He appealed.

Consideration was given, *inter alia*, to reg.16 of the regulations and to in what circumstances counsel and solicitors instructed immediately before the beginning or during the course of the trial might refuse to accept instructions on behalf of the defendant because of difficulties created by judicial case management, in particular in relation to adjournments.

Held, dismissing the appeal, (1) where a defendant completely changed his instructions, counsel would be presented with an impossible situation. If he could properly do so, of course he had to continue to represent his client, but there were occasions when he could not do so. It was for counsel to decide whether, consistent with his obligations to his client, and the court, and the rules of his profession, he was so professionally embarrassed that he could not continue with the case. If so, again consistent with his duty to the court, but without contravening the legal privilege which underpinned his professional relationship with his client, he should inform the court of his situation, providing such explanation as he could, to enable the judge to decide how to proceed. In the extremely unlikely event that a judge had grounds for believing that counsel or solicitors were not acting in good faith, and in accordance with the obligation owed to the court, their conduct should be referred to the Bar Council or Law Society.

(2) In an application for a transfer of representation in the Crown Court, the grounds of the application and full particulars needed to be specified by the existing representatives. Next, the substantial compelling reason under reg.16(2)(a)(iv), if relied on, needed to be specified so that it could be identified. It would not generally be sufficient to allege a lack of care or competence of existing representatives. Only in extremely rare cases, and where full particulars were given in the application, would a general ground of loss of confidence or incompetence be entertained. It would not be sufficient simply to say that there was a breakdown in the relationship between solicitor and client. Many breakdowns were imagined rather than real or as a result of proper advice. The court could not oblige lawyers to continue to act when they had made a professional judgment that they were obliged, for compelling reasons, to withdraw from the case. That approach was consistent with the provisions of the regulations. One of the consistent requirements of reg.16 was that legal representatives should provide details of the nature of the duty which they believed required them to withdraw from the case, or the nature of the breakdown in the relationship between the representative and the client. Requirements such

as those could not impinge on the obligation of confidentiality between lawyer and client. Lawyers would do their best to comply with the requirement within the limits of the rules governing legal professional privilege, with the result that the court might be less well informed of the pressures on lawyers to withdraw from the defence or explain the nature of the breakdown. The purpose of the regulations was to ensure that the client did not manipulate the system. Claims of a breakdown in the professional relationship between lawyer and client were frequently made by defendants. If judges intended to reject an application for a change of legal representative they might well explain to the defendant that the consequence might be that the case would continue without him being represented at public expense. If defendants terminated their lawyer's retainer for improper motives, the court was not bound to agree to an application for a change of representation. The ultimate decision for the court was case and fact specific, and it did not follow from the repeated indication of the mantra "loss of confidence" that an application would be granted.

(3) Judges should seek to find a common-sense solution to the kind of problems to which the withdrawal of counsel or a change of instructions could give rise, clearing up possible misunderstandings and, as best they can, introducing the calm and balance which sometimes can evaporate in the forensic process. However, it would rarely be right for trial judges, midway through a trial, to be required to engage in a personal discussion with defendants about their defence, and whether it was changing, or the state of the professional relationship with their lawyers, and certainly not if satisfied that a defendant was attempting to manipulate the process. Where barristers or solicitors were invited to take on a defence case at a very late stage or halfway through a long trial, the starting point was that trial judges had to decide whether, and if so for how long, they were prepared to adjourn a trial to accommodate new counsel. The responsibility was vested exclusively in the judge. If the judge's decision produced an injustice or deprived the defendant of the fair trial to which he was entitled, the remedy was to be found in the Court of Appeal. The rules of the legal professions had to defer to and be consistent with those principles.

