CASE MANAGEMENT IN THE CROWN COURT

HH Judge
Roderick Denyer QC

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This book is not intended as an academic treatise on criminal law nor the law of evidence. It is designed instead to assist all those who work in the Crown Court in dealing with the day-to-day practical problems that arise both before and during trial. In particular it deals with all the problems that pre-trial case management can pose as well as those management type problems that can arise during the course of a trial such as problems with jurors, witnesses and absent defendants. It deals with all the main applications such as bad character, disclosure and abuse of process. As such it will be an invaluable *vade mecum* for barristers and solicitors appearing in the Crown Court, officers of the Court, Circuit Judges, members of the CPS whose work brings them into daily contact with the Court and students on the BVC.

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Case Management and the Criminal Procedure Rules

1.1 As will be apparent from other chapters in this book, it is a mistake to think that case management begins and ends with the Criminal Procedure Rules (the Rules).[1] The Rules set out objectives and provide tools to assist the Judge and the parties in the preparation and progression of a case. But the concepts are not new. Quite apart from the Rules, the basics and philosophy of case management were set out clearly in the judgment of Judge LJ in *Chaaban*.[2] It is worth setting out the following paragraphs from his judgment in full:

> 35. The trial Judge has always been responsible for managing the trial. That is one of his most important functions. To perform it he has to be alert to the needs of everyone involved in the case. That obviously includes, but is not limited to, the interests of the Defendant. It extends to the prosecution, the complainant, to every witness (whichever side is to call the witness), to the jury, or if the jury has not been sworn, to jurors in waiting. Finally the Judge should not overlook the community's interest that justice should be done without unnecessary delay. A fair balance has to be struck between all these interests.
>
> 37. We must also consider whether the case was somehow rushed, a submission which gives this court the opportunity to highlight a significant recent change, perhaps less heralded than it might have been, but nowadays, as part of his responsibility for managing the trial, the Judge is expected to control the timetable and to manage the available time. Time is not unlimited. No-one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time. At the risk of stating the obvious, every trial which takes longer than it reasonably should is wasteful of limited resources. It also results in delays to justice in cases still waiting to be tried, adding to the tension and distress of victims, defendants, particularly those in custody awaiting trial, and witnesses. Most important of all it does nothing to assist the jury to reach a true verdict on the evidence.

[1] The Criminal Procedure Rules 2005 (SI no 384) (L4) as amended by:

Amendment Rules 2006 (2006 no 353) (L2)
Amendment No 2 Rules 2006 (2006 no 2639) (L9)
Amendment Rules 2007 (2007 no 699) (L3)
Amendment No 2 Rules 2007 (2007 no 2317) (L23)
Amendment Rules 2008 (in force Apr 2008).

[2] (2003) EWCA Crim 1012.

> 38. In principle, the trial Judge should exercise firm control over the timetable, where necessary, making it clear in advance and throughout the trial that the timetable will be subject to appropriate constraints. With such necessary even-handedness and flexibility as the interests of justice require as the case unfolds, the Judge is entitled to direct that the trial is expected to conclude by a specific date and to exercise his powers to see that it does. We find that nothing in the criticisms of the way in which the Judge dealt with the timetable, and nothing in the remaining complaints about his management of the case which would justify us interfering with the decisions made whilst exercising his discretion as the trial Judge.

It was a subject to which he returned in *Jisl*.[3] The following paragraphs are particularly relevant:

> 114. The starting point is simple. Justice must be done. The Defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the Defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as Counsel and solicitors for the Defendants themselves think appropriate. Resources are limited. The funding for courts and judges, and for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.
>
> 116. The principle therefore is not in doubt. This appeal enables us to re-emphasise that its practical application depends on the determination of trial judges and the cooperation of the legal profession. Active hands-on case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the Judge's duty. The profession must understand that this has become and will remain part of the normal trial process and that cases must be prepared and conducted accordingly.
>
> 118. Once the issue has been identified, in a case of any substance at all … the Judge should consider whether to direct the timetable to cover pre-trial steps, and eventually the conduct of the trial itself, not rigid nor immutable and fully recognising that during the trial at any rate the unexpected must be treated as normal and making due allowance for it in the interests of justice. To enable the trial Judge to manage the case in a way which is fair to every participant, pre-trial, the potential problems as well as the possible areas for time saving should be canvassed … when trial Judges act in accordance with these principles, the directions they give and where appropriate, the timetables they prescribe in the exercise of their case management responsibilities, will be supported in this court. Criticism is more likely to be addressed to those who ignore them.

[3] (2004) EWCA Crim 696.

1.2 Part 1.1 of the Rules sets out the 'overriding objective' in connection with the criminal trial process:

1.1(1) The overriding objective of this new code is that criminal cases be dealt with justly.
(2) Dealing with a criminal case justly includes—
(a) acquitting the innocent and convicting the guilty,
(b) dealing with the prosecution and the defence fairly,
(c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights,
(d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case,
(e) dealing with the case efficiently and expeditiously,
(f) ensuring that appropriate information is available to the court when bail and sentence are considered, and
(g) dealing with the case in ways that take into account—
(i) the gravity of the offence alleged,
(ii) the complexity of what is in issue,
(iii) the severity of the consequences for the defendant and others affected, and
(iv) the needs of other cases.

It is the obligation of all the participants in a criminal case to work towards achieving the overriding objective. This is provided for by Rule 1.2:

1.2(1) Each participant in the conduct of each case must—
(a) prepare and conduct the case in accordance with the overriding objective,
(b) comply with these rules, practice directions and directions made by the court, and
(c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.[4]
(2) Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule.

The obligation to further the overriding objective extends to the court:

1.3 The court must further the overriding objective in particular when—
(a) exercising any power given to it by legislation (including these rules),
(b) applying any practice direction, or
(c) interpreting any rule or practice direction.

1.3 Part 3 of the Rules specifically deals with case management. Rule 3.2 imposes a duty on the court to further the overriding objective by actively managing the case—it goes on to identify some of the matters involved in active case management:

3.2(1) The court must further the overriding objective by actively managing the case.

[4] This may be regarded as 'the duty to grass'. If one party is dragging its feet, the other parties should not let it ride but should bring the matter to the attention of the court.

(2) Active case management includes:
  (a) the early identification of the real issues,
  (b) the early identification of the needs of witnesses,
  (c) achieving certainty as to what must be done, by whom and when, in particular by the early setting of a timetable for the progress of the case,
  (d) monitoring the progress of the case in compliance with directions,
  (e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way,
  (f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion and avoiding unnecessary hearings,
  (g) encouraging the participants to cooperate in the progression of the case, and
  (h) making use of technology.

(3) The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible.

Likewise, Rule 3.3 imposes a duty on the parties to assist the court in active case management:

3.3 Each party must—
  (a) actively assist the court in fulfilling its duty under Rule 3.2 without or if necessary with a direction, and
  (b) apply for a direction if needed to further the overriding objective.

As an important link between the court and the parties in and about active case management, Rule 3.4 provides for the nomination of case progression officers in all cases unless the court otherwise directs:

3.4(1) At the beginning of the case each party must, unless the court otherwise directs—
  (a) nominate an individual responsible for progressing that case, and
  (b) tell other parties and the court who he is and how to contact him.

(2) In fulfilling its duty under Rule 3.2, the court must where appropriate—
  (a) nominate a court officer responsible for progressing the case, and
  (b) make sure the parties know who he is and how to contact him.

(3) In this part, a person nominated under this Rule is called a Case Progression Officer.

(4) A Case Progression Officer must—
  (a) monitor compliance with directions,
  (b) make sure that the court is kept informed of events that may affect the progress of that case,
  (c) make sure that he can be contacted promptly about a case during ordinary business hours,
  (d) act promptly and reasonably in response to communications about the case, and
  (e) if he will be unavailable, appoint a substitute to fulfil his duties and inform the other case progression officers.

1.4 Rules 3.5 and 3.10 lie at the heart of judicial case management. New Rule 3.5 sets out the court's case management powers:

3.5(1) In fulfilling its duty under Rule 3.2 the court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with legislation including these Rules.

(2) In particular the court may—
  (a) nominate a judge … to manage the case,
  (b) give a direction on its own initiative or on an application by a party,
  (c) ask or allow a party to propose a direction,
  (d) for the purpose of giving directions, receive applications and representations by letter, by telephone or by any other means of electronic communication, and conduct a hearing by such means,
  (e) give a direction without a hearing,[5]
  (f) fix, postpone, bring forward, extend or cancel a hearing,
  (g) shorten or extend, even after it has expired, a time limit fixed by a direction,
  (h) require that issues in the case should be determined separately and decide in what order they will be determined, and
  (i) specify the consequences of failing to comply with the direction.[6]

(3) A Magistrates Court may give a direction that will apply in the Crown Court if the case is to continue there.

(4) A Crown Court may give a direction that will apply in a Magistrates Court if the case is to continue there.

(5) Any power to give a direction under this part includes a power to vary or revoke that direction.

Rule 3.10 is headed 'Conduct of a Trial':

3.10 In order to manage the trial … the court may require a party to identify—
  (a) which witnesses he intends to give oral evidence,[7]
  (b) the order in which he intends those witnesses to give their evidence,
  (c) whether he requires an order compelling the attendance of a witness,

[5] See K and others (2006) EWCA Crim 835 when the Court of Appeal (at paragraph 6) said—

'The Judge was rightly concerned to save as much time as possible. One way for him to do so was to invite Counsel who wished to make submissions to reduce them into writing with a consequent curtailment of oral argument … We should therefore emphasise that when dealing with matters preliminary to the trial, if the Judge thought it right to do so, his new case management powers permitted him to deal with these issues exclusively by reference to written submissions, and again if he saw fit, submissions limited to a length specified by him. He is not bound to allow oral submissions, and he is certainly entitled to put a time limit on them. The necessary public element of any hearing is sufficiently achieved if the defendants themselves are supplied with copies of written submissions … and the representatives of the media present in court for any hearing are similarly so supplied. We are not prescribing any particular method of approach. Case management decisions are case-specific. They are simply emphasising that the new Criminal Procedure Rules impose duties and burdens on all the participants in a criminal trial, including the Judge, and the preparation and conduct of criminal trials is dependent on and subject to those Rules.'

[6] This raises the vexed question of sanctions, which to some extent is dealt with in a separate chapter. It assumes particular significance in the *Warley Magistrates case* (2007) EWHC 1836 (admin) dealt with below.

[7] *Warley Magistrates Case, ibid.* An order was made in the Magistrates Court that: 'the defence provide details within 14 days to the prosecution of their witnesses to enable the prosecution to consider any issues in relation to making applications to admit bad character information.' The objection that was taken was that the Magistrate had no power to make such an order, given that section 6C(1) of the Criminal Procedure and Investigations Act 1996 was not yet in force. This section provides statutory authority to require an accused to identify his prospective witnesses coupled with the possible sanction of the drawing of adverse inferences in the event of non-compliance. The argument based on the non-implementation of this section did not weigh heavily with the court. Laws LJ said at paragraph 14: 'I doubt whether the inchoate legislation can of itself bear the inference that the Criminal Procedure Rules provide no power to do what the Deputy District Judge did.' The court took the view that the

(d) what arrangements, if any, he proposes to facilitate the giving of evidence by a witness,
(e) what arrangements, if any, he proposes to facilitate the participation of any other person, including the defendant,
(f) what other material, if any, he intends to make available to the court in the presentation of the case,
(h) whether he intends to raise any point of law that could affect the conduct of the trial or appeal,[8]
(i) what timetable he proposes and expects to follow.

information sought by the direction infringed the rules governing legal professional privilege and litigation privilege. Having said that, the reasoning behind the court's decision to quash the order is somewhat opaque. It seems to centre upon the lack of a proportionate sanction for non-compliance. This appears from the following paragraphs in the judgment of Laws LJ—

'32. In my judgement a power to require disclosure of privileged material may only be characterised as doing no more than regulating practice and procedure if it forms part of a code … having that purpose. If such a power is open-ended, not coloured and confined by moderate procedural sanctions for breach, it is likely to be regarded by the court as an attempt to infringe privilege as such; and that will be unlawful unless strictly authorised by express provision or necessary implication in primary legislation.

33. I have referred to 'moderate' procedural sanctions. 'Proportionate' might be a better term. In my judgement this is an important condition to be met if a rule is to be treated as no more than a procedural regulation. In principle such a rule must provide for no more than might reasonably be required for the proper working of such a regulation. If it goes further, it will not be categorised as procedural only. It will be liable to be treated as purporting to change the general law of evidence. Unconditional orders for disclosure of privileged material plainly exceed this boundary. So, I think, would a rule which absolutely prohibited a party—with no discretion in the trial court—calling a witness whose identity he had not disclosed in advance. Such a rule would exceed the requirements of a reasonable regulatory regime.

34. I return to the direction in the present case. It was unconditional. It is true as I have said that Part 3.5(2) of the Criminal Procedure Rules permits the court to specify the consequences of failing to comply with a direction. That is an open-ended provision which is I think a problematic circumstance in this context. Where an order apparently infringes litigation privilege or legal professional privilege, absent a justification in main legislation, I think it can be saved only by a case management code having the characteristics I have described, and not a regime of judicial discretion.

35. But that is an issue that may have to await another day, since in any event no such consequences were specified here. In the result the District Judge's direction cannot in my judgement be seen as an exercise in case management, undertaken within a regulatory regime limited to that purpose. It may be that it is futile rather than unlawful; or at least a request rather than an effective order. I would quash it.'

If and when the statute is enforced, the failure to comply with the requirement to identify witnesses may be the subject of an adverse inference at trial. It seems clear that such a sanction could not be imposed under secondary legislation such as the Rules. Equally, as is apparent from the passages cited above, a rule forbidding the calling of an unidentified witness would be wholly disproportionate and destructive of the defendant's right to a fair trial.

The Criminal Procedure (Amendment) Rules 2008, which come into force on 1 April 2008, make an effort to deal with this problem. They insert a new Rule 3.5(6)—

'If a party fails to comply with a rule or a direction the court may—
(a) fix, postpone, bring forward, extend, cancel or adjourn a hearing,
(b) exercise its powers to make a costs order, and
(c) impose such other sanction as may be appropriate.'

Whether this will be sufficient to cure the defect identified in the Warley Justices case remains to be seen. Unless an adjournment is rendered necessary by the failure to identify witnesses, it is hard to see what extra costs will be incurred by any party and it is not clear what 'other sanctions' could be imposed.

[8] In *Gleeson* (2003) EWCA Crim 3357, the question for the Court of Appeal was whether: 'When a defendant with an unanswerable legal challenge to the indictment which, unless amended would entitle

1.5 No great amount of case law has yet accumulated around these specific case management provisions but there are some pointers.

In *B*[9] the Court of Appeal indicated that a Judge was entitled to impose time limits on cross-examination in order to prevent prolix and repetitive questioning. This is not in fact a new power since judges have always had that right.

In K,[10] the President said:

> The Judge was rightly concerned to save as much time as possible. One way for him to do so was to invite Counsel who wished to make submissions to reduce them into writing, with a consequent curtailment of oral argument … We should therefore emphasise that when dealing with matters preliminary to the trial, if the Judge thought it right to do so, his new case management powers permitted him to deal with these issues exclusively by reference to written submissions and, again if he saw fit, submissions limited to a length specified by him. He is not bound to allow oral submissions and he is certainly entitled to put a time limit on them. The necessary public element of any hearing is sufficiently achieved if the defendants themselves are supplied with copies of the written submissions if they wish to see them, and the representatives of the media present at court for any hearing are similarly so supplied.[11]

In *Lee*,[12] the Appellant had been charged with a series of serious sexual assaults including rape on his nieces. The grounds of appeal centred very much around allegations that the trial Judge had been unduly interventionist and had unfairly curtailed cross-examination and prevented the defence from calling certain witnesses. In rejecting those submissions, Thomas LJ said:

> it is clear that the Judge's interventions during cross-examination were either for the purpose of suggesting to Counsel he move on where a point had been gone over sufficiently or to keep the trial focused on the issues or to clarify questions: the interventions were quite proper … all of that was good case management … Secondly, as to raising with Counsel the need to call witnesses, so far from this founding a ground of criticism of a judge, it is our view that this is what a judge ordinarily ought to do in the course of a case as part of good trial management.[13]

him to an acquittal, leaves it until the end of the prosecution case before raising it, does justice require that, although the defect is remediable by amendment, no amendment should be permitted at that stage.' In rejecting the appeal based upon the fact that the trial Judge in that case had allowed an amendment, Auld LJ spelt out very clearly what is now required of the defence in such circumstances. He said—

> '34. Counsel should have drawn attention to his proposed legal challenge to the indictment … at the plea and directions hearing and in the defence statement. If he had done that, he could have had no valid objection to the prosecution correcting their error at that stage or certainly by the beginning of the trial …
>
> 35. Just as a defendant should not be penalised for errors of his legal representatives in the conduct of his defence if he is unfairly prejudiced by this, so also should a prosecution not be frustrated by errors of the prosecutor unless such errors have irremediably rendered a fair trial for the defendant impossible. For defence advocates to seek to take advantage of such errors by deliberately delaying identification of an issue of fact or law in this case until the last possible moment is, in our view, no longer acceptable, given the legislative and procedural changes to our criminal justice process in recent years.'

[9] (2006) Crim LR 54.
[10] (2006) EWCA Crim 835.
[11] *Ibid*, at para 6.
[12] (2007) EWCA Crim 764.
[13] *Ibid*, at para 28.

2

Non-Compliance with Procedural Orders and the Sanctions Available to the Court

2.1 It is obvious that a statute can and in some cases does specifically provide for the drawing of an adverse inference against a party who does not comply with the Criminal Procedure Rules (the Rules) or with court orders, for example in relation to Defence Case Statements or hearsay notices. Likewise, a statute can provide that certain evidence may not be called unless the appropriate procedures have been complied with. However, in the absence of a statutory authority the nature of the sanctions that can be imposed for non-compliance with case management orders are somewhat limited. Sir Robin Auld noted that:

> I have anxiously searched here and abroad for just and efficient sanctions and incentives to encourage better preparation for trial. A study of a number of recent and current reviews in other Commonwealth countries and in the USA shows that we are not alone in this search and that, as to sanctions at any rate, it is largely in vain.[1]

2.2 Rule 3.2 of Part 3 of the Rules imposes an obligation on the court to further the overriding objective by actively managing the case. Rule 3.5 provides that in fulfilling that obligation, the court may give any direction necessary in order actively to manage a case, provided only that such step is not inconsistent with legislation or the Rules themselves. By Rule 3.5(2)(i) the court may specify the consequences of failing to comply with a direction. An examination of the cases to date shows that (apart from costs orders which are dealt with in a later paragraph) no very effective sanctions exist, particularly in relation to non-compliance by the Crown. This partly arises from the fact that, unlike private disputes between citizens, the criminal process involves the public interest in the prosecution and the conviction of wrongdoers and the right of a defendant, who will be subject to state imposed sanctions to have a fair trial.

2.3 In this paragraph we look at a number of cases involving prosecution failures.

[1] Review of the Criminal Courts of England and Wales, 2001 at para 231 (hereinafter referred to as 'Auld').

In *Phillips*[2] the Crown totally failed to comply with various orders made by different judges as to the disclosure of certain documents. Giving the judgment in the Court of Appeal, Clarke J said:

> Not only must judges be robust in their case management decisions … but the parties who are ordered to take steps must take them. Case progression staff, both on the prosecution and the defence side, must ensure compliance with case management orders. The responsibilities of prosecution and defence, particularly in accordance now with the Criminal Procedure Rules, are well known.[3]

In spite of describing the Crown's failure as lamentable, this non-compliance was not the ground upon which the conviction of the Appellant was quashed.

In *Owens*,[4] the Crown had been regularly supplying notices of additional evidence. The defence legitimately complained of this 'drip-feeding'. Eventually the Judge made an order in these terms:

> anything served following 21 days from today will not be admitted, full stop. I will stand by that one … whatever is served after that will definitely not be admitted.

Approximately two weeks before the trial, the prosecution served 18 pages of witness statements and 100 pages of exhibits which subsequently led to the further disclosure of 7,000 pages of unused material. Not surprisingly, the defence objected and wanted the evidence excluded. The Judge refused. This refusal was not a successful ground of appeal. Rix LJ said:

> The Judge was entitled, having satisfied himself that there was ultimately no unfairness and no undue prejudice in the service of this material, to conclude that, his own order notwithstanding, it would be in the interests of justice to permit the material encompassed by the NAE to go forward for consideration as to its admissibility or exclusion on its own merits.[5]

In *Sutton Coldfield Magistrates*,[6] a bad character application was made by the prosecution. There had been a complete failure to comply with the time limit set out in Part 35 of the Rules. The Magistrates allowed the evidence to be given. In refusing to quash the conviction, a number of observations were made by the Divisional Court:

> The first point to make is that time limits must be observed. The objective of the Criminal Procedure Rules … depends upon adherence to the timetable set out in the Rules. Secondly, Parliament has given the court a discretionary power to shorten a time limit or extend it even after it has expired. In the exercise of that discretion, the court will take account of all the relevant considerations, including the furtherance of the overriding objective. I am not persuaded that the discretion should be fettered in the

[2] (2007) EWCA Crim 1042.
[3] *Ibid,* at para 36.
[4] (2006) EWCA Crim 2206.
[5] *Ibid,* at para 52.
[6] R (on the application of Robinson) v Sutton Coldfield Magistrates Court (2006) EWHC 307, (2006) 2 Cr App R 13.

> manner for which the Claimant contends, namely that time should only be extended in exceptional circumstances.
>
> In this case there were two principal material considerations: first the reason for the failure to comply with the Rules. As to that, a party seeking an extension must plainly explain the reasons for its failure. Secondly, there was the question of whether the Claimant's position was prejudiced by the failure.
>
> … any application for an extension will be closely scrutinised by the court. A party seeking an extension cannot expect the indulgence of the court unless he clearly sets out the reasons why it is seeking the indulgence.[7]

2.4 The Rules are binding on defendants. The question of prejudice will often crop up in the context of a multi-defendant trial, for example where the parties are running cut-throat defences. A good illustration is provided by *Lawson*.[8] In that case, Counsel for the co-accused put a previous conviction of the Appellant to him during the course of his cross-examination. No notice had been given either formally, pursuant to Part 35.5 of the Rules, or informally to Counsel and leave had not been sought. Giving judgment, Hughes LJ said:

> we are quite unable to understand how that came to happen. It was directly contrary to the Rules … we are wholly unsurprised by the Judge's description of the conduct of Counsel as reprehensible.
>
> It is contended that in the absence of notice the Judge should not have allowed the question to be asked or the evidence to stand … we entirely agree with the way the Judge dealt with it. He had a discretion under Rule 35.8 to allow evidence of bad character to be adduced, notwithstanding that the required notice had not been given, by permitting notice to be given orally or in a different form from that prescribed and he had power to shorten time for it. It must be implicit in the power to shorten time that it can be shortened to any degree and thus dispensed with.
>
> Whenever a co-accused proposes to adduce bad character evidence … he should always, without exception, alert Counsel for the other defendant of his intention. That is so that the latter can take objection … and that the Judge can rule, after proper argument on both sides whether the evidence is admissible or not. The requirement that Counsel be alerted is not a substitute for the notice called for by the Criminal Procedure Rules, where the possibility of such an application can be anticipated.