(4) The cab-rank rule, and the rationale which supported it, applied whenever, and however late, the barrister was instructed. The absence of what the barrister would regard as sufficient time for the purpose of preparation did not constitute an exception. Paragraph 701(b)(ii) of the Code of Conduct directed that a barrister should not undertake any task for which "he does not have adequate time and opportunity to prepare for and perform". It did not constitute an exception to the cab-rank rule. Paragraph 701(b)(ii) was concerned to prevent barristers from accepting work over and above their existing commitments which they would not be able adequately to prepare and deal with in a professionally competent manner. The barrister faced with the problem which arose in the present trial was professionally required to soldier on and do the best she could. The process would normally encompass discussions with former counsel, taking stock generally, analysis of the issues likely to arise thereafter, and sensible applications to the trial judge for adjournment as and when the need arose. Rule 2.01 of the Law Society Rules was not directed to and the solicitor was not prevented from acting nor required to cease to act where an order of the court created difficulties and made it that much harder for him to discharge his professional obligations to his client. Such difficulties arose because of the judge's ruling, not the absence of

appropriate resources or necessary competence. The ruling, however, was binding on the solicitor, as it was on the barrister, and indeed everyone else involved in the conduct of the case. In the context of the conduct of criminal litigation, the solicitor was an officer of the court. He had an obligation to the court to comply with its orders, and to do his best for his client in the light of those orders. Neither barristers nor solicitors in such circumstances would be in breach of the rules of their profession, nor acting improperly or negligently, if the worse that could be said was that they were doing their best to comply with orders of the court which made it impossible or difficult to look after the client's interests to the standard which, without those difficulties, they would normally be expected to achieve. In the present case, the decisions of the new teams of barristers and solicitors were wrong. However, in all the circumstances of the present case, and in the light of the strength of the prosecution case, the conviction was not unsafe.

Cases considered: *Jones* [2002] UKHL 5; [2002] 2 Cr. App. R. 9; *G* [2004] EWCA Crim 1368; [2004] 2 Cr. App. R. 37; *Al Zubeidi* [1999] Crim. L.R. 906.

[Reported by Vanessa Higgins, Barrister]

Benjamin Aina for the defendant.

Charles Garside, Q.C. and *Roger Smart* for the Crown.

Timothy Cray for the General Council of the Bar.

Bruce Holder, Q.C. for the Law Society.

Commentary. Article 6(3)(c) of the European Convention on Human Rights speaks of an accused's right to defend himself in person or through a legal representative of his choosing. However, the danger of a defendant rejecting counsel on spurious grounds in an attempt to prolong and frustrate the trial cannot be ignored. To prevent a trial being derailed may, on occasion, demand fairly robust control by the trial judge but that may be necessary to ensure fairness to all parties in the proceedings including, in this case, other defendants. There may be occasions such as the present one when defendants completely change their instructions to counsel at a late stage in the trial, placing counsel in a very difficult position. Whether counsel choose to continue to represent the defendant or feel that they are so professionally embarrassed that they cannot continue with the case must be a decision for counsel to take. This has been recognised as such in numerous cases, including *G and B* [2004] EWCA Crim 1368; [2004] 2 Cr. App. R. 37; *Jones (No.2)* (1972) 56 Cr. App. R. 413; *Shaw* (1980) 70 Cr. App. R. 313. Given that counsel will invariably be better informed than the judge and that there may well be considerations that counsel is unable to reveal, it is difficult to envisage a scenario in which the judge would direct counsel to continue or refuse permission to withdraw (for the provision of legal representation at public expense and the grounds for an application for a change of representative, see the Criminal Defence Service (General) (No.2) Regulations 2001, reg.16). If defendants do seek to change their legal representative then the judge should ensure they are clear in the decision and that any adverse consequences of such a change are minimised for all involved in the trial, for example through an appropriate adjournment. However, the judge should not engage in an investigation of the decision which would, for example, involve personal discussions with defendants as the potential for bias in this approach is all too apparent.

In most circumstances when defendants seek to change their representative the court will permit this, however, each case inevitably turns on its own facts though a

defendant's "loss of confidence" in the representative is often not sufficient of itself. Loss of confidence will often be a natural result of clients not receiving the advice they wish to hear.

If there is to be a change of representative then clearly it is the responsibility of the court to determine the appropriate adjournment to ensure that the new representatives are prepared for their task, and that the trial is not derailed. The Bar Standards Board Code of Conduct para.701(b)(ii) directs that a barrister should not undertake any task for which "he does not have adequate time and opportunity to prepare for and perform". It is suggested however that this refers to the workloads of individual barristers and the amount of work they choose to undertake. New counsel will inevitably face problems when stepping into an ongoing trial but this has to be weighed against the overall fairness of the trial to all parties and to the public. As discussed above, the trial judge should seek to alleviate any potential disadvantage to the defendant but ultimately, should it be felt that the defendant suffered an injustice, the solution should lie in the hands of the Court of Appeal.

It was suggested that the rules of the Solicitors' Code of Conduct were not compatible with this position in that solicitors were entitled to decide which client to take on and were not subject to the "cab-rank rule". As such, though barristers might have to pursue a case despite not having the preparation time they might feel is appropriate, this is not the position for the solicitor. Should solicitors take on a case without what they would consider to be adequate preparation time, that decision might fall foul of r.2.01 which states that:

"You are generally free to decide whether or not to take on a particular client. However, you must refuse to act or cease acting for a client in the following circumstances . . . (b) Where you have insufficient resources or lack the competence to deal with the matter."

However, in cases such as this the problem of preparation time arises not through the absence of appropriate resources but because of a judge's ruling. Both barrister and solicitor owe a duty to the court and that duty is not different in its application. Indeed, r.1.01 of the Solicitors' Code states that "[y]ou have obligations not only to clients but also to the court and to third parties". Ultimately, if there is a lack of preparation time it is likely to be the defendant who is disadvantaged but this potential problem can only be appropriately tackled by a case-specific determination of what secures fairness for the process as a whole. It is submitted that this view of the Solicitors' Code must be correct. To hold otherwise would be to frustrate the judge's ruling and potentially jeopardise the fairness of the proceedings. Given that counsel would be expected to have "soldiered on" it would be anomalous not to expect the solicitor to do likewise.

[N.W.T.]

Global Digest

Compiled by: Andrew J. Roberts, LL.B., M.Phil.

Video Reconstruction—Jury Directions—Australia

Mahmood v State of Western Australia [2008] HCA 1

(LT) Australia; Judicial comment; Jury directions; Murder; Re-enactments; Video evidence

The appellant had been convicted of the murder of his wife. In a police interview he claimed to have become suspicious when she failed to return from the toilet at the restaurant which they ran. He explained that when he went to see where she was, he found her body at the rear of the premises. Her throat had been cut. One week after being interviewed by the police, the appellant agreed to re-enact the events surrounding the discovery of the body. He accompanied the police to the restaurant and “walked through” the events of the day and described the position in which he had found the body and the manner in which he had handled it.

The prosecution’s case against the appellant was circumstantial: no murder weapon had been found; the appellant had suspected his wife of having an affair and had hired a private detective to investigate matters; there was evidence that raised voices had been heard in the restaurant on the morning of the murder. Expert witnesses were called to give evidence regarding the location of blood at the premises.

The defence relied on a six-minute sequence of the video recorded re-enactment in which the appellant explained how he had held his wife’s body. Although defence counsel indicated a willingness to tender the whole of the video, the prosecution did not consent to such a course. However, in his closing address to the jury, prosecution counsel drew attention to the appellant’s demeanour during the six-minute video sequence played at trial. The jury were invited to consider whether the appellant had shown any emotion when he was asked about the blood and were invited to infer that his demeanour was that of someone who had committed a cold-blooded and clinical murder. In light of this, defence counsel applied to reopen the case for the defence so that the jury could be shown the recording in its entirety. This application was refused and the trial judge dealt with the issue in her summing-up in which she subsequently suggested to the jury that that it would be “unwise” to draw any adverse inferences against the accused because of his demeanour during the video recording.