Musone[9] is a rare and (with great respect) in some ways a slightly doubtful illustration of the use of the Rules (and their breach) being used to prevent one defendant pursuing a line of enquiry against a co-defendant. At a late stage in the proceedings the Appellant, without prior notice, indicated an intention to (a) introduce hearsay evidence and (b) give bad character evidence in respect of his co-defendant to the effect that that co-defendant had admitted murder on a previous occasion.

[7] *Ibid,* at paras 14, 15 and 16.
[8] (2006) EWCA Crim 2572, (2007) 1 Cr App R 11 (p 178), paras 17, 18 and 41.
[9] (2007) EWCA Crim 1237.

As to the hearsay, section 132(5) of the Criminal Justice Act 2003 clearly gives a power to a judge to refuse to admit the evidence where the Rules have not been complied with. In this case application was made at a late stage and there had been no compliance with Part 34 of the Rules. Moses LJ said:

> The Act thus gives power to the Judge to prevent that which, in the Judge's assessment, might cause incurable unfairness either to the prosecution or to a fellow defendant. Plainly, the Procedural Rules should not be used to discipline one who has failed to comply with them in circumstances where unfairness to others may be cured and where the interests of justice would otherwise require the evidence to be admitted. But there will be cases in which the Judge can properly deploy section 132(5)(a) not merely as a matter of discipline but to prevent substantive unfairness which cannot be cured by an adjournment.[10]

So far as bad character was concerned, section 101(1)(e) of the Act provides for the admissibility of the bad character of a defendant if it has 'substantial probative value in relation to an important matter in issue' between him and a co-defendant. Once a judge has decided that this criterion is met, the 2003 Act itself provides no mechanism for its exclusion. The trial Judge in this case took the view that the complete failure to comply with Part 35 of the Rules and give notice to the co-accused and the court, gave him the power to exclude the evidence, which he duly did. His decision was upheld. Moses LJ said:

> For reasons that are not apparent to us, section 132(5) appears to envisage a more stringent sanction for a failure to comply with a requirement by prohibiting the admission of evidence except with the court's leave, in relation to hearsay evidence. Notwithstanding the absence of any such specific provision within section 111,[11] we take the view that the Rules made under section 111 in relation to bad character evidence, do confer power on a court to exclude such evidence in circumstances where there has been a breach of a prescribed requirement … In our judgement the Judge was entitled to exclude that evidence in circumstances where he concluded that the Appellant had deliberately manipulated the trial process so as to give his co-defendant no opportunity of dealing properly with the allegation … In our judgement it is not possible to see how the overriding objective can be achieved if a court has no power to prevent a deliberate manipulation of the Rules by refusing to admit evidence which it is sought to adduce in deliberate breach of those Rules. We emphasise that cases in which a breach of the Procedural Rules will entitle a court to exclude evidence of substantial probative value will be rare.[12]

2.5 Before considering the question of costs, it is perhaps sensible to bear in mind what Sir Robin Auld said in his report:

> I have mentioned the lack of effective sanctions and the need for better incentives to encourage all concerned in the preparation of criminal cases for trial to cooperate when they reasonably can and to get on with it. Orders of costs, wasted costs orders, the drawing of adverse inferences or depriving one or other side of the opportunity of advancing all or part of its case at trial, are not, in the main, apt means of encouraging

[10] *Ibid,* at para 37.
[11] Which sets out the rule-making authority in connection with bad character applications.
[12] Above n 9, paras 55 to 60.

> and enforcing compliance with criminal pre-trial procedures. In these respects criminal courts have much less control than civil courts …
>
> In criminal cases an order for costs against a defendant personally is rarely an option because of his lack of means and because it may be hard to apportion fault as between him and his legal representative. And there are problems about the fairness of a trial if a defendant is under threat of a sanction of that sort … an order for costs against the prosecution for procedural default is possible and sometimes imposed. But, though it serves as a mark of the court's disfavour and dents a departmental budget, judges are disinclined in publicly funded defence cases to order what amounts to a transfer of funds from one public body to another. The third possible financial sanction is to make a wasted costs order against the legal representative on one side or the other. But again there are often practical limitations on the court in identifying who is at fault—on the prosecution side Counsel, those instructing him or the police—and on the defence side, Counsel, his solicitors or the defendant.[13]

Costs Against a Defendant

Section 18 of the Prosecution of Offences Act 1985 provides as follows:

> (1) Where—
>
> (c) any person is convicted of an offence before the Crown Court, the court may make such order as to costs to be paid by the accused to the prosecution as it considers just and reasonable …
>
> (3) The amount to be paid by the accused in pursuance of an order under this section shall be specified in the order.

The obvious point that arises is that such an order can only be made on conviction. Having said that, if as a result of fault directly attributable to a defendant some pre-trial expense is incurred by the prosecution, there is no reason in principle why the Defendant, if convicted, could not be ordered to pay those costs.

Costs Against a Party

This is provided for by section 19 of the Prosecution of Offences Act 1985 and the Costs in Criminal Cases (General) Regulations 1986 made thereunder:

> (1) The Lord Chancellor may by regulations make provision empowering … the Crown Court … in any case where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper[14] act or

[13] Auld, above n 1, at paras 229 and 230.

[14] In *DPP v Denning* (1992) 94 Cr App R 272, Nolan LJ said at p 280 'the word "improper" in this context does not necessary connote some grave impropriety. Used as it is in conjunction with the word "unnecessary" it is in my judgement intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly.'

omission by or on behalf of another party to the proceedings, to make an order as to the payment of those costs.

(2) Regulations made under sub-section (1) above may in particular—
  (a) allow the making of such an order at any time during the proceedings.[15]

The relevant Regulation is Regulation 3. It provides:

(1) Subject to the provisions of this Regulation, where at any time during criminal proceedings—
  (b) the Crown Court is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an unnecessary or improper act or omission by or on behalf of another party to the proceedings, the court may, after hearing the parties, order that all or part of the costs so incurred by that party shall be paid to him by the other party.

(3) An order made under paragraph (1) shall specify the amount of costs to be paid in pursuance of the order.

Wasted Costs

Section 19A of the Prosecution of Offences Act 1985 provides for the making of wasted costs orders against legal or other representatives. It reads as follows:

(1) In any criminal proceedings—
  (b) the Crown Court may … order the legal or other representative concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with Regulation.

(3) In this section—
'Legal or other representative' in relation to any proceedings, means a person who is exercising a right of audience or a right to conduct litigation on behalf of any party to the proceedings.

'Wasted costs' means any costs incurred by a party—
  (a) as a result of any improper, unreasonable or negligent act or omission on the part of any representative or any employee of a representative or
  (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

Regulation 3B of the 1986 Regulations provides as follows:

(1) A wasted costs order may provide for the whole or any part of the wasted costs … ordered to be paid and the court shall specify the amount of such costs.

[15] In *Denning, ibid,* Nolan LJ said at p 279 'the purpose and effect of section 19(2) and (a) at Regulation 3(1) seems to me to have been not to vary the normal procedure by which a final order for costs is made at the end of the proceedings—that is to say after they have been ended by a verdict or a notice of discontinuance—but to give the court power to make an interim order of costs whilst the proceedings are still in progress.'

(2) Before making a wasted costs order the court shall allow the legal or other representative and any party to the proceedings to make representations.[16]

Costs Against Third Parties

Section 93 of the Courts Act 2003 added a new section 19B to the Prosecution of Offences Act 1985, the relevant parts of which are as follows:

(1) The Lord Chancellor may by regulation make provision empowering … the Crown Court … to make a third party costs order if the conditions in sub-section (3) are satisfied.
(2) A third party costs order is an order as to the payment of costs incurred by a party to criminal proceedings by a person who is not a party to those proceedings (the third party).
(3) The condition is that—
  (a) there has been serious misconduct (whether or not constituting a contempt of court) by the third party and
  (b) the court considers it appropriate having regard to that misconduct to make a third party costs order against him.

[16] Guidance as to the approach to be adopted by the court when considering a wasted costs order is set out in Pt viii of the Practice Direction (Costs): Criminal Proceedings (2004) 2 Cr App R 26, para 1.4 which reads as follows:

'Judges contemplating making a wasted costs order should bear in mind the guidance given by the Court of Appeal in *Re A Barrister* (wasted costs order) No. 1 of 1991 (1993) QB 293. The guidance which is set out below, is to be considered together with all the statutory and other rules and recommendations set out by Parliament and in this Practice Direction:

(i) There is a clear need for any judge or court intending to exercise the wasted costs jurisdiction to formulate carefully and concisely the complaint and grounds upon which such an order may be sought. These measures are draconian and, as in contempt proceedings, the grounds must be clear and particular.
(ii) Where necessary a transcript of the relevant part of the proceedings under discussion should be available and in accordance with the Rules a transcript of any wasted costs hearing must be made.
(iii) A defendant involved in a case where such proceedings are contemplated should be present if, after discussion with Counsel, it is thought that his interest may be affected and he should certainly be present and represented if the matter might affect the course of his trial. Regulation 3B(2) of the Costs in Criminal Cases (General) (Amendment) Regulations 1991 furthermore requires that before a wasted costs order is made, "the court shall allow the legal or other representative and any party to the proceedings to make representations". There may be cases where it may be appropriate for Counsel for the Crown to be present.
(iv) A three stage test or approach is recommended when a wasted costs order is contemplated— (a) has there been an improper, unreasonable or negligent act or omission? (b) as a result have any costs been incurred by a party? (c) if the answers to (a) and (b) are yes, should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs and if so what sum is involved?
(v) It is inappropriate to propose any settlement that the representative might forego fees. The complaint should be formally stated by the Judge and the representative invited to make his own comments. After any other party has been heard the Judge should give his formal ruling.

The relevant parts of Regulation 3F of the 1986 Regulations are as follows:

(2) The court may make a third party costs order—
  (a) subject to paragraph (3) at any time during or after the criminal proceedings and
  (b) on the application of any party or of its own initiative.

(3) The court shall make a third party costs order during the proceedings only if it decides that there are good reasons to do so, rather than making the order after the proceedings, and it shall notify the parties and the third party of those reasons and allow any of them to make representation.

(4) Before making a third party costs order the court shall allow the third party and any party to make representations and may hear evidence …

(6) A third party costs order shall specify the amount of costs to be paid in pursuance of the order.

The procedure which has to be gone through in connection with the making of an order for costs against a third party is set out in Regulation 3G:

(2) An application for a third party costs order shall be in writing and shall contain
  (a) the name and address of the applicant
  (b) the name and addresses of the other parties
  (c) the name and address of the third party against whom the order is sought
  (d) the date of the commencement of the criminal proceedings
  (e) a summary of the facts upon which the Applicant intends to rely in making the application including details of the alleged misconduct of the third party.

(3) The application shall be sent to the appropriate officer and upon receiving it the appropriate officer shall serve copies of it on the third party and the other parties.

(4) Where the court decides that it might make a third party costs order of its own initiative, the appropriate officer shall serve notice in writing accordingly on the third party and the parties.

(vi) The Judge must specify the sum to be allowed or ordered. Alternatively the relevant available procedure should be substituted should it be impossible to fix the sum.'

Para 1.5 of Pt 8 reads as follows:

'The Court of Appeal has given further guidance in *Re P* (2002) 1 Cr App R 19 as follows:

(i) The primary object is not to punish but to compensate, albeit as the order is sought against a non-party it can from that perspective be regarded as penal.

(ii) The jurisdiction is a summary jurisdiction to be exercised by the court which has tried the case in the course of which the misconduct was committed.

(iii) Fairness is assured if the lawyer alleged to be at fault has sufficient notice of the complaint made against him and a proper opportunity to respond to it.

(iv) Because of the penal element a mere mistake is not sufficient to justify an order—there must be a more serious error.

(v) Although the trial Judge can decline to consider an application in respect of costs, for example on the ground that he or she is personally embarrassed by the appearance of bias, it will only be in exceptional circumstances that it will be appropriate to pass the matter to another judge, and the fact that, in the proper exercise of his judicial function, a judge has expressed views in relation to the conduct of a lawyer against whom an order is sought, does not of itself normally constitute bias or the appearance of bias so as to necessitate a transfer.'

As many a judge knows, embarking initially with enthusiasm in and about the making of a possible wasted costs order can be time-consuming, tedious and usually an ultimate exercise in futility.

(5) At the same time as serving notice under paragraph (4), the appropriate officer shall serve a summary of the reasons why the court might make a third party costs order, including details of the alleged misconduct of the third party.

(6) Where the appropriate officer serves copies of an application under paragraph (3) or serves notice under paragraph (4), he shall at the same time serve notice on the parties and the third party of the time and place fixed for the hearing.[17]

Although these Regulations have been in force since 18 October 2004, I am not aware of any authority on their interpretation.

[17] If ever any regulations required rewriting by the Rules Committee, it is these, if only to make them more intelligible and to provide that the third party should respond in writing or at least have the opportunity of so doing.

3

The Plea and Case Management Hearing (PCMH)

3.1 In the Criminal Procedure Rules (the Rules), references to the Practice Direction are references to the Lord Chief Justice's Consolidated Criminal Practice Direction as amended.[1] So far as case management is concerned, the form set out in the Practice Direction must be used.[2] The Rules themselves, although enjoining active case management, do not provide specifically for a plea and case management hearing. Instead, this is dealt with in Part IV.41 of the Practice Direction. However, the latest amendment to the Rules, effective from April 2008, provides a new 3.8(3) to the effect that 'the court must conduct a plea and case management hearing unless the circumstances make that unnecessary'.

3.2 There is no requirement in the Rules or the Practice Direction to hold a preliminary hearing in every case which is sent to the Crown Court, a point seemingly lost in some court centres.[3] As to the PCMH itself, in sent cases this is provided for by paragraph IV.41.5 of the Practice Direction. It reads as follows:

> Where the Magistrates Court do not order a PH it should order a PCMH to be held within about fourteen weeks after sending for trial when a defendant is in custody and within about seventeen weeks after sending for trial when a defendant is on bail. These periods accommodate the periods fixed by the relevant rules for the service of the prosecution case papers and for making all potential preparatory applications.[4] When

[1] Part 2.2. The Practice Direction itself can be accessed at the Ministry of Justice website—www.justice.gov.uk/criminal/procrules_fin/index.htm.

[2] Part 3.11.

[3] IV.41.3 of the Practice Direction provides as follows:

> 'A preliminary hearing (PH) is not required in every case sent for trial under section 51 … A preliminary hearing should normally only be ordered by the Magistrates Court or by the Crown Court where—
>
> (i) there are case management issues which call for such a hearing,
> (ii) the case is likely to last for more than four weeks,
> (iii) it would be desirable to set an early trial date,
> (iv) the defendant is a child or young person,
> (v) there is likely to be a guilty plea and the defendant could be sentenced at the preliminary hearing.
>
> A preliminary hearing, if there is one, should be held about fourteen days after sending.'

[4] As will be seen, many of the matters to be dealt with on the PCMH form should have been done by that time. Truncating time limits renders this more difficult.

> the parties realistically expect to have completed their preparations for the PCMH in less time than that, then the Magistrates Court should order it to be held earlier. But it will not normally be appropriate to order that the PCMH be held on a date before the expiry of at least four weeks from the date on which the prosecutor expects to serve the prosecution case papers to allow the defence a proper opportunity to consider them. To order that a PCMH be held before the parties have had a reasonable opportunity to complete their preparations in accordance with the Criminal Procedure Rules risks compromising the effectiveness of this most important pre-trial hearing and risks wasting their time and that of the court.[5]

So far as cases committed for trial by the Magistrates to the Crown Court, this is dealt with by paragraph IV.41.6 of the Practice Direction, which reads as follows:

> For cases committed to the Crown Court for trial under section 6 of the Magistrates Courts Act 1980 … a PCMH should be ordered by the Magistrates Court in every case, to be held within about seven weeks after committal. That period accommodates the periods fixed by the relevant rules for making all potential preparatory applications. Where the parties realistically expect to have completed their preparations for the PCMH in less time than that, then the Magistrates Court should order it to be held earlier. However, to order that a PCMH be held before the parties have had a reasonable opportunity to complete their preparations in accordance with the Criminal Procedure Rules risks compromising the effectiveness of this most important pre-trial hearing and risks wasting their time and that of the court.

3.3 The PCMH is very important in case management terms (though other procedural rules should not be overlooked). Paragraph IV.41.8 of the Practice Direction provides:

> Active case management at the PCMH is essential to reduce the number of ineffective and cracked trials and delays during the trial to resolve legal issues. The effectiveness of a PCMH hearing in a contested case depends in large measure upon preparation by all concerned and upon the presence of the trial advocate or an advocate who is able to make decisions and give the court the assistance which the trial advocate could be expected to give. Resident judges in settling the listing policy should ensure that list officers fix cases as far as possible to enable the trial advocate to conduct the PCMH and the trial.

When we examine the form to be used at the PCMH[6] it is obvious that many of the points to be dealt with (and in respect of which directions are to be given) should by that time have been done.

3.4 It is instructive to look at the various topics dealt with on the current form. References are to the appropriate numbered paragraphs in the form.

[5] Those who wish to shorten time limits which are so clearly set out in the Practice Direction would do well to remember what Sir Robin Auld said in his report (at p 485):

> 'This well intentioned but rigid timetable accompanied by equally insistent court service targets for trial dates, achieves the reverse of what is intended because the parties become committed to a trial for which they may not be ready. It can generate last-minute changes of plea … or inability to start the trial on the day listed for it'

[6] Paragraph IV.41.10—'the PCMH forms as set out in annexe'.

(a) Paragraph 3.2 provides for details of the case progression officers. This should have happened at the outset.[7]

(b) Paragraph 5 deals with advice to a defendant in respect of credit for a guilty plea.[8] It is difficult to conceive that defence lawyers will not have pointed that out.

(c) Paragraph 10.1 asks whether the prosecution have made statutory disclosure. This should have happened.[9]

(d) Paragraph 10.2 asks whether a defence statement has been served. This should have happened.[10] Paragraph 10.3 raises a question as to the adequacy of the defence statement.[11]

(e) Paragraph 10.5 asks whether the defence have or will be making an application under section 8 of the Criminal Procedure and Investigations Act 1996.[12]

(f) Paragraph 12 deals with expert evidence. This should be well in hand.[13]

(g) Paragraph 17 deals with special measures. This should normally have been done.[14]

(h) Paragraph 20 deals with third party material and disclosure. This is potentially a huge time-wasting area and it should not be.[15]

(i) Paragraph 22 deals with video evidence in the case of young or vulnerable witnesses. This is another area which does, but should not, cause problems and delay.[16]

[7] R 3.4 of the Rules is as follows:

'(1) At the beginning of each case each party must, unless the court otherwise directs—
(a) nominate an individual responsible for progressing that case
(3) A person nominated under this Rule is called a case progression officer.
(4) A case progression officer must—
(a) monitor compliance with directions'

[8] See s 144 of the Criminal Justice Act 2003.

[9] Section 13 Criminal Procedure and Investigations Act 1996 'as soon as reasonably practicable' after service of the papers.

[10] Regulation 2 of the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997—within 14 days of the prosecutor complying or purporting to comply with his initial disclosure duty.

[11] The defence statement should comply with s 6A of the Criminal Procedure and Investigations Act 1996. It should include points of law that the defence intend to raise. It should include details of alibi. It should spell out the issues of fact in respect of which there is a dispute and why. Further, if the defence statement is late, that is out of time, the Judge should point out the possibility of an adverse inference being drawn—see s 11(1) and (2) of the Act.

[12] This only arises when the defence have served a defence statement and the prosecution have not or are alleged to have not properly fulfilled their disclosure duties triggered by s 7A(5) of the Act.

[13] Part 24.1 of the Rules provides that this should be done 'as soon as practicable' after committal or sending.

[14] Part 29 of the Rules provides that the written application should have been received by the court within 28 days of committal or within 28 days of the service of the papers in a s 51 sent case.

[15] Section 2(4) of the Criminal Procedure (Attendance of Witnesses) Act 1965—the application for the issue of the witness summons should be made 'as soon as is reasonably practicable' after the case is sent to the Crown Court. The application should also comply with Pt 28.5 of the Rules.

[16] Part 29.7 of the Rules gives extensive guidance in respect of the use and editing of video interviews. Pt 29.7(1) through to (6) set out the information which should accompany an application for special measures involving the playing of a video. By Pt 29.1(7) the party who receives the application

(j) Paragraph 26 deals with cross-examination in respect of the sexual history of a complainant. This should have been dealt with by the PCMH.[17]

(k) Paragraph 27 deals with bad character applications. This should have been done long before any PCMH.[18]

(l) Paragraph 28 deals with hearsay applications. Again this should have been done long before the PCMH. [19]

(m) Paragraph 29 deals with the admissibility of evidence and other legal issues. As to legal issues, these should have been raised in a properly drafted defence statement (see paragraph (d) above). This is also the place to raise (if it has not already been raised) any issue as to abuse of process. [20]

(n) Paragraph 31 asks whether any 'on notice' public interest immunity application is to be made.[21]

(and the video) has 14 days to respond including suggestions as to editing—see also Pt IV.40 of the Practice Direction.

[17] Part 36 of the Rules provides that the written application should be made not more than 28 days after the Crown has complied or purported to comply with its initial disclosure obligations pursuant to s 3 of the Criminal Procedure and Investigations Act 1996. The Crown should respond within 14 days thereafter.

[18] Part 35 of the Rules. The prosecution application should be made within 14 days of committal or within 14 days of the service of the papers in a sent case. A defendant's application in opposition should be made within 14 days thereafter. A defendant who wishes to introduce the bad character of a prosecution witness should make application within 14 days of the prosecutor's compliance or purported compliance with s 3 of the Criminal Procedure and Investigations Act 1996—the same applies to an application in respect of the bad character of a co-defendant.

[19] The time limits are set out in Pt 34 of the Rules. The time limits are the same as those for bad character applications.

[20] Part IV.36 of the Consolidated Practice Direction applies. See in particular Pt IV.36.5 'in all cases where defence advocates are at the time of the (PCMH) considering the possibility of an abuse of process application, this must be raised with the Judge dealing with the matter'.

[21] The appropriate procedures are set out in Pt 25 of the Rules.

4

Bad Character and Proof of Previous Convictions

4.1 In this chapter we are concerned with the appropriate procedures to be used in connection with applications to adduce in evidence the previous convictions (bad character) of a defendant, a co-defendant or a witness and with the proof of such convictions. The chapter does not purport to deal with the now quite extensive case law governing the approach to be adopted by a court in connection with such applications.

4.2 Prosecution applications to introduce the previous convictions of a defendant are made pursuant to section 101 of the Criminal Justice Act 2003 (the Act). Applications to introduce evidence of the previous convictions of a witness (whether for the prosecution or the defence) are governed by section 100 of the Act. When a defendant wishes to introduce the previous convictions of a co-defendant in a 'cut-throat' type situation, he has to bring himself within section 101(1)(e).

4.3 The power of the Criminal Procedure Rules Committee to make rules in respect of bad character applications derives from section 111 of the Act:

> (1) Rules of court may make such provision as appears to the appropriate authority to be necessary or expedient for the purposes of this Act …
>
> (2) The Rules may, and, where the party in question is the prosecution, must, contain provision requiring a party who—
>
> (a) proposes to adduce evidence of a defendant's bad character, or
>
> (b) proposes to cross-examine a witness with a view to eliciting such evidence,
>
> to serve on the defendant such notice and such particulars of or relating to the evidence as may be prescribed.
>
> (3) The Rules may provide that the court or the defendant may … dispense with (a requirement to serve such a notice).
>
> (5) The Rules may—
>
> (a) limit the application of any provision of the Rules to prescribed circumstances,
>
> (b) subject any provision of the Rules to prescribed exceptions,
>
> (c) make different provision for different cases or circumstances.

The relevant Rules are set out in Part 35 of the Criminal Procedure Rules.

4.4 Prosecution applications to introduce a defendant's bad character are governed by Rule 35.4:

> (1) A prosecutor who wants to introduce evidence of a defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence … must give notice in the form set out in the Practice Direction to the court officer and all other parties to the proceedings.
> (2) Notice under paragraph (1) must be given—
> (b) in a case to be tried in the Crown Court not more than 14 days after—
> (i) the committal of the defendant
> (iv) where a person is sent for trial under section 51 of the Crime and Disorder Act 1998 … the service of copies of the documents containing the evidence on which the charge or charges are based.

In spite of the apparently mandatory terms of Rule 35.4 above, Rule 35.8 gives the court power to allow an application to be given in a different form or orally and to shorten a time limit or extend a time limit, even after that limit has expired. Likewise, Rule 35.9 provides that a defendant who is entitled to receive a written notice of application may waive that entitlement. By Rule 35.6, the defendant's application to exclude the evidence must be in the form set out in the Practice Direction and served on the court and the parties not more than 14 days after receiving the notice.

4.5 Rule 35.2 deals with applications to introduce the bad character of a person who is not a defendant, usually therefore a witness. It provides that:

> A party who wants to introduce evidence of a non-defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence under section 100 … must apply in the form set out in the Practice Direction and the application must be received by the court officer and all other parties to the proceedings—
> (a) not more than 14 days after the prosecution have—
> (i) complied or purported to comply with section 3 of the Criminal Procedure and Investigations Act 1996 (initial disclosure by the prosecution), or
> (ii) disclosed the previous convictions of that non-defendant,
> or
> (b) as soon as reasonably practicable where the application concerns a non-defendant who is to be invited to give (or who has given) evidence for a defendant.

The dispensing power in Rule 35.8 applies. By Rule 35.3, a party who wishes to oppose the application should give notice in writing to the court and the other parties not more than 14 days after receiving the application.

4.6 Last, in terms of the Procedure Rules, there is Rule 35.5 which deals with a defendant who wishes to introduce evidence of the bad character of a co-defendant:

> A co-defendant who wants to introduce evidence of a defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence under section 101 … must give notice in the form set out in the Practice Direction to the court officer and all other parties … not more than 14 days after the prosecution has complied or purported to comply with section 3 of the Criminal Procedure and Investigations Act 1996.

The dispensing provision in Rule 35.8 applies. By Rule 35.6, a notice in opposition should be sent within 14 days.[1]

4.7 Reference has been made to the dispensing power in Rule 35.8. In *Robinson v Sutton Coldfield Magistrates*,[2] there had been an abject failure by the prosecution to serve a bad character application within the time limits laid down. In spite of this, the Justices allowed evidence of the defendant's bad character to be given. In the Divisional Court, Owen J made some general observations as to the proper approach in those circumstances. He said:

> The first point to make is that time limits must be observed. The objective of the Criminal Procedure Rules "to deal with all cases efficiently and expeditiously" depends upon adherence to the timetable set out in the Rules. Secondly, Parliament has given the court a discretionary power to shorten a time limit or extend it even after it has expired. In the exercise of that discretion the court will take account of all the relevant considerations, including the furtherance of the overriding objective. I am not persuaded that the discretion should be fettered in the manner for which the claimant contends, namely that the time limit should only be extended in exceptional circumstances. In this case there were two principal material considerations: first the reason for the failure to comply with the Rules. As to that, a party seeking an extension must plainly explain the reasons for its failure. Secondly, there was the question of whether the claimant's position was prejudiced by the failure. Any application for an extension will be closely scrutinised by the court. A party seeking an extension cannot expect the indulgence of the court unless he clearly sets out the reasons why it is seeking that indulgence.[3]

4.8 Assuming the formalities have been complied with and assuming there are no problems with proving the conviction (dealt with below), the question arises as to when the Judge should make his decision as to the admissibility of the evidence. This was dealt with by the Court of Appeal in *Gyima*.[4] Gage LJ said:

> We can entirely understand the practical reason for inviting a judge at the outset of a trial to rule whether a defendant's previous convictions are or are not admissible. There are plainly good reasons for this for the purposes of the administration of justice where there is a prospect that, once the ruling to admit the conviction is made, the defendant will plead guilty. However, in our judgement judges and practitioners should be astute to recognise that there may be cases where it is important to defer such a ruling until the whole of the evidence of the prosecution has been adduced. In such cases, where it appears that there may be weaknesses or potential weaknesses in the prosecution case, it is unwise to rule on the admission of previous convictions until the court is able to make a better assessment of the strength or weakness of the prosecution case.[5]

[1] In *Musone* (2007) EWCA Crim 1237, the Court of Appeal upheld the decision of the trial Judge to refuse to allow a defendant to cross-examine a co-defendant about an alleged previous admission to murder where there had been a total failure to comply with the requirements of this Rule. The case is discussed more fully in Ch 2 dealing with non-compliance with procedural rules.

[2] (2006) EWHC 307; (2006) 2 Cr App R 13.

[3] *Ibid*, at paras 14, 15 and 16.

[4] (2007) EWCA Crim 429.

[5] *Ibid*, at para 40.

4.9 In this and following paragraphs we are concerned with the question of proving previous convictions. The starting point in proving a conviction in the United Kingdom is section 73 of the Police and Criminal Evidence Act 1984 (PACE). It provides as follows:

> (1) Where in any proceedings, the fact that a person has in the UK been convicted … of an offence … is admissible in evidence, it may be proved by producing a certificate of conviction … relating to that offence and proving that the person named in the certificate … is the person whose conviction … is to be proved.
>
> (2) For the purposes of this section, a certificate of conviction—
>
> (a) shall, as regards a conviction … on indictment, consist of a certificate, signed by the proper officer of the court where the conviction … took place, giving the substance and effect … of the indictment and of the conviction …
>
> and a document purporting to be a duly signed certificate of conviction … under this section shall be taken to be such a certificate unless the contrary is proved.
>
> (3) In sub-section (2) above, 'proper officer' means
>
> (b) … the clerk of the court, his deputy or any other person having custody of the court record.
>
> (4) The method of proving a conviction … authorised by this section shall be in addition to and not to the exclusion of any other authorised manner of proving a conviction.

As to foreign convictions, these are governed by section 7 of the Evidence Act 1851. That provides:

> All judgments, decrees, orders and other judicial proceedings of any court of justice in any foreign state … may be proved in any court of justice … either by examined copies or by copies authenticated as hereinafter mentioned: that is to say … if the document sought to be proved be a judgment, decree, order, or other judicial proceedings of any foreign court … the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign … court to which the original document belongs, or, in the event of such court having no seal, to be signed by the Judge.

The section continues:

> If any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence without any proof of the seal where a seal is necessary, or of the signature.

4.10 A defendant may still contest that the conviction in fact relates to him. In *Burns*,[6] the prosecution produced a Memorandum of Conviction relating to a person with the same name and date of birth as the defendant. The Judge ruled that the Memorandum was sufficient to prove that the person identified in them was the defendant. In the Court of Appeal, Rose LJ said that the question of whether the Memorandum was proof that the defendant was the person referred to, was ultimately a question of fact for the jury.[7] He went on to say that:

[6] (2006) EWCA Crim 617; (2006) 1 WLR 1273.
[7] *Ibid*, at para 14.

> it cannot … be a matter of law as to what is capable of giving rise to prima facie evidence of identification in this context. Similarity in name and date of birth between a Memorandum and a defendant may or may not amount to prima facie proof … Everything must depend upon the circumstances of the particular case.[8]

In *Lewenden*,[9] referring to *Burns*, he said:

> Counsel helpfully draws attention to the provisions of section 117 of the Criminal Justice Act 2003 from which it is apparent that the admissibility of business and other documents may well be solely a matter of law for the determination by the Judge. For the avoidance of doubt, section 117 was not under consideration in *Burns*.[10]

The matter was considered at some length by Newman J in the Divisional Court in *Pattison v DPP*.[11] The Justices had convicted the defendant of driving whilst disqualified. He gave his name at the time of his arrest but refused to say in interview whether he was a disqualified driver. At trial, the prosecution relied upon a certificate of conviction. The defendant did not call any evidence. Reviewing the authorities, he said:

> It is clear that proof according to the provisions (of section 73 of PACE) involves two evidential stages (1) the production of the certificate of conviction and (2) proof to the criminal standard that the person to whom the certificate relates is the accused. As to (2) the proof contemplated by the sub-section is not limited to particular defined methods of proof. For example, proof by an admission by or on behalf of the accused or by the evidence of fingerprints or by someone who was present in court at the time that the person was convicted and disqualified being present to give evidence. The evidential issue is at large: proof to the criminal standard will be required that the person to whom the certificate relates is the person there and then before the court.[12]

He went on to say:

> In my judgement, the following principles can be distilled from the cases—
>
> (a) as with any other essential element of an offence, the prosecution must prove to the criminal standard that the person accused was a disqualified driver,
>
> (b) it can be proved by any admissible means such as an admission (even a non-formal one) by the accused that he was a disqualified driver,
>
> (c) if a certificate of conviction is relied upon pursuant to section 73 of PACE then it is an essential element of the prosecution case that the accused is proved to the criminal standard to be the person named in that certificate …
>
> (e) there is however no prescribed way that this must be proved. It can be proved by any admissible means,
>
> (f) an example of such means is a match between the personal details of the accused on the one hand and the personal detail recorded on the certificate of conviction,

[8] Above n 6, at para 17.
[9] (2006) EWCA Crim 648; (2006) 1 WLR 1278.
[10] *Ibid*, at para 12.
[11] (2005) EWHC 2938.
[12] *Ibid*, at para 14.

(g) even in a case where the personal details such as the name of the accused are not uncommon, a match will be sufficient for a prima facie case,
(h) in the absence of any evidence contradicting this prima facie case, the evidence will be sufficient for the court to convict,
(i) the failure of the accused to give any contradictory evidence in rebuttal will be a matter to take into account.[13]

As to foreign convictions, in *Mauricia*,[14] a copy of a conviction in a Dutch court had been obtained by letters rogatory. The defendant disputed them so the prosecution called evidence from a liaison officer with the Rotterdam police. He produced a certified certificate of judgment from the Netherlands which indicated that a man with the defendant's name born on the day that the defendant was born, had been convicted of offences of dishonesty. He also produced fingerprint records of this man and the prosecution called further evidence showing that the fingerprints matched those of the defendant. Approving of this procedure, Longmore J said:

> the Crown still has to prove that the examined copies of the conviction relate to the defendant who is currently before the court … that can be proved by any admissible evidence in the ordinary way. It is just a matter of proving that the person mentioned in the certificate and the defendant in court are one and the same person. Evidence of fingerprints is easily the most sensible way in which to proceed and there is nothing in the Evidence Act 1851 to suggest that proceeding by way of fingerprint evidence is in any way inadmissible.[15]

4.11 Sometimes however it will be necessary to prove more than the mere fact of a conviction. The following passage from the judgment of Rose LJ in *Hanson*[16] has relevance in this connection:

> It will often be necessary, before determining admissibility … to examine each individual conviction rather than merely to look at the name of the offence or the defendant's record as a whole … Where past events are disputed, the Judge must take care not to permit the trial unreasonably to be diverted into an investigation of matters not charged in the indictment.[17]

He went on to say:

> It follows from what we have already said that, in a conviction case the Crown needs to decide, at the time of giving notice of their application, whether it proposes to rely simply upon the fact of conviction or also upon the circumstances of it. The former may be enough where the circumstances of the conviction are sufficiently apparent from its description to justify a finding that it can establish propensity … But where, as will often be the case, the Crown needs and proposes to rely on the circumstances of the previous conviction, those circumstances and the manner in which they are to be proved, must be set out in the application. There is a similar obligation of frankness

[13] Above n 11, at para 26.
[14] (2002) EWCA Crim 678; (2002) 2 Crim App R 27.
[15] *Ibid*, at para 32—see also Kordasinski (2006) EWCA Crim 2984; (2007) 1 Crim App R 17.
[16] (2005) EWCA Crim 824; (2005) 1 WLR 3169.
[17] *Ibid*, at para 12.

> on the defendant … Routine applications by defendants for disclosure of the circumstances of previous convictions are likely to be met by a requirement that the request be justified by identification of the reason why it is said that those circumstances may show the conviction to be inadmissible. We would expect the relevant circumstances of previous convictions generally to be capable of agreement.[18]

However, complications rapidly emerged. In *Bovell*,[19] Rose LJ said:

> It is worth mentioning that the basis of plea in relation to an earlier conviction may be relevant where it demonstrates differences from the way in which the prosecution initially put the case. In other words, the mere reference to the statement of a complainant in an earlier case may not provide the later court with the material needed to make a decision as to the admissibility of the earlier conviction.[20]

In *Humphris*,[21] the Crown sought to prove previous convictions and some details thereof by reference to section 117 of the Act.[22] They relied upon a statement from an officer with the Essex police. She retrieved records from the Essex police computer. Records obtained from that computer were derived from information from various members of staff who worked for the Essex police and they were clearly under a duty to record information from persons also acting under a duty who had or might reasonably be supposed to have had personal knowledge of the matters dealt with in the records and who could not now be expected to have any recollection of the matters dealt with in the information supplied. The records contained details of the previous convictions and a description of the methods used in the offence. The Court of Appeal accepted the argument that the details of what the defendant was alleged to have done was information dependent upon the complainant in each case. She was the 'relevant person' for the purposes of section 117(2)(b) but she did not actually supply the information for the purpose of the records—a police officer did so. Accordingly, section 117(2)(b) could not be relied upon for the purpose of proving the details. Lord Woolf said:

[18] Above n 16, at para 17.
[19] (2005) EWCA Crim 1091.
[20] *Ibid*, at para 2.
[21] (2005) EWCA Crim 2030.
[22] Section 117 provides as follows:

'(1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if—
  (a) oral evidence given in the proceedings would be admissible as evidence of that matter,
  (b) the requirements of sub-section (2) are satisfied.
(2) The requirements of this sub-section are satisfied if—
  (a) the document … was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office,
  (b) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and
  (c) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in paragraph (a) received the information in the course of a trade, business, profession or other occupation or as the holder of a paid or unpaid office.'

> the right course to have adopted was that which was adopted prior to the Criminal Justice Act. A statement should have been obtained from the complainant. If that had been done, it may or may not have been possible to rely on the circumstances in section 116(2) which allows statements to be adduced before a jury when a witness is unavailable.[23]

He went on to say:

> Before we leave this case we point out that it has a moral for other cases of this sort. First, it emphasises the importance of the Crown determining whether they need any more evidence than the actual previous conviction to achieve the purpose for which they want the evidence to be admitted. Second, it emphasises the importance of the Crown deciding that if they want more than the evidence of the conviction and the matters that can be formally established by relying upon PACE, they must ensure that they have available the necessary evidence to support what they require. That will normally require the availability of either a statement by the complainant … in a sexual case or the complainant to be available to give first-hand evidence of what happened.[24]

In *Ainscough*,[25] evidence of previous convictions came from a police officer. His information came from the Police National Computer. He referred to print-outs from the computer in order to provide details of the offences. The defendant did not dispute the convictions but he did not accept the accuracy of the details. Morris Kay LJ said:

> where there is a dispute between the prosecution and the defence about the facts which supported previous convictions, it is not enough for the prosecution simply to rely on the Police National Computer … It is to be hoped that where there is a dispute about the facts supporting previous convictions, in almost all cases it should be possible for the matter to be dealt with in accordance with *Humphris*. However, we appreciate that there may be cases where the position is simply too complicated. Whatever the complainant may have said in a statement at the time of the earlier conviction, or may say now in evidence to the court, it may be that a current defendant was sentenced on a different basis as a result of a basis of plea proffered and accepted by the prosecution and by the Judge. In other words, where these matters are in dispute, there is a need for caution, there is a need to have regard to what was said in *Humphris* and there is a need to ensure that a current trial does not give rise to numerous satellite issues about what did or did not happen in some case many years ago.[26]

[23] Above n 21, at para15.
[24] Above n 21, at para 21.
[25] (2006) EWCA Crim 674.
[26] *Ibid,* at paras 18 and 19.

5

Hearsay

5.1 Chapter 2 of the Criminal Justice Act 2003 sets out new provisions in respect of the law relating to hearsay. So far as procedure is concerned, section 132(1) of the Act provides for the making of rules by the Criminal Procedure Rules Committee. It goes on to provide:

(2) The Rules may make provision about the procedure to be followed and other conditions to be fulfilled by a party proposing to tender a statement in evidence under any provision of this chapter.

(3) The Rules may require a party proposing to tender the evidence to serve on each party to the proceedings such notice, and such particulars of or relating to the evidence, as may be prescribed.

(4) The Rules may provide that the evidence is to be treated as admissible by agreement of the parties if—

  (a) a notice has been served in accordance with provisions made under subsection (3), and

  (b) no counter notice in the prescribed form objecting to the admission of the evidence has been served by a party.

(5) If a party proposing to tender evidence fails to comply with a prescribed requirement applicable to it—

  (a) the evidence is not admissible except with the court's leave,[1]

  (b) when leave is given the court or jury may draw such inferences from the failure as appear proper,

  (c) the failure may be taken into account by the court in considering the exercise of its powers with respect to costs.[2]

[1] A good example of the use of this sensible power is provided by *McKewan* (2007) EWCA 740 (Admin). A criminal damage trial in the Magistrates Court had taken 10 months to come to trial. There had been 9 pre-trial reviews and 1 vacated trial date. On the day of trial, the prosecution wanted a further adjournment because a witness was ill. No adequate steps had been taken to justify the admission of the statement of the witness pursuant to s 116, namely that the witness was unfit to give evidence. Rejecting the application for the adjournment, the Magistrates then acceded to a prosecution request to admit the statement pursuant to s 114(1)(d), the so-called 'safety valve'. Of course, no notice had been given. Quashing the ensuing conviction, Gross J said, at para 18, 'For my part, the safety valve is there to prevent injustice. It would have to be an exceptional case for it to be relied upon … to rescue the prosecution from the consequences of its own failures'.

[2] It is interesting that this section specifically provides for sanctions in the event of non-compliance with the Rules. It should be contrasted with the apparent lack of sanctions for non-compliance in the context of bad character applications, save as to costs—see s 111 of the Act. In *Musone* (2007) EWCA Crim 1237, Moses LJ said, at para 37, 'In circumstances where a judge refuses to dispense with the

(6) In considering whether or how to exercise any of its powers under sub-section (5), the court shall have regard to whether there is any justification for the failure to comply with the requirement.
(7) A person shall not be convicted of an offence solely on an inference drawn under sub-section (5)(b).
(8) The Rules under this section may[3]—
  (a) limit the application of any provision of the Rules to prescribed circumstances,
  (b) subject any provision of the Rules to prescribed exceptions,
  (c) make different provision for different cases or circumstances.

5.2 The relevant Rules are set out in Part 34 of the Criminal Procedure Rules 2005 as amended. They provide as follows:

34.2 The party who wants to introduce hearsay evidence must give notice in the forms set out in the Practice Direction to the court officer and all other parties.
34.3 The prosecutor must give notice of hearsay evidence—
  (b) in the Crown Court not more than 14 days after—
    (i) the committal of the defendant or
    (iv) where a person is sent for trial under section 51 of the Crime and Disorder Act 1998 … the service of copies of the documents containing the evidence on which the charge or charges are based.
34.4 A defendant must give notice of hearsay evidence not more than 14 days after the prosecutor has complied with or purported to comply with section 3 of the Criminal Procedure and Investigations Act 1996.
34.5 A party who receives a notice of hearsay evidence may oppose it by giving written notice within 14 days in the form set out in the Practice Direction to the court officer and all other parties.
34.7 The court may—
  (a) dispense with the requirement to give notice of hearsay evidence,
  (b) allow notice to be given in a different form or orally.
34.8 A party entitled to receive a notice of hearsay evidence may waive his entitlement by so informing the court and the party who would have given the notice.

5.3 The crucial time limits therefore, so frequently ignored, are:

(a) Prosecution—14 days after committal or service of the papers in a sent case.
(b) Defence—14 days after compliance or purported compliance by the prosecution with its initial disclosure obligations.
(c) Either party—14 days to oppose.

requirement to give notice or shorten a time limit and refuses to give leave to admit the evidence. The Act thus gives power to the judge to prevent that which … might cause incurable unfairness either to the prosecution or to a fellow defendant. Plainly the Procedural Rules should not be used to discipline.'

[3] *Ibid*.

6

Applications in Respect of the Previous Sexual History of a Complainant

6.1 The relevant parts of sections 41 and 42 of the Youth Justice and Criminal Evidence Act 1999 are as follows:

Section 41:

(1) If at trial a person is charged with a sexual offence then, except with the leave of the court—
  (a) no evidence may be adduced and
  (b) no question may be asked in cross-examination by or on behalf of any accused … about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application … and may not give such leave unless it is satisfied—
  (a) that sub-sections (3) or (5) apply, and
  (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury … on any relevant issue in the case.

(3) This sub-section applies if the evidence or question relates to a relevant issue in the case and either—
  (a) the issue is not an issue of consent, or
  (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar
    (ii) to any other sexual behaviour of the complainant which … took place at or about the same time as that event that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of sub-section (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

Section 42:

In section 41—
  (a) 'relevant issue in the case' means any issue falling to be proved by the prosecution or defence in the trial of the accused,
  (b) 'issue of consent' means any issue whether the complainant in fact consented … (and accordingly does not include any issue as to the belief of the accused that the complainant so consented).

6.2 Section 3 of the Human Rights Act 1998 provides that:

> So far as is possible to do so, primary legislation … must be read and given effect to in a way which is compatible with the Convention of Rights.

The House of Lords in *A*[1] were able to utilise the provisions of section 3 in order that the highly restrictive terms of section 41 could be interpreted in such a way as to ensure that a defendant's right to a fair trial was not irreparably damaged. The following paragraphs from the speeches of Lord Steyn and Lord Hutton are highly relevant.

Lord Steyn said:

> (45) It is therefore possible under section 3 to read section 41 and in particular section 41(3)(c) as subject to the implied provision that evidence of questioning which is required to ensure a fair trial under Article 6 … should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c) … On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant … Where the line is to be drawn must be left to the judgement of trial judges.
>
> (46) The effect of the decision today is that under section 41(3)(c) … the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 … If the test is satisfied, the evidence should not be excluded.