On appeal against conviction, it was common ground that the appellant had displayed distress and appeared to have been emotionally upset when talking about his wife at several points in the parts of the video recording which had not been shown to the jury. The High Court, allowing the appeal, concluded that in order to overcome the prejudicial effects of the prosecutors remarks it would have been

necessary for the trial judge in her summing-up to have denied the implication that the parts of the video recording that they had seen was evidence of the appellant's emotional state. In order to distance the evidence from the purpose suggested by the prosecution, a suitably framed direction was required.

There was a distinction to be drawn between a direction and a comment. This reflected the fundamental division of functions in a criminal trial between judge and jury. Telling a jury that they may attach particular significance to a fact or suggesting that evidence may be considered of greater weight, is comment. Comment may properly be ignored by a jury. A direction will contain warnings about either the degree of care needed in assessing some evidence, or the use to which it may be put. A direction is something that the law requires the judge to issue and the jury to heed.

In the present case the judge's statements were no more than comment. The evidence available to the jury was only part of the video recording and it was necessary for the jury to be directed in unequivocal terms that they could not safely draw the inference that the prosecutor had invited them to draw, and that they should ignore the remarks. The trial judge's statements were directed to the reasons why they might give the evidence lesser weight than other more contemporaneous evidence. However, they failed to deny its evidentiary effect and the misdirection amounted to an error of law.

Criminal Liability of Drivers who Fall Asleep Causing Death—Australia

Tasmania Law Reform Institute, Issues Paper No.12: *Criminal Liability of Drivers Who Fall Asleep Causing Motor Vehicle Crashes Resulting in Death or Other Serious Injury* (Jiminez: 2007)

 Causing death by dangerous driving; Criminal liability; Fitness to drive; Tasmania

The Tasmania Law Reform Institute has published an issues paper dealing with the criminal liability of drivers who cause death and serious injury as a result of falling asleep at the wheel. The paper considers the implications and practical difficulties caused by the decision of the High Court of Australia in *Jiminez v The Queen* (1992) 173 C.L.R. 572. In that case it was held that the actions of a sleeping driver were not conscious or voluntary, which meant that he or she could not be criminally responsible for driving the car in a dangerous manner. Where a driver has fallen asleep the focus of the inquiry to determine criminal liability is, therefore, on the driving which preceded the moment when the driver fell asleep. The prosecution is required to prove that the driver was "affected by tiredness to an extent that, in the circumstances, his driving was objectively dangerous".

The Institute notes the perception that the decision in *Jiminez* has made it more difficult to secure convictions where drivers have fallen asleep. Among the options for reform of the relevant Tasmanian legislation is the introduction of a legislative provision reflecting *Jiminez*. This would specify that if there is an appreciable risk of falling asleep, driving while sleepy may constitute negligence or dangerousness in circumstances in which the driver falls asleep and causes death or grievous

bodily harm. An alternative proposal is to introduce provisions which establish a rebuttable presumption that a person who has fallen asleep at the wheel did, in fact, have a prior awareness that they were at risk of falling asleep. The presumption could be rebutted by drivers who could establish on the balance of probability that they had no prior warning of sleepiness. The Institute acknowledges that while research suggests that healthy drivers do have prior warning that they are sleepy, some drivers are not good at predicting how close to falling asleep they are. Moreover, what research exists is based on a small number of healthy drivers and has been conducted in artificial conditions. Nonetheless, such a presumption would overcome the evidentiary difficulties that prosecutors currently encounter in establishing that a driver knew he was at risk of falling asleep. In a final option, the Institute suggests that road traffic legislation could be amended specifically to exclude falling asleep at the wheel from being relied upon by an accused in relation to driving offences.

The paper is available on the Institute's website: http://www.law.utas.edu.au/reform/jiminez_issues_paper_A4-PDFfinal_4_Sept_07.pdf [Accessed February 19, 2008].

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