Lord Hutton said:

> (152) Where there has been a recent close and affectionate relationship between the complainant and the defendant, it is probable that the evidence will be relevant, not to advance the bare assertion that because she consented in the past she consented on the occasion in question but … that evidence of such a relationship will show the complainant's specific mindset towards the defendant, namely her affection for him.
>
> (163) … I consider that section 41(3)(c) should be read as including evidence of such previous behaviour by the complainant because the defendant claims that her sexual behaviour on previous occasions was similar and the similarity was not a coincidence because there was a causal connection which was her affection for, and feelings of attraction towards, the defendant. It follows that I am in full agreement with the test of admissibility stated by Lord Steyn in paragraph 46 of his speech.

Although of little or no assistance on the general approach to section 41, it is worth mentioning the speech of Lord Hope in connection with section 41(3)(a), namely that the issue is not one of consent (though it should be noted that leave is still required). He said:

> (79) Paragraph (a) of sub-section (3) sets out the first qualifying condition. That is that the issue to which the evidence or question relates is not an issue of consent … Examples of issues which fall within this paragraph because the evidence of sexual behaviour is proffered for specific reasons are (a) the defence of honest belief …

[1] (2001) UKHL 25; (2001) 2 Crim App R 351.

(b) that the complainant was biased against the accused or had a motive to fabricate the evidence, (c) that there is an alternative explanation for the physical conditions on which the Crown rely to establish that intercourse took place, and (d) especially in the case of young complainants … that the detail of their account must have come from some other sexual activity before or after the event which provides an explanation for their knowledge of that activity.

6.3 In this and the following paragraphs, we are concerned with the procedural requirements surrounding an application to introduce the previous sexual history of the complainant. It is somewhat complicated. The Act itself contains some provisions:

(41)(6) For the purposes of sub-sections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those sub-sections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(43)(1) An application for leave shall be heard in private and in the absence of the complainant …

(2) Where such an application has been determined the court must state in open court …

(a) its reasons for giving or refusing leave, and

(b) if it gives leave, the extent to which evidence may be adduced or questions asked in pursuance of the leave …

(3) Criminal Procedure Rules may make provision

(a) requiring applications for leave to specify, in relation to each item of evidence or question to which they relate, particulars of the grounds on which it is asserted that leave should be given by virtue of sub-section (3) or (5) of section 41;

(b) enabling the court to request a party to the proceedings to provide the court with information which it considers would assist it in determining an application for leave.

6.4 Part 36 of the Criminal Procedure Rules, as conditioned by the statutory provisions dealt with in the previous paragraph, governs the making of a section 41 application:

36.2 The defendant must apply for permission to do so—

(a) in writing, and

(b) not more than 28 days after the prosecutor has complied or purported to comply with section 3 of the Criminal Procedure and Investigations Act 1996 (disclosure by prosecutor).

36.3 The application must—

(a) identify the issue to which the defendant says the complainant's sexual behaviour is relevant,

(b) give particulars of—

(i) any evidence that the defendant wants to introduce, and

(ii) any questions that the defendant wants to ask,

(c) identify the exception to the prohibition in section 41 of the Youth Justice and Criminal Evidence Act 1999 on which the defend ant relies, and

(d) give the name and date of birth of any witness whose evidence about the complainant's sexual behaviour the defendant wants to introduce.[2]

36.4 The defendant must serve the application on the court officer and all other parties.

36.5 A party who wants to make representations about an application under Rule 36.2 must

(a) do so in writing not more than 14 days after receiving it, and

(b) serve those representations on the court officer and all other parties.

36.7 The court may shorten or extend (even after it has expired) a time limit under this part.

[2] Presumably the legality of this requirement derives from s 43(3)(b) of the Act.

7

Vulnerable Witnesses—Competence and Special Measures

7.1 The first matter to consider is the competence of the witness to give evidence. This is obviously particularly important in the case of young children. The matter is now largely governed by statute, namely section 53 of the Youth Justice and Criminal Evidence Act 1999:

(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.
(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—
  (a) understand questions put to him as a witness, and
  (b) give answers to them which can be understood.

It is for the court to determine questions of competence. The basic approach is set out in section 54 of the Act:

(1) Any question whether a witness in criminal proceedings is competent to give evidence in the proceedings whether raised
  (a) by a party to the proceedings, or
  (b) by the court of its own motion,
  shall be determined by the court in accordance with this section.
(2) It is for the party calling the witness to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings.
(3) In determining the question … the court shall treat the witness as having the benefit of any direction under section 19 (special measures).
(4) Any proceedings held for the determination of the question shall take place in the absence of the jury.
(5) Expert evidence may be received on the question.[1]
(6) Any questioning of the witness (when the court considers that necessary) shall be conducted by the court in the presence of the parties.

[1] This overrules the decision of Phillips LJ (as he then was) in *Gee v DPP* (1997) 2 CR App R 78 when, in dealing with an appeal based on a refusal by the trial judge to hear psychiatric evidence on the question, said (at p 84) 'In my judgement the exercise was misconceived, inappropriate and a complete waste of … considerable money. The test of whether a child is capable of giving intelligible evidence does not require any input from an expert. It is a simple test, well within the capacity of a judge or magistrate'. Sensible, but no longer the law!

In *Macpherson*,[2] dealing with the competence of a young child, Forbes J said:

> In the ordinary way, that issue should be determined before the witness is sworn, usually as a preliminary issue at the start of the trial. In cases such as this, the Judge should watch the videotaped interview … and/or ask the child appropriate questions … The issue raised … is one of understanding, that is to say: can the witness understand what is being asked and can the jury understand the witness's answer.[3]

He went on to say that:

> Questions of credibility and reliability are not relevant to competence. Those matters go to the weight of the evidence.[4]

In *Powell*,[5] where the complainant was 3½ years old, Scott Baker LJ said:

> However, the plain fact is that when a case depends on the evidence of a very young child, it is absolutely essential (a) that the ABE (achieving best evidence) takes place very soon after the event, (b) that the trial (at which the child has to be cross-examined) takes place very soon thereafter. As the expert evidence in this case showed, very young children simply do not have the ability to lay down memory in a manner comparable to adults. Looking at the case with hindsight, it was completely unacceptable that the appellant should have been tried for an offence proof of which relied on the evidence of a 3½ year old, when the trial did not take place until over nine months had passed from the date of the alleged offence. Competency to give evidence relates to the whole of the witness's evidence and not just to part of it.[6]

7.2 Quite apart from the statutory special measures regime, the court has certain inherent powers to protect witnesses and to assist them in giving their evidence. In *DJX*,[7] in respect of a number of child witnesses who were giving evidence in a family sex case, the trial judge permitted the use of screens. The Court of Appeal held that he was right to do so:

> We take the view … that what the learned Judge did here in his discretion was a perfectly proper and indeed a laudable attempt to see that there was a fair trial.[8]

It is worth observing that in that case the Judge had given an appropriate warning to the jury to the effect that the use of screens should not prejudice them against the defendant.

In *Davis*,[9] the Court of Appeal was dealing with a case where gangsters were on trial and the witnesses were terrified. The trial judge had permitted those witnesses to give their evidence anonymously. Having held that there was clear jurisdiction at common law to admit the incriminating evidence of an anonymous witness

[2] (2005) EWCA Crim 3605; (2006) 1 Crim App R 30.
[3] *Ibid*, at paras 25 and 26.
[4] Above n 2, at para 29.
[5] (2006) EWCA Crim 3; (2006) 1 Crim App R 31.
[6] *Ibid*, at paras 41 and 42.
[7] (1990) 91 Crim App R 36.
[8] *Ibid*, at p 41.
[9] (2006) EWCA Crim 1155; (2006) 2 Crim App R 32.

and having gone on to review the European human rights jurisprudence, the President said:

> The court accepted that the convention rights of witnesses included, where necessary, the preservation of their anonymity, and in our judgement decided that the concealment of the identity of witnesses is not inconsistent with the right to a fair trial, provided first the need for anonymity is clearly established, second that cross-examination of the witness by an advocate for the defendant is permitted and finally, the ultimate test, that the trial should be fair.[10]

7.3 It is necessary now to consider the statutory scheme usually referred to as 'special measures'. This is provided for by Part 2 of the Youth Justice and Criminal Evidence Act 1999. The first question is as to eligibility. There are different categories of eligibility and it is useful to bear the differences in mind.

Section 16 Eligibility

This section deals with those witnesses who are eligible for assistance by virtue of age or incapacity:

(1) … a witness in criminal proceedings … is eligible for assistance by virtue of this section—
  (a) if under the age of 17 at the time of the hearing, or
  (b) if the court considers that the quality of (the) evidence (to be) given by the witness is likely to be diminished by reason of any of the circumstances falling within sub-section 2.

(2) The circumstances falling within this sub-section are—
  (a) that the witness
    (i) suffers from mental disorder within the meaning of the Mental Health Act 1983, or
    (ii) otherwise has a significant impairment of intelligence and social functioning,
  (b) that the witness has a physical disability or is suffering from a physical disorder.

(5) References to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy: and for this purpose coherence refers to a witness's ability in giving evidence to give answers which address the question put to the witness and can be understood both individually and collectively.

The special measures available to a witness in this category are those set out in sections 23 to 30 of the Act—section 18(1)(a).

[10] *Ibid*, at para 51. Further, it should be noted that s 19(4) of the Youth Justice and Criminal Evidence Act 1999, expressly preserves the inherent power of the court to make special provision for witnesses whether or not they fall within the categories specified in ss 16 and 17.

Section 17 Eligibility

This section deals with witnesses who are eligible for assistance on the grounds of fear or distress in connection with testifying:

(1) … a witness in criminal proceedings is eligible for assistance by virtue of this sub-section if the court is satisfied that the quality of (the) evidence (to be) given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(2) In determining whether a witness falls within sub-section (1) the court must take into account in particular—

  (a) the nature and alleged circumstances of the offence to which the proceedings relate,

  (b) the age of the witness,

  (c) such of the following matters as appear to the court to be relevant, namely—

    (i) the social and cultural background and ethnic origins of the witness,

    (ii) the domestic and employment circumstances of the witness, and

    (iii) any religious beliefs or political opinions of the witness,

  (d) any behaviour towards the witness on the part of—

    (i) the accused,

    (ii) members of the family or associates of the accused, or

    (iii) any other person who is likely to be an accused or a witness in the proceedings.

(3) In determining that question the court must in addition consider any views expressed by the witness.

(4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence … the witness is eligible for assistance in relation to those proceedings by virtue of this sub-section unless the witness has informed the court (to the contrary).

The special measures available to a witness in this category are those set out in sections 23 to 28 of the Act—section 18(1)(b). It is worth noting that in respect of investigations commenced after 1 September 2007, the video evidence provisions of section 27 will be available to section 17 eligible witnesses in sex cases.

Section 32 of the Act provides that:

> Where … evidence has been given in accordance with a special measures direction, the Judge must give the jury such warning (if any) as the Judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.

In *Brown*,[11] application was made during the course of the trial pursuant to section 17 for certain witnesses to give their evidence from behind a screen. The application was granted. Before the first of those witnesses gave evidence, the Judge warned the jury not to allow the fact of the use of a screen to prejudice them against the defendant. Complaint was made that he should have repeated that warning in his summing-up. Rejecting that complaint in the Court of Appeal, Buxton LJ said: We cannot agree with that. It is an argument which is purely formalistic. The question is whether … the Judge

[11] (2004) EWCA Crim 1620.

has got across to the jury the essential matter of the use of screens and the conclusion they should draw and not draw from it. That is much more likely to impress itself on the jury if it is given at the time that the witness gives evidence than if it is required at a later stage in the summing-up.[12]

7.4 This paragraph deals with the various special measures available other than that relating to the use of video recording. By virtue of section 19(2) of the Act, once the court has determined that the witness is eligible for assistance by virtue of sections 16 and 17 it must then:

(a) determine whether any of the special measures available in relation to the witness … would in its opinion be likely to improve the quality of (the) evidence (to be) given by the witness, and
(b) if so—
  (i) determine which of those measures … would be likely to maximise … the quality of such evidence, and
  (ii) give a direction … providing for the measure or measures … to apply to … the witness.

By section 19(3):

(3) In determining … whether any special measure or measures would or would not be likely to improve … the quality of the evidence (to be) given by the witness, the court must consider all the circumstances of the case including in particular—
  (a) any views expressed by the witness, and
  (b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

The available special measures are:

Section 23—screens.
Section 24—evidence by live link,
Section 25—although headed evidence in private, in fact it provides a power to exclude persons of any description specified in the direction from being present in court during the giving of the evidence of that witness. However, the direction may only be given where the proceedings relate to a sexual offence or when it appears to the court that there are reasonable grounds for believing that any person (apart from the accused) has sought or will seek to intimidate the witness when testifying.
Section 26—removal of wigs and gowns.

7.5 Part 29 of the Criminal Procedure Rules (the Rules) sets out the steps which should be taken in respect of an application for a special measures direction pursuant to section 19 of the Act. It can be paraphrased as follows:

(1) It should be made in writing in the form set out in the Practice Direction.
(2) The application must be sent to the court office and every other party.

[12] *Ibid*, at para 21. The case is also authority for the proposition that the decision to grant special measures is essentially a matter for the discretion and judgement of the trial judge, having regard to 'the justice of the case, fairness to the defendant and … fairness to the witnesses'—see para 14.

(3) The application must be received by the court office within 28 days of committal or within 28 days of the service of the papers in a case sent pursuant to section 51 of the Crime and Disorder Act 1998.
(4) A party wishing to oppose the application must notify his opposition in writing to the court and the applicant within 14 days of receiving the application and set out his reasons.
(5) The written notice of opposition must state whether that party disputes that the witness is eligible for protection by virtue of section 16 or 17 or whether he disputes that any special measures available would be likely to improve the quality of the evidence of that witness.
(6) Where no written notice of opposition has been filed, the court may determine the application in favour of the applicant without a hearing—alternatively, it may order a hearing.
(7) Where a party has properly notified his opposition, the court must direct a hearing.
(8) A written application may be made for an extension of the relevant time period, even after that period has expired though that application must set out the reasons why it could not have been made in time. Copies of any such late applications should be sent to every party. The extension application may be heard by a judge without a hearing unless he otherwise directs.
(9) Even where no application has been made in accordance with the foregoing provisions, an application may be made orally at trial. Such an applicant must state the reasons why the application is late and the court must be satisfied that he was unable to make the application in accordance with the primary rule in Rule 29.1.[13]

Once a special measures direction has been made, it has binding effect until the proceedings are determined.[14] However, by section 20(2):

> the court may discharge or vary … a special measures direction if it appears to the court to be in the interests of justice to do so and may do so either (a) on an application made by a party … if there has been a material change of circumstances since the relevant time, or (b) of his own motion.

By Rule 29.4, any such application to vary or discharge must be in writing and specify the change of circumstances which is alleged to have occurred. The application may be opposed on the ground that there has been no such change.

[13] In *Brown* (2004) EWCA Crim 1620, one of the complaints that was made was that the application was made late and not in accordance with the Rules. Buxton LJ said (at para 16), 'We do not accept that the provisions of (the rules) are mandatory in the sense that if they are not complied with, it is not possible for the Judge to give the relevant direction.' It is not entirely easy to see how this squares with the requirement in R 29.3(2)(b) that 'the court must be satisfied that the applicant was unable to make the application in accordance with Rule 29.1.' This is particularly so in the context of a prosecution application.

[14] Section 20(1) of the Act.

When ruling on such an application the court must give its reasons in open court.[15]

7.6 A witness under the age of 17 years is eligible for assistance by virtue of section 16 of the Act. There are further provisions relating to such child witnesses which are set out in section 21 of the Act, which is headed 'Special Provisions relating to Child Witnesses'. The section reads as follows :

(1) For the purposes of this section—
  (a) a witness in criminal proceedings is a child witness if he is an eligible witness by reason of section 16(1)(a)
  (b) a child witness is in need for special protection if the offence to which the proceedings relate is
    (i) an offence falling within section 35(3)(a) (sexual offences etc),[16] or
    (ii) an offence falling within section 35(3)(b), (c) or (d) (kidnapping, assaults etc),[17] and
    (iii) a relevant recording in relation to a child witness is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness

(3) The primary rule in the case of a child witness is that the court must give a special measures direction … which complies with the following requirements—
  (a) it must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief) and
  (b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording … to be given by means of a live link.

(4) The primary rule is subject to the following limitation—
  (b) the requirement contained in sub-section (3)(a) … has effect subject to section 27(2).

The additional requirement in section 21(6) which provides for the cross-examination and re-examination of such a witness to be video recorded is not currently available.

The use of the video recording as evidence in chief is subject to section 27 of the Act, Part 29 of the Rules and Part IV of the Practice Direction. The relevant parts of section 27 are as follows:

(1) A special measures direction may provide for a video recording of an interview of the witness to be admitted as the evidence in chief of the witness.

(2) A special measures direction may, however, not provide for a video recording, or a part of such recording to be admitted under this section if the court is of the

[15] Section 20(5) of the Act.

[16] Section 35(3)(a). The relevant offences are offences under the Protection of Children Act 1978 and offences under Pt 1 of the Sexual Offences Act 2003.

[17] Section 35(3)(b), (c) and (d). The relevant offences are offences of kidnapping, false imprisonment and under ss 1 and 2 of the Child Abduction Act 1984, offences under s 1 of the Children and Young Persons Act 1933 and any offence which involves an assault on or injury or threat of injury to any person.

opinion having regard to all the circumstances of the case that in the interests of justice the recording or that part of it, should not be so admitted.

(3) In considering for the purposes of sub-section (2) whether any part of a recording should not be admitted under this section, the court must consider whether any prejudice to the accused from that part being so admitted is outweighed by the desirability of showing the whole or substantially the whole of the recorded interview.

(4) Where a special measures direction provides for a recording to be admitted under this section, the court may … subsequently direct that it is not to be so admitted

(a) if it appears to the court that

(i) the witness will not be available for cross-examination …

(b) any criminal procedure rules requiring the disclosure of the circumstances in which the recording was made have not been complied with.

The relevant part of the Rules is Rule 29.7. In slightly shortened and edited form it is set out hereunder:

(1) Where the application is for a special measures direction to enable a video recording to be admitted as the evidence in chief of the witness, then the matters set out in (2) must also be dealt with.

(2) The application must be accompanied by the video and must include—

(a) the name of the defendant and the offence charged,

(b) the name and date of birth of the witness,

(c) the date the recording was made,

(d) whether and when an oath or solemn declaration was made,

(e) whether the witness is available for cross-examination,

(f) the circumstances in which the recording was made including times, location, people present and equipment used.

(3) Where it is proposed to tender only part of the recording, the application must specify that part.

(7) A party who receives a video served (as above) must within 14 days of receiving it notify in writing the applicant and the court,

(a) whether he objects to the admission … of any part of the recording giving his reasons why it would not be in the interests of justice for the recording or part of it to be admitted,

(b) whether he would agree to the admission of parts of the recording and if so which parts.

Lastly, Part IV.40 of the Consolidated Criminal Practice Direction provides, in its relevant parts, as follows:

40.2 Where a court grants leave to admit a video recording in evidence, it may direct that any part of the recording be excluded. Where any such direction is given, the party who made the application must edit the video recording in accordance with those directions.

40.4 Once a trial has begun, if by reason of faulty or inadequate preparation (or some other cause) the procedures set out above have not been properly complied with and an application is made to edit the video recording, thereby making an adjournment necessary, the court may make an appropriate award of costs.

Discussion

It is the common experience of judges sitting in the Crown Court that the interviewing of child witnesses is often badly done, that the technical quality of the recording is often poor and that the rules governing editing and amendment are rarely complied with. In spite of this lamentable state of affairs, there is precious little authority dealing with how a judge should deal with these problems. In *G v DPP*,[18] where there had been breaches of the memorandum of good practice which then governed the interviewing of children, Phillips LJ said:

> Where the failure to comply with the memorandum of good practice should lead to the exclusion of video evidence will not necessarily be a question that can be determined by considering the nature and extent of the breaches that have occurred. It will depend upon the extent to which passages in the evidence affected by the breaches are supported by other passages in respect of which no complaint can be made. It can depend also upon other evidence in the case and the extent to which this corroborates the evidence given in the video interviews.[19]

In *K*,[20] the Court of Appeal had to consider a case where there had been breaches of the 'achieving best evidence' guidelines. Hooper LJ said:

> In *R v Hanton* (2005) EWCA Crim 2009, the Court of Appeal was concerned with a case where there were a number of alleged breaches. Having considered *G*, it adopted as the test 'could a reasonable jury properly directed be sure that the witness has given a credible and accurate account on the video tape notwithstanding any breaches'. If yes, it was a matter for the jury. If no, the interview would be inadmissible. The test could also be expressed in this way. 'Were the breaches such that a reasonable jury properly directed could not be sure that the witness gave a credible and accurate account in the video interview'… Read as a whole, *G* indicates that the prime consideration is the reliability of the video evidence, which will normally be assessed by reference to the interview itself, the condition under which it was held, the age of the child and the nature and extent of any breach of the code.[21]

Dealing with the reference in *G* to 'other evidence', Hooper LJ went on to say:

> We should only add that our reading of *G* is that the court considered it possible, rather than necessary or desirable, for a court to have regard to other evidence in the case. It may not sufficiently have emphasised, though we do, that any such reference to other evidence should be undertaken with considerable caution, since it may not be often that other evidence can assist as to the credibility, accuracy and completeness of a video interview.[22]

It often happens that the only way of following the evidence on the video is by reference to a written transcript of what had been said. In *Welstead*,[23] the trial

[18] (1997) 2 Crim App R 78.
[19] *Ibid*, at p 87.
[20] (2006) EWCA Crim 472; (2006) 2 Crim App R 10.
[21] *Ibid*, at paras 23 and 25.
[22] Above n 20, at para 29.
[23] (1996) 1 Crim App R 59.

judge allowed the jury to have copies of the transcript. In the Court of Appeal, Evans LJ said:

> In our judgement he was entitled to do that, provided that certain conditions were met. First that the transcripts would in fact be likely to assist them in following the evidence … secondly, that he made it clear to them that the transcripts were made available only for that limited purpose and that they should concentrate primarily on the oral evidence. The transcript was not the child's evidence in the case. Thirdly, that he gave them such directions, both at the time and in the summing-up, as would be likely to be an effective safeguard against the risk of disproportionate weight being given to the transcript.[24]

In this case, the jury gave the transcripts back when they retired to consider their verdict. In *Morris*,[25] the jury took the transcript with them when they retired. The Court of Appeal disapproved. They said it was rare that a jury should be permitted to retire with a transcript, even when the defence consented.

Given the technical inadequacies of many of the videos of child witnesses, jurors often want to see part or all of the video again. This is dealt with at some length in the judgment of Lord Taylor in *Rawlings*.[26] He said:

> In our judgement, it is a matter for the Judge's discretion as to whether the jury's request for the video to be replayed should be granted or refused … Usually, if the jury simply wish to be reminded of what the witness said, it would be sufficient and most expeditious to remind them from his own note. If however the circumstances suggest or the jury indicate that how the words were spoken is of importance to them, the Judge may in his discretion allow the video, or the relevant part thereof, to be replayed. It would be prudent where the reason for the request is not stated or obvious for the Judge to ask whether the jury wished to be reminded of something said, which he may be able to give them from his note, or whether they wish to be reminded of how the words were said. If the Judge does allow the video to be replayed, he should comply with the following three requirements:
>
> (a) The replay should be in court with Judge, Counsel and defendant present.
> (b) The Judge should warn the jury that because they are hearing the evidence in chief of the complainant for a second time, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case.
> (c) To assist in maintaining a fair balance, he should, after the replay of the video, remind the jury of the cross-examination and re-examination of the complainant from his notes whether the jury asked him to do so or not.[27]

[24] *Ibid*, at p 69.
[25] (1998) Crim LR 416.
[26] (1995) 2 CR App R 222.
[27] *Ibid*, at p 237.

8

Expert Evidence

8.1 The disclosure of expert evidence is dealt with by Part 24 of the Criminal Procedure Rules (the Rules) whose authority is derived from section 81 of the Police and Criminal Evidence Act 1984. The Rules provide as follows:

24.1(1) following—

(b) the committal for trial of any person

(e) the sending of any person for trial under section 51 of the Crime and Disorder Act 1998.

If any party to the proceedings proposes to adduce expert evidence (whether of fact or opinion) in the proceedings … he shall as soon as practicable …

(i) furnish the other party or parties and the court with a statement in writing of any finding or opinion which he proposes to adduce by way of such evidence and notify the expert of that disclosure, and

(ii) where a request in writing is made to him in that behalf by any other party, provide that party also with a copy of (or if it appears to the party proposing to adduce the evidence to be more practicable, a reasonable opportunity to examine) the record of any observation, test, calculation or other procedure on which such finding or opinion is based and any other document or other thing or substance in respect of which any such procedure has been carried out,

(iii) in paragraph (1) document means anything in which information of any description is recorded.

24.2(1) If a party has reasonable grounds for believing that the disclosure of any evidence in compliance with the requirements imposed by Rule 24.1 might lead to the intimidation or attempted intimidation of any person on whose evidence he intends to rely in the proceedings, or otherwise to the course of justice being interfered with, he shall not be obliged to comply with those requirements in relation to that evidence.

(2) Where in accordance with paragraph (1) a party considers that he is not obliged to comply with the requirements imposed by Rule 24.1 with regard to any evidence in relation to any other party, he shall give notice in writing to that party to the effect that the evidence is being withheld and the grounds for doing so.

24.3 A party who seeks to adduce expert evidence in any proceedings and who fails to comply with Rule 24.1 shall not adduce that evidence in those proceedings without leave of the court.

8.2 Quite apart from the Rules, the common law had evolved quite detailed rules as to the nature of the duty of an expert and what should be contained

in his report. The classic account derives from the judgment of Cresswell J in *The Ikarian Reefer*.[1] In summary:

(1) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.
(3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
(4) An expert witness should make it clear when a particular question or issue falls outside his expertise.
(5) If an expert's opinion is not properly researched because he considers that insufficient data are available then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
(6) If after exchange of reports, an expert witness changes his view having read the report of the other side, or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay.
(7) Where expert evidence refers to photographs etc these must be provided to the other side at the same time as the exchange of reports.

In *Harris*,[2] the Court of Appeal stressed that the guidelines given by Cresswell J were very relevant to criminal proceedings:

> and should be kept well in mind by both prosecution and defence. The new Criminal Procedure Rules provide wide powers of case management to the court … In cases involving allegations of child abuse, the Judge should be prepared to give directions in respect of expert evidence … It ought to be possible to narrow the areas of dispute before trial and limit the volume of expert evidence which the jury will have to consider.[3]

In *B*,[4] the Court of Appeal gave further guidance. Gage LJ said:

> In addition to the specific factors referred to by Cresswell J … we add the following as necessary inclusions in an expert report—
> (1) Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinion expressed in the report and the range and extent of the expertise and any limitation upon the expertise.

[1] (1993) 2 Lloyds Report 68 at pp 81 and 82.
[2] (2006) 1 Crim App R 5.
[3] *Ibid*, at para 273.
[4] (2006) EWCA Crim 417; (2006) 2 Crim App R 3.

(2) A statement setting out the substance of all the instructions received … questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinion expressed or upon which those opinions are based.
(3) Information relating to who has carried out measurements, examinations, tests etc and the methodology used and whether or not such measurements etc were carried out under the expert supervision.
(4) Where there is a range of opinion in the matters dealt with in the report, a summary of the range of opinions and the reason for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinion expressed should be set out.
(5) Relevant extracts of literature or any other material which might assist the court.
(6) A statement to the effect that the expert has complied with his or her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an acknowledgement that the expert will inform all parties and where appropriate the court, in the event that his or her opinion changes on any material issues.
(7) Where on an exchange of experts' reports matters arise which require a further or supplemental report, the above guidelines should of course be complied with.[5]

The foregoing provisions are now substantially codified in the Rules. The relevant parts in relation to the expert's duty and the contents of the report are set out in Rules 33.2 and 33.3:

33.2(1) An expert must help the court to achieve the overriding objective by giving objective unbiased opinion on matters within his expertise.
(2) This duty overrides any obligation to the person from whom he receives instructions or by whom he is paid.
(3) This duty includes an obligation to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement under Part 24.

33.3(1) An expert's report must—
(a) give details of the expert's qualifications, relevant experience and accreditation,
(b) give details of any literature or other information which the expert has relied on in making the report,
(c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report or upon which those opinions are based,
(d) make clear which of the facts stated in the report are within the expert's own knowledge,
(e) say who carried out any examination, measurement, test or experiment which the expert has used for the report, and—
(i) give the qualifications, relevant experience and accreditation of that person,
(ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and
(iii) summarise the findings on which the expert relies,

[5] *Ibid*, at para 177.

(f) where there is a range of opinion on the matters dealt with in the report—
  (i) summarise the range of opinion and
  (ii) give reasons for his own opinion,
(g) if the expert is not able to give his opinion without qualification, state the qualification,
(h) contain a summary of the conclusions reached,
(i) contain a statement that the expert understands his duty to the court and has complied and will continue to comply with that duty, and
(j) contain the same declaration of truth as a witness statement.

Once a report has been disclosed, the expert should be informed of that fact.[6]

8.3 Part 33 also contains provisions which are important in case management terms. Rule 33.5 gives a power to the court to direct a pre-hearing discussion between the experts:

(1) This rule applies where more than one party wants to introduce expert evidence.
(2) The court may direct the expert—
  (a) to discuss the expert issues in the proceedings, and
  (b) to prepare a statement for the court of the matters on which they agree and disagree giving their reasons.
(3) Except for that statement, the content of that discussion must not be referred to without the court's permission.

Rule 33.6 provides that:

> a party may not introduce expert evidence without the court's permission if the expert has not complied with a direction under Rule 33.5.[7]

8.4 Rules 33.7 and 33.8 constitute an effort to avoid a plethora of expert reports in multi-handed cases:

33.7(1) Where more than one defendant wants to introduce expert evidence on an issue at trial, the court may direct that the evidence on that issue is to be given by one expert only.
(2) Where the co-defendant cannot agree who should be the expert, the court may—
  (a) select the expert from a list prepared or identified by them, or
  (b) direct that the expert be selected in such other manner as the court may direct.

33.8(1) Where the court gives a direction under Rule 33.7 for a single joint expert to be used, each of the co-defendants may give instructions to the expert.
(2) When a co-defendant gives instructions to the expert, he must at the same time send a copy of the instructions to the other co-defendants.

[6] Rule 33.4 Criminal Procedure Rules.

[7] This may well be another instance where there is a divergence between the practice of the civil courts and the criminal courts. In *Barron v Lovell* (1999) TLR Sep 14, it was held that the holding back of an expert report was to be deprecated and would likely attract cost penalties and might lead the court to order that the party could not rely upon the evidence. In a criminal case it is hard to envisage a situation, particularly in the context of a defence report where, if that report were relevant, the Judge would refuse to admit it. There may be a wasted cost sanction if an adjournment is required.

(3) The court may give directions about—
  (a) the payment of the expert's fees and expenses, and
  (b) any examination, measurement, test or experiment which the expert wishes to carry out.

(4) The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.

(5) Unless the court otherwise directs, the instructing co-defendants are jointly and severally liable for the payment of the expert's fees and expenses.

9

Disclosure

9.1 Section 3 of the Criminal Procedure and Investigations Act 1996 (the 1996 Act) as amended by section 32 of the Criminal Justice Act 2003 (the 2003 Act) sets out the duties of a prosecutor in respect of initial disclosure and the time for compliance with that obligation. The relevant parts of section 3 are as follows:

(1) The prosecutor must—
  (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
  (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

(8) The prosecutor must act under this section during the period which, by virtue of section 12, is the relevant period for this section.

Section 12 of the 1996 Act enabled the Secretary of State to make regulations defining 'the relevant period'. So far as the prosecution are concerned, no such regulations have been made. Part 22 of the Criminal Procedure Rules (the Rules) is likewise silent on the matter. Accordingly, section 13 of the 1996 Act applies. That provides that where no regulations have been made, section 3(8) above should read as follows:

(8) The prosecutor must act under this section as soon as is reasonably practicable after—
  (b) the accused is committed for trial,
  (c)(a) copies of the documents containing the evidence on which the charge or charges are based are served on the accused.

When considering its duty pursuant to section 3(1), it is important that the prosecution bear in mind what was said by Lord Bingham in *H*,[1] and what is set out in the Protocol for the Control and Management of Unused Material in the Crown Court,[2] and the current guidelines issued by the Attorney General.[3]

The following passages from the speech by Lord Bingham in *H* are relevant:

> section 3 does not require disclosure of material which is either neutral in its effect or which is adverse to the defendant, whether because it strengthens the prosecution or weakens the defence.[4]

[1] (2004) UKHL 3; (2004) 2 WLR 335.
[2] Issued in 2006.
[3] Issued in Apr 2005.
[4] Above n 1, at para 17.

> If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose, the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands. If the material contains information which the prosecution would prefer that the defendant did not have, on forensic as opposed to public interest grounds, that will suggest that the material is disclosable. If the disclosure test is faithfully applied, the occasions on which a judge will be obliged to recuse himself because he has been privately shown material damning to the defendant will … be very exceptional indeed.[5]

The Protocol tells prosecutors that:

> (4) The overarching principle is therefore that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public consideration.
>
> (18) Where the single test for disclosure applies under the amended CPIA disclosure regime, the prosecution is under a duty to consider, at an early stage of proceedings, whether there is any unused prosecution material which is reasonably capable of assisting the case for the accused. What a defendant has said by way of defence or explanation either in interview or by way of a prepared statement, can be a useful guide to making an objective assessment of the material which would satisfy the test.

9.2 Certain documents need not be disclosed by the Crown at the initial disclosure stage when a claim to public interest immunity arises. Section 3(6) of the 1996 Act provides that:

> Material need not be disclosed under this section to the extent that the court, on an application by the prosecution, concludes that it is not in the public interest to disclose it and orders accordingly.

From a procedural point of view, applications by the prosecution pursuant to this sub-section and their handling by the court are governed by Part 25 Rules 1 to 3 of the Rules[6]. These provide as follows:

> 25.1(1) This rule applies to the making of an application by the prosecutor under section 3(6), 7A(8) or 8(5) of the Criminal Procedure and Investigations Act 1996.
>
> (2) Notice of such an application shall be served on the court officer and shall specify the nature of the material to which the application relates.
>
> (3) Subject to paragraphs (4) and (5) below, a copy of the notice of application shall be served on the accused by the prosecutor.

[5] Above, n 1, at para 35.

[6] The rules closely follow the formulation set out by Lord Bingham in his speech in *H* (2004) UKHL 3 at para 20.

(4) Where the prosecutor has reason to believe that to reveal to the accused the nature of the material to which the application relates, would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed, paragraph (3) above shall not apply but the prosecutor shall notify the accused that an application to which this rule applies has been made.

(5) Where the prosecutor has reason to believe that to reveal to the accused the fact that an application is being made would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed, paragraph (3) above shall not apply.

(6) Where an application is made in the Crown Court to which paragraph (5) above applies, notice of the application may be served on the trial Judge or, if the application is made before the start of the trial, on the Judge, if any, who has been designated to conduct the trial instead of on the court officer.

25.2(1) This rule applies to the hearing of an application by the prosecutor under section 3(6), 7A(8) or 8(5) of the Criminal Procedure and Investigations Act 1996.

(2) Where notice of such an application is served on the Crown Court Officer, the Officer shall on receiving it refer it—

(a) if the trial has started, to the trial Judge, or

(b) if the application is received before the start of the trial either—

(i) to the judge who has been designated to conduct the trial, or

(ii) if no judge has been designated for that purpose, to such judge as may be designated for the purposes of hearing the application.

(3) Where such an application is made and a copy of the notice of application has been served on the accused in accordance with Rule 25.1(3), then subject to paragraphs (4) and (5) below—

(a) the court officer shall on receiving notice of the application give notice to—

(i) the prosecutor,

(ii) the accused, and

of the date and time when and the place where the hearing will take place and, unless the court orders otherwise, such notice shall be given in writing,

(b) the hearing shall be inter partes, and

(c) the prosecutor and the accused shall be entitled to make representations to the court.

(4) Where the prosecutor applies to the court for leave to make representations in the absence of the accused, the court may for that purpose sit in the absence of the accused and any legal representative of his.

(5) … where a copy of the notice of application has not been served on the accused in accordance with Rule 25.1(3)—

(a) the hearing shall be ex parte,

(b) only the prosecutor shall be entitled to make representations to the court,

(c) the accused shall not be given notice as specified in paragraph (3)(a)(ii) of this Rule,

25.3(1) This Rule applies to an order under section 3(6), 7A(8) or 8(5) of the Criminal Procedure and Investigations Act 1996.

(2) On making an order to which this rule applies, the court shall state its reasons for doing so. Where such an order is made in the Crown Court, a record shall be made of the statement of the court's reason.

(3) In a case where such an order is made following—
(a) an application to which Rule 25.1(4) (nature of material not to be revealed) applies, or
(b) an application notice of which has been served on the accused in accordance with Rule 25.1(3) but the accused has not appeared or been represented at the hearing of that application,
the court officer shall notify the accused that an order has been made. No notification shall be given in a case where an order is made following an application to which Rule 25.1(5) (fact of application not to be revealed) applies.

As to the proper approach of both the Crown and the court where public interest immunity matters are being considered, reference again should be made to the speech of Lord Bingham in *H*. He said:

> If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it … When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of problems—
> (1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.
> (2) Is the material such as may weaken the prosecution case or strengthen that of the defendant? If no, disclosure should not be ordered. If yes, full disclosure should (subject to (3), (4) and (5) below) be ordered.
> (3) Is there a real risk of serious prejudice to an important public interest (and if so, what) if full disclosure of the material is ordered? If no, full disclosure should be ordered.
> (4) If the answer to (2) and (3) is yes, can the defendant's interests be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence? This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure, short of full disclosure, may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the Judge …
> (5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If no, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.
> (6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.
> (7) If the answer to (6) when first given is no, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced? It is important

that the answer to (6) should not be treated as a final once-and-for-all answer but as a provisional answer which the court must keep under review.[7]

9.3 The need for further disclosure by the prosecution may be triggered by a defence statement. This paragraph deals with the defence statement. Section 33 of the 2003 Act amended section 5 of the 1996 Act. Not all of those amendments are yet in force. The relevant parts of section 5 as amended are as follows:

(1) … this section applies when
(b) the prosecutor complies with section 3 or purports to comply with it.
(5) Where this section applies, the accused must give a defence statement to the court and the prosecutor.
(5C) A defence statement that has to be given to the court and the prosecutor … must be given during the period which, by virtue of section 12 is the relevant period for this section.

By section 12 of the Act:

the relevant period is a period beginning and ending with such days as the Secretary of State prescribes by regulations.

The regulations are the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997. The relevant parts read as follows:

(2) … the relevant period for section 5 … of the Act (disclosure by the accused) is a period beginning with the day on which the prosecutor complies or purports to comply with section 3 of that Act and ending with the expiration of 14 days from that day.
(3(1)) The period referred to in Regulation 2 shall, if the court so orders, be extended by so many days as the court specifies.
(2) The court may only make such an order if an application which complies with paragraph (3) below is made by the accused before the expiration of the period referred to in Regulation 2.
(3) An application under paragraph (2) above shall—
(a) state that the accused believes on reasonable grounds that it is not possible for him to give a defence statement under section 5 … during the period referred to in Regulation 2,
(b) specify the grounds for so believing, and
(c) specify the number of days by which the accused wishes the period to be extended.
(4) The court shall not make an order under paragraph (1) unless it is satisfied that the accused cannot reasonably give or, as the case may be, could not reasonably

[7] *Ibid*, at paras 35 and 36. As to the position of a judge who has considered PII material and concluded that on ordinary principles it need not be disclosed, see the judgment of Sir Igor Judge, President in *Dawson* (2007) EWCA Crim 822 at paras 58, 59 and 60. Normally the judge who has examined undisclosed material should continue to act as trial judge—he, after all, is the one who has to keep the position under review as the trial proceeds. The judge has a discretion to recuse himself if, in his opinion, the interests of justice require it but it is difficult to think of any circumstances in which a judge might reach that conclusion.

> have given a defence statement under section 5 … during the period referred to in Regulation 2.[8]

Section 33(2) of the 2003 Act provides for a new section 6A of the 1996 Act. Section 6A sets out what a defence statement should contain:

> (1) … a defence statement is a written statement—
> (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
> (b) indicating the matters of fact on which he takes issue with the prosecution,
> (c) setting out, in the case of each such matter, why he takes issue with the prosecution,
> (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take and any authority on which he intends to rely for that purpose.
> (2) A defence statement which discloses an alibi must give particulars of it.

Section 36 of the 2003 Act adds a new section 6E to the 1996 Act. It provides as follows:

> (1) Where an accused's solicitor purports to give on behalf of the accused—
> (a) a defence statement under section 5 … the statement shall, unless the contrary is proved, be deemed to be given with the authority of the accused.
> (2) If it appears to the Judge at a pre-trial hearing that an accused has failed to comply fully with section 5 … so that there is a possibility of comment being made or inferences drawn under section 11(5), he shall warn the accused accordingly.

The remainder of section 6E deals with the possibility of the jury at trial being given a copy of the defence statement.

In *K*,[9] the President stressed the importance of practitioners being familiar with the protocol on disclosure of February 2006. This has a number of pertinent things to say about defence statements, the most relevant of which are as follows:

> 34 In the past, the prosecution and the court have too often been faced with a defence case statement that is little more than an assertion that the defendant is not guilty. As was stated by the Court of Appeal in *Bryant* (2005) EWCA Crim 2079 (per Judge LJ paragraph 12) such a reiteration of the defendant's plea is not the purpose of a defence

[8] This whole Regulation in relation to the extension provisions is a bit of a nonsense—
 (a) It contains an inherent contradiction between Reg 3(2) (application within 14 days) and 3(4) ('could not reasonably have given').
 (b) A late defence statement in respect of which no application has been made, is still a valid defence statement—see *Wood* (2006) EWHC 32 (Admin).

If the Regulation has any meaning, it is that an application within 14 days which is granted, prevents the operation of s 11, namely the making of a comment or the drawing of an adverse inference. I find it hard to conceive of a judge permitting such comment or allowing the drawing of such inference where an otherwise properly drafted case statement has been provided, albeit slightly late, because in the real world, particularly with defendants in custody, 14 days is a very short period of time. The whole Rule should be redrafted. As to the procedure to be adopted in the making of an application under Reg 3(2), see R 25.7 of the Rules.

[9] (2006) EWCA Crim 835.

statement. Defence statements must comply with the requisite formalities set out in the CPIA …

35 Where the enhanced requirements for defence disclosure apply under section 6A of the CPIA, namely when the case involves a criminal investigation commencing on or after 4 April 2005, the defence statement must spell out in detail the nature of the defence, and particular defences relied upon: it must identify the matters of fact upon which the accused takes issue with the prosecutor and the reasons why, in relation to each disputed matter of fact. It must further identify any point of law … which the accused proposes to take and identify authorities relied on in relation to each point of law … Judges will expect to see defence case statements that contain a clear and detailed exposition of the issues of fact and law in the case.

37 There must be a complete change in the culture. The defence must file the defence case statement by the due date. Judges should then examine the defence case statement with care, to ensure that it complies with the formalities required by the CPIA.

38 If no defence case statement—or no sufficient case statement—has been served by the PCMH, the Judge should make a full investigation of the reasons for this failure to comply with the mandatory obligation of the accused.

39 If there is no, or no sufficient defence statement by the date of the PCMH, or any pre-trial hearing where the matter falls to be considered, the Judge must consider whether the defence should be warned … that an adverse inference may be drawn at the trial. In the usual case, where section 6E(2) applies, and there is no justification for the deficiency, such a warning should be given.

9.4 Assuming that a defence statement has been served (even if belated and not in proper form)[10], the ball is then back in the prosecutor's court. This arises from section 7A of the 1996 Act inserted by section 37 of the 2003 Act. It is headed 'Continuing duty of prosecutor to disclose' and reads as follows:

(1) This section applies at all times—
  (a) after the prosecutor has complied with section 3 or purported to comply with it,
(2) The prosecutor must keep under review the question whether at any given time (and in particular following the giving of a defence statement) there is prosecution material which—
  (a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and
  (b) has not been disclosed to the accused.

[10] *DPP v Wood* (2006) EWHC (Admin). Ouseley J said, at paras 24 and 25:

'I reject the submission … that the defence statement was not a defence statement given under section 5 because it was given late … The concept of a statement given under section 5 must be the same for the purposes of applying section 8. I also find it difficult to see that the late provision of such a statement could deprive (a judge) of jurisdiction to hear a section 8 application … The next argument …was that the defendant could not make a section 8 application because the defence statement was not in substance a defence statement because it did not comply with the requirements of section 5(6). Of course, there may be so-called defence statements which are so deficient in their fulfilment of the requirements … that they cannot properly be termed defence statements at all … But there are real dangers of injustice in treating deficient written defence statements as so wholly ineffective as to be non-existent in reality and thus remove the Judge's jurisdiction to make a section 8 order.'

(3) If at any time there is any such material as is mentioned in sub-section (2), the prosecutor must disclose it to the accused as soon as is reasonably practicable …[11]

(5) Where the accused gives a defence statement under section 5—
  (a) if as a result of that statement, the prosecutor is required by this section to make any disclosure, or further disclosure, he must do so during the period which, by virtue of section 12, is the relevant period for this section,[12]
  (b) if the prosecutor considers that he is not so required, he must during that period give to the accused a written statement to that effect.

(8) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes that it is not in the public interest to disclose it and orders accordingly.[13]

If a defendant who has given a defence statement and who has received (or not received) a section 7A(5) notice is still dissatisfied, he can rely upon section 8 of the 1996 Act as substituted by section 38 of the 2003 Act. It provides as follows:

(1) This section applies when the accused has given a defence statement under section 5 … and the prosecutor has complied with section 7A(5) or has purported to comply with it or has failed to comply with it.

(2) If the accused has at any time reasonable cause to believe that there is prosecution material which is required by section 7A to be disclosed to him and has not been, he may apply to the court for an order requiring the prosecutor to disclose it to him.[14]

The appropriate procedure is set out in Part 25.6 of the Rules. It reads as follows:

(1) This Rule applies to an application by the accused under section 8(2) of the Criminal Procedure and Investigations Act 1996.

(2) Such an application shall be made by notice in writing to the court officer and shall specify—
  (a) the material to which the application relates,
  (b) that the material has not been disclosed to the accused,
  (c) the reason why the material might be expected to assist the applicant's defence as disclosed by the defence statement given under section 5 or 6 of the 1996 Act, and
  (d) the date of service of a copy of the notice on the prosecutor in accordance with paragraph (3).

[11] This is a continuing obligation of the prosecution and applies regardless of whether in fact a defence statement has been served.

[12] Since no regulations affecting the prosecution have been made under s 12, the default provisions of s 13(2) apply. This reads:

'As regards a case in relation to which no regulations under section 12 have come into force for the purposes of section 7A, section 7A(5) shall have effect as if—
  (a) in paragraph (a) for the words "during the period" to the end, and
  (b) in paragraph (b) for "during that period" there were substituted "as soon as is reasonably practicable after the accused gives the statement in question".

[13] The provisions of RR 25.1 to 25.3 of the Rules apply.

[14] As is apparent from *Wood* above, late service of a defence statement or arguably a not particularly well drafted defence statement is not a bar to the making of a s 8 application. The fact is he has 'given a defence statement'.

(3) A copy of the notice referred to in paragraph (2) shall be served on the prosecutor at the same time as it is sent to the court officer.
(4) Where such an application is made in the Crown Court, the court officer shall refer it
  (a) if the trial has started, to the trial judge, or
  (b) if the application is received before the start of the trial—
    (i) to the judge who has been designated to conduct the trial, or
    (ii) if no judge has been designated for that purpose, to such judge as may be designated for the purposes of determining the application.
(5) A prosecutor receiving notice under paragraph (3) of an application to which this Rule applies shall give notice in writing to the court officer within 14 days of service of that notice that—
  (a) he wishes to make representations to the court concerning the material to which the application relates, or
  (b) if he does not so wish, that he is willing to disclose that material.
  and a notice under paragraph (5)(a) shall specify the substance of the representations he wishes to make.
(6) A court may determine an application to which this Rule applies without hearing representations from the applicant or the prosecutor unless—
  (a) the prosecutor has given notice under paragraph (5)(a) and the court considers that the representations should be made at a hearing, or
  (b) the court considers it necessary to hear representations from the applicant or the prosecutor in the interests of justice for the purposes of determining the application.
(7) Subject to paragraph (8), where a hearing is held in pursuance of this Rule—
  (a) the court officer shall give notice in writing to the prosecutor and the applicant of the date and time when, and the place where the hearing will take place,
  (b) the hearing shall be inter partes, and
  (c) the prosecutor and the applicant shall be entitled to make representations to the court.
(8) Where the prosecutor applies to the court for leave to make representations in the absence of the accused, the court may for that purpose sit in the absence of the accused and any legal representative of his.
(9) A copy of any order under section (8)(2) of the 1996 Act shall be served on the prosecutor and the applicant.

This seems to leave one question unresolved. If the prosecution are resisting the application on grounds other than public interest immunity, it must mean that in their view the material is not disclosable—it does not undermine the case for the prosecution or assist the case for the accused. If the defence (who by definition are claiming that they have not seen the material) are asserting that it is material, it must follow that the Judge will have to look at it and make the decision. It would seem not to be the proper exercise of the judicial function in these circumstances simply to accept the assertion of the prosecution and dismiss the application out of hand. In any event, this is implicit in the speech of Lord Bingham in *H* when he said:

> only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands.[15]

[15] (2004) UKHL 3, at para 35.

This clearly assumes the existence of a set of circumstances where the decision has to be taken by the Judge.

9.5 Whether in respect of section 3 or section 7A, the obligation on the prosecutor is only to disclose prosecution material, namely material which is in his possession and which came into his possession in connection with the case for the prosecution or which he has inspected pursuant to a Code issued under Part 2 of the 1996 Act.[16] Material which is in the possession of third parties is not prosecution material, and its disclosure cannot be ordered pursuant to section 8.[17]

9.6 This paragraph and those that follow deal with third party disclosure, namely the obtaining of documents not in the hands of the parties. The procedure is set out in section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 (as amended) and Part 28 of the Rules. The relevant provisions of the Act are as follows:

(1) This section applies where the Crown Court is satisfied that—
  (a) a person is likely to be able to … produce any document or thing likely to be material evidence[18] for the purpose of any criminal proceedings before the Crown Court, and
  (b) it is in the interests of justice to issue a summons under this section to secure the attendance of that person … to produce the document or thing.

Although frequently ignored, the remaining provisions of this section and the Rules clearly envisage a two-stage approach to any application for disclosure of documents by a third party. This is apparent from what follows:

[16] See ss 3(2) and 7A(5) and 8(3).

[17] *Wood* (2006) EWHC (Admin) at para 55 where the Judge said: 'The disclosure duties are created in respect of material which, put shortly, the CPS or the police have and which the CPS have inspected or must be allowed to inspect … There is no provision in the Code which imposes any obligation on third parties, nor sensibly could there be.'

[18] The requirement that the evidence must be 'material' evidence has generated (and continues to generate) much confusion. The strict position is that set out by the House of Lords in *R v Derby Magistrates Court ex parte B* (1996) 1 Crim App R 385, dealing with the directly analogous position arising under s 97 of the Magistrates Courts Act 1980. Lord Taylor said (at p 393):

> 'Section 97 contemplates the production by a witness of documents which are immediately admissible per se and without more … The objection taken is, however, entirely in accordance with the principle that section 97 cannot be used to obtain discovery … it was not open to the defence to obtain a witness summons … to secure discovery of documents for use in cross-examination.'

He went on to say that the rationale behind that Rule was that:

> 'It is settled law … that where a previous inconsistent statement goes before the jury, it is not evidence of the truth of its contents. Its effect is confined to discrediting the witness generally or, if the inconsistencies relate directly to the matter in issue, to rendering unreliable the witness's sworn evidence.'

> Lord Taylor approved what had been said by the Divisional Court in the *Reading Justices* case (1996) 1 Crim App R 139 to the effect that the approach to s 97 and the disclosure of material in the possession of third parties had not changed because a different approach was now being taken in respect of prosecution disclosure and that it was not appropriate to introduce 'a less exacting test of materiality'.

> With the advent of the hearsay provisions of the Criminal Justice Act 2003 where, in certain circumstances, previous statements can be evidence of that which they assert, as well as the provisions of s 117 of that Act relating to the admissibility of statements contained in documents, it may be that

(2)(2) In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons … directed to the person concerned and requiring him to—

(a) attend before the Crown Court at the time and place stated in the summons, and

(b) … produce the document or thing.

(2)(3) A witness summons may only be issued under this section on an application, and the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled.

(2)(7) An application must be made in accordance with Criminal Procedure Rules.

The procedure governing applications is set out in Part 28 of the Rules:

28.3(1) A party who wants the court to issue a witness summons … must apply as soon as practicable after becoming aware of the grounds for doing so.[19]

the position has changed. Having said that, it is not quite clear what the appropriate test now is (see the discussion in para 9.7).

To some extent, problems can be alleviated if the prosecution play a more active part in the obtaining of documents from third parties. This is partly dealt with in the Guidelines issued by the Attorney General in April 2005. The following paragraphs appear to be relevant—

'47 Where it appears to … a prosecutor that a government department or other Crown body has material that may be relevant to an issue in the case, reasonable steps should be taken to identify and consider such material …

50 Where after reasonable steps have been taken to secure access to such material, access is denied the … prosecutor should consider what if any further steps might be taken to obtain the material or inform the defence.

51 There may be cases where the investigator, disclosure officer or prosecutor believe that a third party (eg a local authority, a social services department, a hospital, a doctor, a school, a provider of forensic services) have material or information which might be relevant to the prosecution case. In such cases, if the material or information might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused, prosecutors should take what steps they regard as appropriate in the particular case to obtain it.

52 If the … prosecutor seeks access to the material or information but the third party declines or refuses to allow access to it, the matter should not be left. If despite any reasons offered by the third party it is still believed that it is reasonable to seek production of the material or information and the requirements of s 2 of the Act … are satisfied, then the prosecutor should apply for a witness summons causing a representative of the third party to produce the material to the court.'

The foregoing provisions were considered by the Court of Appeal in *Alibhai* (2004) EWCA Crim 681. Longmore LJ said:

'The trigger for the provisions of … the Attorney General's Guidelines is suspicion on the part of the investigator, disclosure officer or prosecutor that a third party has material or information that might be disclosable if in the possession of the prosecution …

Secondly, even if there is the suspicion that triggers these provisions, the prosecutor is not under an absolute obligation to secure the disclosure of the material or information. He enjoys what may be described as a margin of consideration as to what steps he regards as appropriate in the particular case.'

[19] There seems to be a slight divergence here between the Statute and the Rules. Section 2(4) in its amended form, seems to suggest that in respect of cases sent pursuant to s 51 (and probably committed cases as well) the application must be made as soon as reasonably practicable after service of the papers upon the defendant.

(2) The party applying must—
  (a) identify the proposed witness,
  (b) explain—
    (i) what evidence the proposed witness can … produce,
    (ii) why it is likely to be material evidence, and
    (iii) why it would be in the interests of justice to issue a summons.

(3) The application may be made orally unless—
  (a) Rule 28.5 applies, or
  (b) the court otherwise direct.

28.4(1) An application in writing under Rule 28.3 must be in the form set out in the Practice Direction, containing the same declaration of truth as a witness statement.

(2) The party applying must serve the application—
  (a) in every case, on the court officer, and as directed by the court, and
  (b) as required by Rule 28.5 if that Rule applies.

28.5(1) This Rule applies to an application under Rule 28.3 for a witness summons requiring the proposed witness—
  (a) to produce in evidence a document or thing, or
  (b) to give evidence about the information apparently held in confidence that relates to another person.

(2) The application must be in writing in the form required by Rule 28.4.

(3) The party applying must serve the application—
  (a) on the proposed witness, unless the court otherwise directs, and
  (b) on one or more of the following if the court so directs—
    (i) a person to whom the proposed evidence relates,
    (ii) another party.

(4) The court must not issue a witness summons where this Rule applies unless—
  (a) everyone served with the application has had at least 14 days in which to make representations, including representations about whether there should be a hearing of the application before the summons is issued, and
  (b) the court is satisfied that it has been able to take adequate account of the duties and rights, including rights of confidentiality, of the proposed witness and of any person to whom the proposed evidence relates.

It is clear therefore from the foregoing that, particularly in connection with applications addressed to third parties to produce documents, a summons should not normally be issued straightaway. The proposed witness should have notice of the application and has the right to be heard on the question of whether the summons should be issued at all.

In, for example, applications directed to local authorities requiring them to produce files in relation to children, it is clear that the rights of those children to privacy and/or their rights to have confidential information about them remain confidential, are directly involved. This was made abundantly clear in *R v Crown Court at Stafford*.[20] In that case, the applicant for judicial review was a 14-year-old girl who was to be the main prosecution witness in a case involving allegations of sexual misconduct against

[20] (2006) EWHC 1645 (Admin); (2007) 1 WLR 1524.

her by the defendant. The defence sought disclosure of her medical records held by the local Health Trust. In the course of his judgment, May LJ said:

> In my judgement, procedural fairness in the light of Article 8 undoubtedly required in the present case that B should have been given notice of the application for the witness summons and given the opportunity to make representations before the order was made … I would firmly reject the suggestion that it would have been sufficient for the interests of B to be represented only by the NHS Trust. The confidence is hers not theirs.[21]

The Rules as currently drafted are an attempt to meet the concerns expressed by the court in the Stafford case and to give the person concerned the right to be heard.[22]

9.7 Assuming the summons has been issued and the person concerned has brought the documents to court,[23] the next question is how the Judge should approach disclosure. If the documents of for example a local authority relate to children in the care of that authority or with whom the authority has been concerned, it will almost certainly be the case that disclosure will be resisted both on grounds of confidentiality and rights of privacy, coupled with an assertion of public interest immunity.[24]

Accordingly, the person producing the documents may assert (a) that they are not material evidence and (b) in any event public interest immunity protects their disclosure. This is the position dealt with in Part 28 of the Rules:

> 28.6(1) This rule applies where a person served with an application for a witness summons requiring the proposed witness to produce in evidence a document or thing objects to its production on the ground that—
>
> (a) it is not likely to be material evidence, or
>
> (b) even if it is likely to be material evidence, the duties or rights, including rights of confidentiality, of the proposed witness or any person to whom the document or thing relates outweigh the reasons for issuing a summons.
>
> (2) The court may require the proposed witness to make the document or thing available for the objection to be assessed.
>
> (3) The court may invite—
>
> (a) the proposed witness or any representative of the proposed witness, or
>
> (b) a person to whom the document or thing relates or any representative of such a person,
>
> to help the court assess the objection.

[21] *Ibid*, at paras 25 and 26.

[22] It is not obvious how useful in fact this right is. Unless the Official Solicitor can be persuaded to act, no provision exists for the granting of public funding to enable the person concerned to be legally represented.

[23] It is to be hoped that the parties will have used the procedure set out in s 2A of the Act which provides for the advance production of documents. It is set out below—

> 'A witness summons which is issued under section 2 … and which requires a person to produce a document or thing … may also require him to produce the document or thing—
>
> (a) at a place stated in the summons and
>
> (b) at a time which is so stated and precedes that stated under section 2(2) above for inspection by the person applying for the summons'.

[24] *D v NSPCC* (1978) AC 171.

Reference has already been made to the *Reading Justices* case[25] and the *Derby Magistrates* case[26] and their affirmation of the rule that so far as third party documents are concerned, they must be shown to be 'material evidence', that is that they are immediately admissible in evidence. There is a clear tension between this test and that governing prosecution disclosure where the approach is that set out in *H*,[27] which amplifies that which Lord Taylor had said in *Keane*.[28] Some assistance in reconciling the two approaches can be found in the decision (sadly still unreported) of *Bruschett*,[29] a case involving historic allegations of violence and buggery against a former headmaster of a special school and where there were voluminous social services files. Otton LJ said:

> In our judgement the learned Judge approached his task in a most conscientious and praiseworthy manner. He remained loyal to the stringent restrictions on disclosure imposed by the *Reading* test but he decided to adopt a more flexible approach. He first identified two categories of documents which the *Reading* test suggested might not be disclosed. First, concerned false allegations in the past, the second where if there was anything which suggested that some other adult had indulged in similar activity with the child. In either case it would be disclosed. We consider this an eminently sensible and pragmatic approach.

In *K*,[30] Lord Taylor emphasised the importance of the Judge looking at the disputed material himself. He said:

> When public interest immunity is claimed for a document, it is for the court to rule whether the claim should be upheld or not. To do that involves a balancing exercise. The exercise can only be performed by the Judge himself examining or viewing the evidence so as to have the facts of what it contains in mind. Only then can he be in a position to balance the competing interests of public interest immunity and fairness to the party claiming disclosure.

However, as the Rule itself foreshadows and as authority suggests, a Judge is entitled to assistance (or at least to ask for assistance) from the party resisting disclosure of the documents. Frequently a local authority will instruct Counsel or an in-house lawyer to go through the files to flag up what might be 'material evidence' and in respect of which a judicial ruling on public interest immunity is sought. This is a permissible approach. In *W*,[31] Staughton LJ said:

> The court by issuing a summons cannot make a person disclose all the documents in his possession if they are all or any of them irrelevant. The courts can only require people

[25] (1996) 1 Crim App R 239.
[26] (1996) 1 Crim App R 597.
[27] (2004) UKHL 3; (2004) 2 WLR 335.
[28] (1994) 99 Crim App R 1. 'Where the prosecution rely on public interest immunity or sensitivity, given that it is for the court to decide whether disclosure is to be made … what might the court's approach be … The court has to carry out a balancing exercise … If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it.'
[29] Court of Appeal, 21 Dec 2000, case no 9907712 Y4 (available on Casetrack).
[30] (1993) 97 Crim App R 342.
[31] (1997) 1 Crim App R 166.

> to disclose relevant documents. In the first instance, it is for the possessor of the documents to decide whether they are relevant or not. He is entitled to claim that some or all are irrelevant and give his reasons for saying so. The next stage is with the Judge. He may either accept the assertion of the possessor of the documents or he may look at the documents himself. That is a decision to be taken in his discretion, but of course, the discretion must be exercised judicially … He may regard an assurance from an independent and competent member of the bar as sufficient reason for treating the documents as irrelevant … At the end of the day, the Judge, in his discretion, may either accept an assurance by or on behalf of the possessor of the document that they are irrelevant or else look at them and decide for himself.[32]

9.8 It will often be the case that criminal matters which concern children, for example their sexual abuse or physical ill-treatment, will be subject to parallel or earlier proceedings in the Family courts, especially Care proceedings under the Children Act 1989. Parties to the criminal proceedings will want to obtain documents or see evidence filed in those proceedings. Until recently, the matter was governed by Rule 4.23(1) of the Family Proceedings Rules 1991,[33] which provided that:

> No document … held by the court and relating to (care) proceedings shall be disclosed other than to a party or (b) the legal representatives of a party … without the leave of the Judge.

Leave was only required in respect of documents held by the court.[34] Accordingly no such leave was required in respect of a local authority's notes of an interview with a mother taken as part of the assessment process and which the local authority wished to disclose to the police.[35] Even when the documents were caught by the Rule, the presumption was in favour of disclosure when the interests of justice so required.[36]

Rule 4.23 has been replaced by Rule 10.20A.[37] Its provisions seem somewhat needlessly complicated. At first glance, they appear to have abolished the 'leave' requirement in respect of disclosure of information to a professional legal adviser in the criminal proceedings.[38] Be that as it may, it would be wise for any person

[32] *Ibid*, at p 170.
[33] SI 1991 / 1247.
[34] *Re G* (1996) 1 FLR 276.
[35] *Re W* (1998) 2 FLR 135.
[36] In Re *W, ibid*, Butler-Sloss LJ said:

> 'In a case such as this where the police and social workers are working together a family judge should hesitate before refusing to provide relevant and significant information to the police … The family judge ought not to frustrate the investigation of potential crime … without good reason, even more so where the police are working alongside the social workers on the same case.'

So far as disclosure to the defence was concerned, the Court of Appeal in *Re D* (1994) 1 FLR 346 said that whilst the Judge had to balance the importance of confidentiality in family proceedings against the public interest in seeing that the ends of justice were properly served, it was in the interests of justice that a defendant in a criminal trial should have available to him all relevant and necessary material for the proper conduct of his defence. See also *Re Z* (2003) 1 FLR 1194.

[37] Family Proceedings (Amendment No 4) Rules 2005.

[38] Defined as 'a barrister or solicitor … who is providing advice to a party, but is not instructed to represent the party in the proceedings'. The proceedings must refer to the care proceedings: by inference therefore the barrister or solicitor concerned is providing advice in respect of other matters.

seeking to obtain documents filed in care proceedings to obtain the permission of the family Judge.[39]

9.9 All the discussion until now has been predicated on the basis that a party will be making the application for disclosure of material held by third parties. There is power in the court to act of its own motion and this derives from section 2D of the Act:

> 2D For the purpose of any criminal proceedings before it, the Crown Court may of its own motion issue a summons … directed to a person and requiring him to—
> (a) attend before the court at the time and place stated in the summons, and
> (b) … produce any document or thing specified in the summons.

By virtue of section 2E, a person in receipt of such a summons aforesaid may apply to the Crown Court to direct that the summons shall be of no effect because he cannot produce any documents or things likely to be material evidence.

9.10 As with many of the Rules, there is a dispensing power in the court when correct procedures have not been followed in relation to applications for third party disclosure. This derives from Rule 28.8:

> (1) The court may—
> (a) shorten or extend (even after it has expired) a time limit under this part, and
> (b) where a rule or direction requires an application under this part to be in writing, allow that application to be made orally instead.
> (2) Someone who wants the court to allow an application to be made orally under paragraph (1)(b) of this Rule must—
> (a) give as much notice as the urgency of his application permits to those on whom he would otherwise have served an application in writing, and
> (b) in doing so explain the reason for the application and for wanting the court to consider it orally.

[39] Indeed that permission is still required, it seems clear from the decision of the Court of Appeal in *Clayton* (2007) 1 All ER 1197, (2006) EWCA Civ 878 and the decision of Sumner J in *Borough Council v A* (2007) 1 All ER 293, (2006) EWHC 1465 (Fam). At paras 93 to 96 he said:

> 'It was the clear view of the advocates before me … that these definitions do not permit disclosure under these Rules to a defence lawyer without the permission of the court. I agree I am also satisfied that a defence lawyer is not a professional legal adviser as defined in the rules … On a practical level, I have been asked to consider how a defence lawyer wishing to obtain the court's permission to disclose would make the application. Is it always necessary to make a separate application or may it be made through a party to the proceedings? Speaking only for myself, I would be content for a straightforward application to be made through another party subject to three provisos. Firstly, notice should be given in writing in advance of a hearing to all parties. Secondly, the application should identify the documents concerned and be supported by a letter from the defence lawyer. Finally, the court will of course reserve the right to hear argument directly from the defence lawyer.'

10

Abuse of Process Applications

10.1 This is not the place to recite all the case law that has now accumulated around the rules relating to abuse of process. For our purposes, it is sufficient to identify the two strands which have developed, namely cases where it is said that the defendant cannot have a fair trial and those in which it is said that it would be unfair to try the defendant.[1]

10.2 As to delay and the inability to have a fair trial, the law was summarised thus by Rose LJ in *S*:[2]

> In the light of the authorities, the correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made, is to bear in mind the following principles—
>
> (i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule.
>
> (ii) Where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted.
>
> (iii) No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held.
>
> (iv) When assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate directions from the judge.
>
> (v) If having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted.[3]

As to cases where evidence has been lost or destroyed, the following passage from the judgment of Mantell LJ in *Medway*[4] is relevant:

> We recognise that in cases where evidence has been tampered with, lost or destroyed, it may well be that a defendant will be disadvantaged. It does not necessarily follow that in such a case the defendant cannot have a fair trial or that it would be unfair for him to be tried. We would think that there would need to be something wholly exceptional about the circumstances of the cases to justify a stay on the ground that evidence has been lost or destroyed. One such circumstance might be if the interference with the evidence was malicious.

[1] See *Beckford* (1996) 1 Crim App R 94 at p 100.
[2] (2006) EWCA Crim 756; (2006) 2 Crim App R 23.
[3] *Ibid*, at para 21.
[4] Unreported—case no 98/7579/Y3.

10.3 In respect of situations where it is said that it is not fair to try the defendant (a problem which often arises when entrapment is alleged by the defence) the following passage from the speech of Lord Steyn in *Latif*[5] suffices to illustrate the point. He said:

> In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed … The speeches in *Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.[6]

10.4 As to the appropriate procedure to be followed in connection with an abuse of process application, the law now seems to be in something of a mess. Part IV.36 of the Consolidated Criminal Practice Direction provides as follows:

> 36.1 In all cases where a defendant in the Crown Court proposes to make an application to stay an indictment on the grounds of abuse of process, written notice of such application must be given to the prosecuting authority and to any co-defendant not later than 14 days before the date fixed or warned for the trial … Such notice must—
>
> (a) give the name of the case and the indictment number,
> (b) state the fixed date or the warned date as appropriate,
> (c) specify the nature of the application,
> (d) set out in numbered paragraphs the grounds upon which the application is to be made,
> (e) be copied to the Chief Listing Officer at the court centre where the case is due to be heard.
>
> 36.2 Any co-defendant who wishes to make a like application must give a like notice not later than 7 days before the relevant date, setting out any additional grounds relied upon.
>
> 36.3 In relation to such applications, the following automatic direction shall apply—
>
> (a) the advocate for the applicant(s) must lodge with the court and serve on all other parties a skeleton argument in support of the application at least five clear working days before the relevant date. If reference is to be made to any document not in the existing trial documents, a paginated and indexed bundle of such documents is to be provided with the skeleton argument,
> (b) the advocate for the prosecution must lodge with the court and serve on all other parties a responsive skeleton argument at least two clear working days before the relevant date, together with a supplementary bundle if appropriate.
>
> 36.4 All skeleton arguments must specify any propositions of law to be advanced (together with the authorities relied upon in support, with page references to passages relied upon) and, where appropriate, include a chronology of events and a list of dramatis personae. In all instances where reference is made to a document, the reference in the trial documents or supplementary bundle is to be given.

[5] (1996) 1 WLR 104.
[6] *Ibid*, at p 112.

> 36.5 The above time limits are minimum time limits. In appropriate cases the court will order longer lead times. To this end, in all cases where defence advocates are, at the time of the plea and directions hearing, considering the possibility of an abuse of process application, this must be raised with the judge dealing with the matter, who will order a different timetable if appropriate, and may wish, in any event, to give additional directions about the conduct of the application.

It seems abundantly clear that this direction is based on the premise that the application will be made before or at the start of the trial. However, a recent Court of Appeal decision seems to cast some doubt on this approach, at least in cases based upon delay. In *Smolinski*,[7] Lord Woolf said:

> The making of applications to have cases stayed where there has been delay on the basis of abuse of process has become prevalent … The court questions whether it is helpful to make applications in relation to abuse of process before any evidence has been given by the complainants in a case of this nature. Clearly, having regard to the period of time which has elapsed, the court expects that careful consideration has been given by the prosecution as to whether it is right to bring the prosecution at all. If having considered the evidence to be called, and the witnesses having been interviewed on behalf of the prosecution, a decision is reached that the case should proceed, then in the normal way we would suggest that it is better not to make an application based on abuse of process. Unless the case is exceptional, the application will be unsuccessful … If an application is to be made to a judge, the best time for doing so is after any evidence has been called. This means that on the one hand the court has had an opportunity of seeing the witnesses and, on the other hand, the complainants have had to go through the ordeal of giving evidence. However, despite the latter point … it seems to us that on the whole it is preferable for the evidence to be called and for a judge then to make his decision as to whether the trial should proceed or whether the evidence is such that it would not be safe for a jury to convict.[8]

Quite how this differs from a judge dealing in the ordinary way with a submission of no case at the close of the prosecution, is not immediately obvious. In particular, it is not clear whether the judge is simply to apply the conventional Galbraith test or whether some enhanced power is envisaged. It is hard to see how, if it is proper applying conventional Galbraith principles for a judge to decide that the case should continue, he should then be able to decide on abuse grounds that the case should be stayed. It is not a logical division: it might involve a judge in making a fairly naked usurpation of the function of the jury.

10.5 Not only is there an inconsistency between the Practice Direction and the *Smolinski* approach, there are other procedural rules which are predicated on the basis that an application will be made before or at the start of the trial. For example, section 6A(1)(d) of the Criminal Procedure and Investigations Act 1996, dealing with the contents of a defence statement, requires that any point to be taken about abuse of process should be indicated in that statement. If in truth we are simply dealing with an 'enhanced' Galbraith submission which, by definition, can only be made after the prosecution case has closed, it is hard to see how a defendant could spell that out in advance of the trial in his defence statement.

[7] (2004) EWCA Crim 1270; (2004) 2 Crim App R 40.
[8] *Ibid*, at paras 8 and 9.

11

Changing a Plea of Guilty

11.1 Happily, the procedure to be followed when a defendant wishes to change a previously entered guilty plea to one of not guilty is now set out in the Criminal Procedure Rules (the Rules).[1] Part 39.3 of the Rules provides as follows:

(1) The defendant must apply as soon as practicable after becoming aware of the grounds for making an application to change a plea of guilty, and may only do so before the final disposal of the case, by sentence or otherwise.
(2) Unless the court otherwise directs, the application must be in writing and it must—
  (a) set out the reasons why it would be unjust for the guilty plea to remain unchanged,
  (b) indicate what, if any, evidence the defendant wishes to call,
  (c) identify any proposed witness, and
  (d) indicate whether legal professional privilege is waived, specifying any material name and date.
(3) The defendant must serve the written application on—
  (a) the court officer and
  (b) the prosecutor.

11.2 In *S v Recorder of Manchester*,[2] Lord Reid said:

> It has long been the law that when a man pleads guilty to an indictment, the trial Judge can permit him to change his plea to not guilty at any time before the case is finally disposed of by sentence or otherwise.[3]

He went on to say, 'It is always for the court's discretion whether to allow the accused to change his plea.[4]

Accordingly, the principle is relatively easy to state: the Judge has a discretion to allow a defendant to withdraw his plea of guilty at any time prior to sentence.

11.3 The difficulty arises in defining the nature and extent of the discretion and how it should be exercised. It seems fairly clear that the discretion should normally be exercised against allowing the change of plea. In *Drew*,[5] Lord Lane said:

> In our judgement only rarely would it be appropriate for the trial Judge to exercise his undoubted discretion in favour of an accused person wishing to change an unequivocal plea of guilty to one of not guilty. Particularly this is so in cases when, as here, the accused

[1] The Criminal Procedure (Amendment No 2) Rules 2007.
[2] (1971) AC 481.
[3] *Ibid*, at p 488.
[4] Above, n 2, at p 489.
[5] (1985) 81 Crim App R 190.

> has throughout been advised by experienced Counsel and when after full consultation with his Counsel he has already changed his plea to one of guilty at an earlier stage of the proceedings.[6]

In *Sayed*,[7] Scott Baker LJ said:

> The Judge has a discretion, but it is only in very rare cases that it would be right for that discretion to be exercised in favour of an accused who had been appropriately and competently advised and allow him to change an unequivocal plea of guilty to not guilty.[8]

The fundamental question appears to be whether the Judge hearing the application is satisfied that the plea represented a genuine acknowledgement of guilt. In *Sheikh*,[9] Mantell LJ said:

> It is well accepted that quite apart from cases where the plea of guilty is equivocal or ambiguous, the court retains a residual discretion to allow the withdrawal of a guilty plea when not to do so might work an injustice. Examples might be when a defendant has been misinformed about the nature of the charge or the availability of a defence or when he has been put under pressure to plead guilty in circumstances where he is not truly admitting guilt. It is not possible to attempt a comprehensive catalogue of the circumstances in which the discretion might be exercised. Commonly however, it is reserved for cases where there is doubt that the plea represents a genuine acknowledgement of guilt.[10]

[6] *Ibid*, at p199.
[7] (2005) EWCA Crim 2386.
[8] *Ibid*, at para 32.
[9] (2004) EWCA Crim 492; (2004) Crim App R 13 at p 228.
[10] *Ibid*, at p 232. *Surhaindo* (2006) EWCA Crim 1429 is an example of a plea entered on the basis of erroneous advice and where the Court of Appeal said that the Judge was wrong in not letting the defendant change that plea.

12

Indications of Sentence—*Goodyear*

12.1 Whatever theorists may say, many defendants simply want to know what their likely sentence will be in the event of their pleading guilty. The position of such a defendant and indeed the position of the Judge who may be asked for an indication of sentence is now governed by the case of *Goodyear*.[1] There is no purpose in trying to summarise the case. Accordingly, set out below are extensive extracts from the judgment of Judge LJ. These passages spell out in considerable detail what the approach should be:

> 30 The starting point is fundamental. The defendant is personally and exclusively responsible for his plea. When he enters it, it must be entered voluntarily, without improper pressure. There is to be no bargaining with or by the judge.
>
> 49 In our judgement there is a significant distinction between a sentence indication given to a defendant who has deliberately chosen to seek it from the Judge, and an unsolicited indication directed at him from the Judge and conveyed to him by his Counsel. We do not see why a judicial response to a request for information from the defendant should automatically be deemed to constitute improper pressure on him. The Judge is simply acceding to the defendant's wish to be fully informed before making his own decision …
>
> 51 We have further reflected whether there should continue to be an absolute prohibition against the Judge making any observation at all which may trigger this process. The Judge is expected to check whether the defendant has been advised about the advantages which would follow an early guilty plea. Equally, he is required to ascertain whether appropriate steps have been taken by both sides to enable the case to be disposed of without a trial … We do not believe it would be logical, and it would run contrary to the modern views of the Judge's obligations to manage the case from the outset, to maintain as a matter of absolute prohibition that the Judge is always and invariably precluded from reminding Counsel in open court, in the presence of the defendant, of the defendant's right to seek an advance indication of sentence … If notwithstanding any observation by the Judge, the defendant does not seek an indication of sentence, then … it would not be appropriate for the Judge to give or insist on giving an indication of sentence, unless in any event he would be prepared to give the indication permitted by *Turner*[2] that the sentence will or will not take a particular form.

[1] (2005) EWCA Crim 888; (2005) 2 Crim App R 20 (p 281). See also the Consolidated Criminal Practice Direction, Pt IV.45.

[2] (1970) 54 Crim App R 72 which, whilst effectively imposing a ban on the giving of an indication of sentence on the basis that the defendant pleaded guilty, did provide that 'it should be permissible for a judge to say that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form'.

54 In our judgement, any advance indication of sentence to be given by the Judge should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought.

55 The Judge should not give an advance indication of sentence unless one has been sought by the defendant.

56 He remains entitled … to exercise the power recognised in *Turner* to indicate that the sentence, or type of sentence, on the defendant would be the same whether the case proceeded as a plea of guilty or went to trial with a resulting conviction … He is also entitled in an appropriate case to remind the defence advocate that the defendant is entitled to seek an advance indication of sentence.

57 In whatever circumstances an advance indication of sentence is sought, the Judge retains an unfettered discretion to refuse to give one.

61 Once an indication has been given, it is binding and remains binding on the Judge who has given it and it also binds any other judge who becomes responsible for the case.[3] In principle, the Judge who has given an indication should, where possible, deal with the case immediately, and if that is not possible, any subsequent hearing should be listed before him … If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect.

62 … an indication should not be sought on a basis of hypothetical facts. Where appropriate, there must be an agreed written basis of plea. Unless there is, the Judge should refuse to give an indication.

64 Whether or not the Judge has given an appropriate reminder, the defendant's advocate should not seek an indication without written authority, signed by his client, that he, the client, wishes to seek an indication.

65 The advocate is personally responsible for ensuring that his client fully appreciates that—

(b) any sentence indication given by the Judge remains subject to the entitlement of the Attorney-General to refer an unduly lenient sentence to the Court of Appeal,

(c) any indication given by the Judge reflects the situation at the time when it is given and if a guilty plea is not tendered in the light of that indication, the indication ceases to have effect.

66 An indication should not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea … or any factual basis relating to that plea. Any agreed basis should be reduced into writing before an indication is sought.

74 The Judge is most unlikely to be able to give an indication … in complicated or difficult cases, unless issues between the prosecution and the defence have been addressed and resolved. Therefore in such a case, no less than seven days' notice in writing of an intention to seek an indication should normally be given … to the prosecution and to the court. If an application has been made without notice when it should have been

[3] For the dangers inherent in the situation when the indication is given by one judge but it ends up in front of another judge, see *Kulah* (2007) EWCA Crim 1701; (2007) Crim LR 907. In the interests of transparency, I must own up to being 'the third judge'.

> given, the Judge may conclude that any inevitable adjournment should have been avoided and that the discount for the guilty plea should be reduced accordingly. It may be that in due course the Criminal Procedure Rules Committee will wish to consider the question of notice, and its length …
>
> 75 The hearing should normally take place in open court with a full recording of the entire proceedings and both sides represented, in the defendant's presence.

12.2 Problems can arise, particularly when the provisions in the Criminal Justice Act 2003 relating to dangerous offenders are engaged.[4] There are two lines of authority. In *AG* reference number 112 of 2006,[5] the defendant pleaded guilty on the day of trial to an offence of wounding with intent, a specified serious violent offence. He did so after the Judge had given a *Goodyear* indication that the sentence would be three years' imprisonment. The defendant had previous convictions for specified offences. Quashing the sentence and imposing a sentence of imprisonment for public protection, Hughes LJ said:

> There is no sign, either at the stage when he was asked to give a *Goodyear* indication or when he came to sentence, that the Judge considered the question of significant risk of serious harm and the various statutory steps which are required by section 224 and following of the Criminal Justice Act 2003. There is no sign … that the Judge ever addressed the question of whether or not this was an offence which required the passing of a sentence of imprisonment for public protection … He was obliged by statute to consider those provisions.[6]

On the other hand, in *McDonald*,[7] the defendant was charged with burglary and threats to kill. The defendant through his Counsel asked for a *Goodyear* indication in respect of the threats to kill. The Judge indicated a total sentence of five years for both offences. The appellant duly pleaded guilty and the case was adjourned for a pre-sentence report. When it arrived, that report indicated a high degree of risk of harm in the future. At the sentencing hearing, prosecution Counsel pointed out that threats to kill was a specified violent offence which required the court to consider the question of imposing an indeterminate sentence. The Judge imposed a sentence of imprisonment for public protection (somewhat surprisingly, not having been reminded by the defence of his earlier indication). Quashing the sentence, the Court of Appeal said that the Judge should have held himself bound by the indication which he had given. It was unjust for the sentence of imprisonment for public protection to remain.[8]

[4] The problem should not of course arise through ignorance on the part of the Judge of the relevant provisions if the prosecution do what is required of them by *Goodyear*. At para 70(c) Judge LJ said:

> 'It should not normally be necessary for Counsel for the prosecution, before the Judge gives any indication, to do more than draw the Judge's attention to any minimum or mandatory statutory sentencing requirements and where he would be expected to offer the Judge assistance with relevant guideline cases.'

[5] (2007) 2 Crim App R (S) 39 (at p 248).
[6] *Ibid*, at para 8.
[7] (2007) EWCA Crim 1117.
[8] See also *Kulah* (2007) EWCA Crim 1701.

Perhaps the situation is best summed up by the comments of Dr Thomas in respect of *McDonald*. He said:

> The moral seems to be that *Goodyear* indications should never be given in respect of a specified offence unless the Judge is satisfied that there will be no question of the imposition of a sentence of imprisonment for public protection, or at least given in qualified form which does not exclude the possibility of a sentence of imprisonment for public protection if the information before the court indicates that such a sentence is required.[9]

[9] (2007) Crim LR 737.

13

Adjournment

13.1 The need for an adjournment of the proceedings can arise in many circumstances; some applications are meritorious, some distinctly less so.

13.2 This paragraph deals with adjournments rendered necessary by the amendment of an indictment. This involves a consideration of section 5 of the Indictments Act 1915 as amended:

(1) Where, before trial or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary … unless, having regard to the merits of the case, the required amendments cannot be made without injustice.

(3) Where, before trial or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

(4) Where, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the court under this Act to amend an indictment or to order a separate trial of a count, the court shall make such order as to the postponement of the trial as appears necessary.

(5) Where an order of the court is made under this section for a separate trial or for the postponement of a trial—

(a) if such an order is made during a trial the court may order that the jury are to be … discharged from giving a verdict on the count or counts, the trial of which is postponed, or on the indictment as the case may be …

(6) Any power of the court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes.

In *Smith*,[1] Humphreys J said:

> In our opinion, any alteration in matters of description and, probably in many other respects, may be made in order to meet the evidence in the case, so long as the amendment causes no injustice to the accused person. There is the most ample power in such a case or in any case where the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by any such amendment to direct that one person should be tried separately from others, or the trial may be postponed.[2]

[1] 34 Crim App R 168.
[2] *Ibid*, at p 177.

In *Johal and Ram*,[3] Ashworth J said:

> In the judgement of this court, there is no rule of law which precludes amendment of an indictment after arraignment, either by addition of a new count or otherwise … On the other hand, this court shares the view expressed in some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment, the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby.[4]

13.3 Often a party will want an adjournment because witnesses have not turned up or because some piece of hoped-for evidence is not available. The general approach to an application in such circumstances is best summed up in a passage from the judgment of Lord Bingham in *R v Hereford Magistrates*.[5] The allegation was one of assaulting a police officer. The Magistrates refused to grant an adjournment when a very important defence witness was unavoidably unable to attend on the day of trial. Quashing the conviction he said:

> The decision whether to grant an adjournment does not depend on a mechanical exercise of comparing previous delays in other cases with the delay in the instant application. It is not possible or desirable to identify hard and fast rules as to when adjournment should or should not be granted. The guiding principle must be that Justices should fully examine the circumstances leading to applications for delay, the reasons for those applications and the consequences both to the prosecution and the defence. Ultimately, they must decide what is fair in the light of all those circumstances. This court will only interfere with the exercise of the Justices' discretion whether to grant an adjournment in cases when it is plain that a refusal will cause substantial unfairness to one of the parties. Such unfairness may arise when a defendant is denied a full opportunity to present his case … Applications for adjournment must be subjected to rigorous scrutiny.[6]

If witnesses do not turn up, the court should seriously consider issuing a witness summons or a warrant. In *R v Bradford Justices*,[7] crucial defence witnesses had failed to turn up on two occasions. The Justices refused to issue warrants, the case went ahead and the defendant was convicted. Quashing the conviction, Mann LJ said:

> The Justices have a duty to hear a case which a defendant wishes to advance. These witnesses were plainly material … Whether they would have been adequate witnesses or cogent witnesses, I do not know, but it appears to me that the power to grant a witness warrant is one which ought to be exercised when evidence is critical.[8]

When an adjournment is sought on the basis that an important witness is absent, the court is entitled to enquire about the nature of the evidence that the witness

[3] 56 Crim App R 348.
[4] *Ibid*, at p 353.
[5] (1997) 2 Crim App R 340.
[6] *Ibid*, at p 353.
[7] (1990) 91 Crim App R 390.
[8] *Ibid*, at p 392.

may be able to give. Indeed, in *R v Bracknell Justices*,[9] the Divisional Court said that if the legal representative does not himself volunteer sufficient information about the nature of the proposed evidence, then the court itself should ascertain what sort of support to the defence case that absent witness could give.

In *R v Ealing Justices*,[10] after defence witnesses had failed to turn up, the Justices refused an adjournment because they felt that the defendant should have taken steps prior to the hearing to obtain witness summonses for their attendance. Quashing the conviction, the Divisional Court held that when witnesses were persons who were apparently willing to attend voluntarily, the fact that the defence had failed to apply for a witness summons was irrelevant. The Justices should not focus on the perceived irresponsibility of a witness but on the germane question of whether on the material before them, there was proper room for the conclusion that the applicant was himself the author of the difficulties in question. The fundamental question was whether, in all the circumstances of the case, including the legitimate interests of the prosecution and the court, it was fair to continue the hearing. The overriding consideration had to be the fairness of the proceedings.

When the absence of evidence or of a witness is related to a failure or fault on the part of a defendant, that may be highly relevant to the decision as to whether the proceedings should be adjourned. In *Lappin v HM Customs & Excise*,[11] there was a failure by the defendant to obtain an expert report in flagrant breach of a previously laid-down timetable. He complained on the basis that in spite of his breach, an adjournment should have been granted. Goldring J said:

> I, of course, accept that the appellant was entitled to a fair trial … Whether he received one depends upon all the circumstances of the case. In assessing those circumstances, a court is entitled to take into account, not only the desirability of the appellant having an expert report … but the reasons for his failure to do so at the time of trial. If the reality is that he did not have such a report because of his persistent failure to obtain one over a period of time, it cannot be said that the resulting trial was unfair and in breach of his Article 6 rights. In my view, the reason for the absence of the report was the appellant's persistent failure to obtain one. It cannot be said in the light of that failure, that the action of the Crown Court in insisting on the hearing going ahead was in any sense disproportionate or unfair.[12]

A very neat summary of the proper approach is to be found in the judgment of Simon Brown LJ in *R v Kingston upon Thames Justices*.[13] During the course of his judgment upholding the decision of the Justices not to adjourn the trial, he said:

> Whether or not an adjournment should be granted in any particular case, more particularly whether or not fairness so clearly demands an adjournment that a refusal will found a successful judicial review application, must inevitably depend on a variety of

[9] (1990) Crim LR 266.
[10] (1999) Crim LR 840.
[11] (2004) EWHC (Admin) 953.
[12] *Ibid*, at paras 23 and 24.
[13] (1994) Immigration Appeal Reports 172 (a case which perhaps points up the dangers of a lawyer acting for himself!).

considerations. These are likely to include: the importance of the proceedings and their likely adverse consequences to the party seeking the adjournment; the risk of his being prejudiced in the conduct of the proceedings if the application is refused; the risk of prejudice or other disadvantage to the other party if the adjournment is granted; the convenience of the court and interests of justice generally in the efficient despatch of court business; the desirability of not delaying future litigants by adjourning early and thus leaving the court empty; and the extent to which the applicant himself has been responsible for creating the difficulty which is said to require the adjournment in the first place; the extent to which, in short, he has brought the problem on himself.[14]

13.4 It is worth considering separately the position that arises when a manipulative defendant recognises that the case is going badly for him and seeks to bring about a situation whereby the existing trial has to be aborted and a new trial held. Such a situation can arise when the defendant, for no objectively good reason, sacks his existing team or so changes his instructions that his existing team feel obliged to withdraw. This was the position in *Ulcay*.[15] Having brought about a situation where those then representing him felt obliged to withdraw, the Judge granted a short adjournment to enable fresh lawyers to take over. To over-simplify a complicated situation, the second set of lawyers requested a further two weeks' adjournment which the trial Judge refused, because to grant it would have the effect of completely derailing the trial. Upholding the decision of the trial Judge not to grant that adjournment, the President said:

> It is however equally elementary that the processes designed to ensure the fairness of his trial cannot be manipulated or abused by the defendant as to derail it and a trial is not to be stigmatised as unfair when the defendant seeking to derail it is prevented from doing so by robust judicial control. Such a defendant must face the self-inflicted consequences of his own actions.[16]

He went on to say:

> In all these circumstances, the Judge was entitled to exercise his discretion to refuse the lengthy adjournment sought by Counsel … A lengthy adjournment would have produced either an inordinate delay in the trial of all the defendants, in which case the jury would have been discharged and a new trial started again at huge public inconvenience and cost, and possibly prejudice to the remaining defendants as well as the prosecution, or alternatively, that which the appellant was seeking, for the trial of the remaining defendants to continue, with the jury discharged from giving a verdict in his case and the subsequent trial of the appellant on his own. That would have been contrary to the interests of justice overall. The fact that the Judge was prepared to transfer the legal aid certificate does not mean that he was saying that, whatever the consequences to the trial, new representatives must be obtained and that thereafter he would conduct the trial in accordance with whatever applications were made by new Counsel.[17]

[14] *Ibid*, at p 177.
[15] (2007) EWCA Crim 2379.
[16] *Ibid*, at para 24.
[17] Above n 15, at para 36.

14

Trial in the Absence of the Defendant

14.1 This chapter is concerned with the situation which arises when a defendant voluntarily absents himself from his trial, either at the outset or during its course. Almost by definition, the absent defendant will have been on bail. His non-attendance will constitute an offence under section 6 of the Bail Act 1976. By virtue of section 7 of that Act, his failure to surrender justifies the court in issuing a warrant for his arrest.[1]

14.2 In *Jones*,[2] Lord Bingham said:

> For very many years the law of England and Wales has recognised the right of a defendant to attend his trial and, in trials on indictment, has imposed an obligation upon him so to do … But, for many years, problems have arisen in cases where, although the defendant is present at the beginning of the trial, it cannot be continued to the end in his presence. This may be because of genuine but intermittent illness of the defendant … or misbehaviour … or because the defendant has voluntarily absconded. In all these cases the court has been recognised as having a discretion … whether to continue the trial or to order that the jury be discharged … The existence of such a discretion is well established but it is of course a discretion to be exercised with great caution and with close regard to the overall fairness of the proceedings: a defendant affected by involuntary illness or incapacity will have much stronger grounds for resisting the continuance of the trial than one who has voluntarily chosen to abscond.[3]

He went on to say:

> In turning to general principle, I find it hard to discern any principled distinction between continuing a trial in the absence, for whatever reason, of a defendant and beginning a trial which has not in law commenced … One who voluntarily chooses not to exercise a right cannot be heard to complain that he has lost the benefits which he might have expected to enjoy had he exercised it … If he voluntarily chooses not to exercise his right to appear, he cannot impugn the fairness of the trial on the ground that it followed a course different from that which it would have followed had he been present and represented.[4]

[1] See also s 80 of the Supreme Court Act 1981 which provides:

(1) Any direction to appear … before the Crown Court, and any summons or order to appear before that court, may be so framed as to require appearance at such time and place as may be directed by the Crown Court.'

[2] (2002) UKHL 5; (2002) 2 WLR 524.

[3] *Ibid*, at para 6.

[4] Above n 2, at paras 10 and 11.

14.3 It follows therefore that a discretion is vested in the trial Judge to continue the trial or indeed start the trial in the absence of the defendant. In *Jones*,[5] Lord Bingham said that:

> the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution. If the absence of the defendant is attributable to involuntary illness or incapacity, it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin.[6]

Subject to two points referred to hereafter, he approved the checklist set out in the judgment of Rose LJ in the court below,[7] when he said:

> In our judgement, in the light of the submissions which we have heard … the principles which should guide the English courts in relation to the trial of a defendant in his absence are these—
>
> (1) A defendant has, in general, a right to be present at his trial and a right to be legally represented.
>
> (2) Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part, if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.
>
> (3) The trial Judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.
>
> (4) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.
>
> (5) In exercising that discretion, fairness to the defence is of prime importance, but fairness to the prosecution must also be taken into account. The Judge must have regard to all the circumstances of the case including in particular—
>
> (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it … and in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear,
>
> (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings,
>
> (iii) the likely length of such an adjournment,
>
> (iv) whether the defendant, though absent, is or wishes to be legally represented at the time or has, by his conduct, waived his right to representation,
>
> (v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence,

[5] Above n 2.
[6] Above n 2, at para 13.
[7] *Hayward* (2001) EWCA Crim 168; (2001) 3 WLR 125.

(vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him,

(vii) the risk of the jury reaching an improper conclusion about the absence of the defendant,

(viii) the seriousness of the offence, which affects defendant, victims and public,

(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates,

(x) the effect of delay on the memories of witnesses,

(xi) where there is more than one defendant, and not all have absconded, the undesirability of separate trials and the prospects of a fair trial for the defendants who are present.

(6) If the Judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In his summing up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case.[8]

The two reservations or modifications indicated by Lord Bingham in *Jones*[9] were as follows:

> First I do not think the seriousness of the offence which affects defendants, victim and public listed in paragraph (viii), as a matter relevant to the exercise of the discretion is a matter which should be considered … secondly, it is generally desirable that a defendant be represented even if he has voluntarily absconded.[10]

14.4 This last observation above from Lord Bingham has the capacity to create difficulty. The full quotation is as follows:

> The task of representing at trial a defendant who is not present, and who may well be out of touch, is of course rendered much more difficult and unsatisfactory and there is no possible ground for criticising the legal representative who withdrew from representing the appellant at trial in this case. But the presence throughout the trial of legal representatives, in receipt of instructions from the client at some earlier stage and with no object other than to protect the interests of that client, does provide a valuable safeguard against the possibility of error and oversight. For this reason, trial judges routinely ask Counsel to continue to represent a defendant who has absconded during the trial and Counsel in practice accede to such an invitation and defend their absent client as best they properly can in these circumstances.[11]

In *O'Hare*,[12] which involved a trial of an absent defendant, the Judge asked if his legal representatives were going to stay and Counsel explained that they were not.

[8] *Ibid*, at para 22.

[9] Above, n 2.

[10] Above n 2, at paras 14 and 15. Reference should also be made to the Consolidated Criminal Practice Direction at paras 1.13.17, 1.13.18 and 1.13.19. The current plea and case management form specifically provides that a box be ticked to show that the defendant has been warned that the trial may proceed in his absence.

[11] *Jones*, above n 2, at para 15.

[12] (2006) EWCA Crim 471.

Both he and his instructing solicitor withdrew. The solicitor, having taken advice from the Law Society, felt she had to withdraw because she was really without instructions. Counsel withdrew because the solicitor withdrew and he felt likewise that he had no instructions and could not be of any use. Thomas LJ said that:

> in the light of these provisions (the rules for the professional conduct of solicitors and the bar's rules of conduct) no possible criticism can be made of Counsel or of the solicitor withdrawing.[13]

though he expressed the hope that the relevant professional bodies might consider revising their rules in the light of *Jones*.[14] A somewhat less measured approach was taken by the trial Judge in *Boodhoo*.[15] The defendant indicated that he had no intention of attending the trial. The Judge made certain strong comments about wanting the solicitor (and Counsel) to remain. Having considered their position and consulted their professional bodies, Counsel indicated that she and her solicitor were withdrawing. The Judge made a wasted costs order against the solicitors! The Court of Appeal said that he was entirely wrong and that the decision to withdraw was not unreasonable, though they stressed that there were cases when it would be helpful if the lawyers could remain and hoped that in some cases that would be the position.

[13] *Ibid*, at para 33.

[14] Above n 2, at para 34.

[15] (2007) EWCA Crim 14; (2007) 1 Crim App R 32. As to the possible differences between the position of Counsel on the one hand and the solicitor on the other, reference should be made to the judgment of the President in *Ulcay* (2007) EWCA Crim 2379. Basically, the barrister is professionally required 'to soldier on and do the best she can'. The court went on to suggest that in spite of the different regulatory regime, the same might be said of the solicitor. He said, at para 44:

> 'in the situation currently under consideration, the conduct of criminal litigation, the solicitor is an officer of the court. He has an obligation to the court to comply with its orders and to do his best for his client in the light of those orders. We can see no reason why the professional position of the barrister and solicitor can or should be distinguished. Both owe a duty to the court. Both should comply with it. Both must soldier on. Neither is in breach of the rules of his profession, nor acting improperly or negligently, if the worst that can be said of him is that he was doing his best to comply with orders of the court which made it impossible or difficult for him to look after his client's interest, to the standard which, without those difficulties, he would normally be expected to achieve.'

It should be stressed that that decision was made in the context of a newly instructed legal team (the previous team having withdrawn) themselves withdrawing because they felt that the time allowed them for preparation was not sufficient. Whether the ruling is applicable to the absent defendant I cannot say.

15

The Reluctant Witness

15.1 In respect of cases committed or sent to the Crown Court, the defence will have copies of the witness statements. The defence then indicate those witnesses whom they wish the prosecution to call. The police usually arrange for the witnesses to be warned to attend for the trial. At this stage, no compulsion is involved.

15.2 Sometimes, prior to trial, a witness indicates a reluctance to attend or does not acknowledge the notification that he is required to attend. If a party requires that witness, the relevant procedure is set out in section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965. Section 2 of that Act provides as follows:

(1) This section applies when the Crown Court is satisfied that—
  (a) a person is likely to be able to give … material evidence … for the purpose of any criminal proceedings before the Crown Court, and
  (b) it is in the interests of justice to issue a summons … to secure the attendance of that person to give evidence.

(2) In such a case the Crown Court shall … issue a summons (a witness summons) directed to the person concerned and requiring him to—
  (a) attend before the Crown Court at the time and place stated in the summons, and
  (b) give the evidence …

(3) A witness summons may only be issued under this section on an application: and the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled.

(7) An application must be made in accordance with Criminal Procedure Rules.

The appropriate procedure is set out in Part 28 of the Criminal Procedure Rules (the Rules):

28.2(1) The court may issue … a witness summons … with or without a hearing.

28.3(1) A party who wants the court to issue a witness summons … must apply as soon as practicable after becoming aware of the grounds for doing so.[1]

(2) The party applying must—
  (a) identify the proposed witness,
  (b) explain—
    (i) what evidence the proposed witness can give,
    (ii) why it is likely to be material evidence, and
    (iii) why it would be in the interests of justice to issue a summons.

(3) The application may be made orally.

[1] See also s 2(4) of the Act.

15.3 The court has power of its own motion to issue a summons. This derives from section 2D of the Act:

> 2D For the purposes of any criminal proceedings before it, the Crown Court may of its own motion issue a summons (a witness summons) directed to a person and requiring him to—
>
> (a) attend before the court at the time and place stated in the summons, and
>
> (b) give evidence.

15.4 By section 3 of the Act, disobedience to a witness summons is punishable as a contempt of court:

> 3(1) Any person who, without just excuse, disobeys a witness summons requiring him to attend before any court shall be guilty of contempt of that court and may be punished summarily by that court as if his contempt had been committed in the face of the court.
>
> (2) No person shall by reason of any disobedience mentioned in sub-section (1) above be liable to imprisonment for a period exceeding 3 months.

In *Yusuf*,[2] Rose LJ said:

> The role of the courts in seeking to protect the public … can only properly be performed if members of the public cooperate with the courts. That cooperation includes participation in the trial process … as a witness. Witnesses who may have important evidence to give must come to court if they are summoned … If they choose to ignore a summons, they are in contempt of court and can expect to be punished because their failure to attend is likely to disrupt the trial process and in some cases to undermine it entirely.[3]

Normally, in order for the contempt to be proved, the summons must actually have been served. In *Wang*,[4] the Court of Appeal left open the question of whether section 3 bites in the situation where a witness knows that a summons is to be applied for and then deliberately evades service.

15.5 If a witness indicates that he will ignore the summons, we move on to the arrest scenario. This is dealt with in section 4(1) of the Act:

> 4(1) If a Judge of the … Crown Court is satisfied by evidence on oath that a witness in respect of whom a … witness summons is in force is unlikely to comply with … the summons, the Judge may issue a warrant to arrest the witness and bring him before the court before which he is required to attend. Provided that a warrant shall not be issued … unless the Judge is satisfied by such evidence as aforesaid that the witness is likely to be able to give … material evidence.

The actual procedure to be used is set out in Part 28 of the Rules which have already been quoted.

The foregoing may be regarded as a form of prospective attack. It is directed to the witness who is unlikely to turn up, not the witness who has failed to attend. This latter situation is dealt with by section 4(2) of the Act:

[2] (2003) 2 Crim App R 32.

[3] *Ibid*, at para 16. See also *Lennock*, 97 Crim App R 228 where it was said that culpable forgetfulness could not amount to 'a just excuse' for not attending in response to a summons.

[4] (2005) EWCA Crim 476.

> 4(2) When a witness who is required to attend before the Crown Court by virtue of … a witness summons fails to attend … that court may—
>
> (a) in any case cause to be served on him a notice requiring him to attend the court forthwith or at such time as may be specified in the notice,
>
> (b) if the court is satisfied that there are reasonable grounds for believing that he has failed to attend without just excuse or if he fails to comply with a notice under (a) above, issue a warrant to arrest him and bring him before the court.

Having had the witness arrested, the court has the power to detain him. This derives from section 4(3) of the Act:

> 4(3) A witness brought before a court in pursuance of a warrant under this section may be remanded by that court in custody or on bail until such time as the court may appoint for receiving his evidence or dealing with him under section 3.

In *H v Wood Green Crown Court*,[5] the appellant (who had been arrested after non-compliance with a witness summons) turned hostile in the witness box. After he had finished giving his evidence, the Judge remanded him in custody pursuant to section 4(3) on the basis that he might be required to answer further questions later in the trial. The legality of this step was one of the issues dealt with in the Divisional Court. Wilkie J said:

> There is no dispute but that the Judge lawfully remanded the claimant in custody overnight on more than one occasion during the course of his giving evidence … The power to remand continued for as long as it was anticipated that the claimant may be required to give evidence on subsequent days. It is a commonplace of the conduct of criminal trials that whenever a witness has given his evidence … the question arises whether that witness can be released from further attendance at court. In the vast majority of cases the witness is released but in some cases it may be that there is some outstanding issue … and accordingly he is told that he may be required to attend on that further occasion … In the very rare case, such as the present, the court has power to remand the witness in custody pursuant to section 4(3). That power does not expire until such time as he is released from further attendance at court.[6]

15.6 The witness who refuses to be sworn or who refuses to give evidence after he has been sworn is in contempt of court and liable to be dealt with as such. As in all contempt cases 'in the face of the court' a degree of care is required on the part of the Judge. First, if the witness wants to give evidence to explain why he refuses or refused to testify at a trial, for example because of duress, he should be allowed to do so.[7] In *K*,[8] the appellant (who was a serving prisoner) refused to give evidence against a defendant (who was also a serving prisoner). In committing him for contempt, the trial Judge failed to offer him the opportunity of legal representation and prevented him from explaining why he was refusing to

[5] (2006) EWHC 2683 (Admin).
[6] *Ibid*, at para 29.
[7] *Lewis* (1993) 96 Crim App R 412.
[8] (1984) 78 Crim App R 82.

testify. In the Court of Appeal, Watkins LJ said that duress could be a defence to an allegation of contempt (threats from fellow prisoners). He went on to say:

> The court is well aware of the difficulties confronting judges who from time to time are faced with an obdurate and stubborn person who refuses to give evidence … There are many ways of dealing with a situation of that kind. Sometimes … inaction … at other times, stern measures … What is always wise is that no action be taken in haste.

He went on to say:

> The appellant was denied his basic right to defend himself … Moreover, it is of the highest importance that an appellant before he is punished … is given the opportunity of seeking and taking legal advice, in other words of being represented.[9]

Not only should a recalcitrant witness be given the opportunity of giving an explanation and of being represented, hasty action by the Judge is to be avoided. In *Phillips*,[10] the witness was brought back at the end of the day, found to be in contempt and sent to prison for four months. Watkins LJ said:

> The Judge was we think unnecessarily precipitous … in proceeding to deal with this appellant at the time he did. We think it advisable in circumstances of this kind to punish at the conclusion of a trial or at the very soonest at the end of the prosecution case. The witness who refuses to testify may have at his disposal evidence of great importance … or he may be one whose evidence adds little or nothing … Such a person … when his significance or otherwise could be properly assessed may be very lightly punished or … his contempt disregarded altogether.[11]

The proper approach to punishment in this type of case is set out in *Montgomery*,[12] in the judgment of Potter J. I can do no better than set out the following passages:

> it is perhaps useful to set out the principles which emerge from the cases. First, an immediate custodial sentence is the only appropriate sentence to impose upon a person who interferes with the administration of justice … unless the circumstances are wholly exceptional … Second, whilst review of the authorities suggests that interference with or threats made to jurors are usually visited with higher sentences than in the case of a witness who refuses to give evidence, there is no rule or established practice to that effect, the circumstances of each case being all-important. Third, whilst it is legitimate in the case of a witness refusing to testify, to have regard to the fact that the maximum sentence for failing to comply with a witness order is three months, that should not inhibit the court from imposing a sentence substantially longer than three months for a blatant contempt in the face of the court by a witness who has refused to testify, fully realising what he was refusing to do … Fourth, the principal matters affecting sentence are as follows—
>
> (a) The gravity of the offence being tried …
>
> (b) The effect upon the trial …

[9] *Ibid*, at p 87.

[10] (1984) 78 Crim App R 88.

[11] *Ibid*, at p 93. See also *Montgomery*, below, n 6, at p 29.

[12] (1995) 2 Crim App R 23, approved and applied in *Robinson* (2006) EWCA Crim 613; (2006) 2 Crim App R (S) 613.

(c) The contemnor's reasons for failing to give evidence …
(d) Whether or not the contempt is aggravated by impertinent defiance of the Judge, rather than simple or stubborn refusal to answer.
(e) The scale of sentences in similar cases, albeit each case must turn on its own facts …
(f) The antecedents, personal circumstances and characteristics of the contemnor.
(g) Whether or not a special deterrent is needed.[13]

[13] *Ibid*, at p 27.

16

Contempt

16.1 This chapter is concerned with contempt in the face of the court or activities closely connected with court proceedings and where swift action is required. It does not deal with those activities such as press reporting which may lead to action being taken by the Attorney General in the Divisional Court and which are outwith the day to day functions of those who sit in the Crown Court.

16.2 Aside from any considerations of an inherent jurisdiction, the power to commit for contempt has a number of statutory sources. The relevant part of section 45 of the Supreme Court Act 1981 provides as follows:

> (4) … the Crown Court shall, in relation to the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction, have the like powers, rights, privileges and authority of the High Court.

Order 52 of the Rules of the Supreme Court (now to be found in Schedule 1 to the Civil Procedure Rules 1998) expressly preserves the power of the Crown Court to send to prison those who commit contempt in the face of the court or who disobey its orders. The Rule also gives a power to suspend any prison sentence.[1]

Section 14(1) of the Contempt of Court Act 1981 requires that any order for committal to prison must be for a fixed term and in any event cannot exceed two years.

16.3 It is necessary to consider what in fact constitutes a contempt of court. In *Attorney General v Leveller Magazine*,[2] Lord Diplock said:

> Although criminal contempts of court take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.[3]

However, as Staughton LJ said in *Powell*,[4] referring to what Lord Diplock had said:

> We accept those observations … But when one comes to the task of carrying them into effect, there is, we think, more guidance to be found in section 12 of the Contempt

[1] Order 52(7)(1) 'the court by whom an order of committal is made may by order direct that the execution of the order of committal shall be suspended for such period or on such terms or conditions as it may specify'.

[2] (1979) AC 440.

[3] *Ibid*, at p 449.

[4] (1994) 98 Crim App R 224.

of Court Act 1981. That was an enactment providing for the first time power for a Magistrates Court to deal with contempt.[5]

Section 12 is as follows:

> (1) A Magistrates Court has jurisdiction under this section to deal with any person who—
>
> (a) wilfully insults the Justice or Justices, any witness before or officer of the court or any solicitor or Counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from court, or
>
> (b) wilfully interrupts the proceedings of the court or otherwise misbehaves in court.

In *Griffin*,[6] Mustill LJ said:

> It is beyond doubt that activities taking place either before or after the trial and away from the precinct, are capable of amounting to contempt if they constitute an interference with the course of justice in pending proceedings.[7]

The jurisdiction persists when the trial has ended. In *Huggins*,[8] whilst the jury were still present but just after the contemnor's mother had been sentenced, he shouted at the jury. Moses LJ said:

> The close of a trial is a moment of particular sensitivity and stress for a jury. Their anxieties in sitting in judgement on a fellow citizen can only be heightened if they are shouted at or, worse, abused or threatened. We reject any notion that there can be no contempt where the trial has finished.[9]

16.4 This paragraph and those that follow are concerned with the exercise of the jurisdiction to commit for contempt. Although immediate action may be required to restore order, the decision to commit to prison should never be taken hastily. This is a message running through any number of authorities. Coupled with the need to avoid hasty action is the equally compelling need to ensure that the contempt proceedings are fair. This is particularly so because it is a summary process and no rules are laid down in statute or statutory instrument as to the procedures to be followed.

The starting point is the judgment of Lawton LJ in *Moran*,[10] though his comments about legal advice have been superseded by subsequent cases. He said:

> The following principles should be borne in mind. First a decision to imprison a man for contempt of court should never be taken too quickly. The Judge should give himself time for reflection as to what is the best course to take. Secondly, he should consider whether that time for reflection should not extend to a different day because overnight thoughts are sometimes better than thoughts on the spur of the moment. Thirdly, the

[5] *Ibid*, at p 226.
[6] (1989) 88 Crim App R 63.
[7] *Ibid*, at p 67.
[8] (2007) EWCA Crim 732.
[9] *Ibid*, at para 13.
[10] (1985) 81 Crim App R 51.

> Judge should consider whether the seeming contemnor should have some advice … Justice does not require a contemnor in the face of the court to have a right to legal advice. But if the circumstances are such that it is possible for the contemnor to have advice, he should be given the opportunity of having it … Giving an opportunity to apologise is one of the most important aspects of this summary procedure which in many ways is draconian.[11]

To like effect is a passage in the judgment of Staughton LJ in *Powell*. He said:

> The jurisdiction to deal with contempt in the face of the court … has to be exercised with great caution. The court is the victim; the court is the witness; the court is the prosecutor and the court is the judge. It is perhaps a rare example in English law of an inquisitorial process.[12]

It is usually appropriate for the Judge who witnessed the contempt or whose proceedings are affected by it, to deal with the matter himself. There is certainly no rule that it should be dealt with by another judge. This is apparent from the judgment of the Court of Appeal in *Wilkinson v S*.[13] The following passage from the judgment of Hale LJ is relevant:

> Both the father and the Official Solicitor questioned whether the Judge should have dealt with the matter herself. The Phillimore Committee on Contempt of Court … saw three advantages in the matter being dealt with by the same judge: she would be in the best position to deal with it because she had witnessed what had taken place: she might well be more inclined to take a lenient view after a period of reflection than another judge who simply read the transcript and would be naturally anxious to protect a sister judge: and the effect of immediate imprisonment is an effective deterrent. To these may be added the necessity for prompt action in cases where the trial is still going on and the impracticability of arranging for another judge to deal with it if there is still a risk that the contempt hearing will itself be disrupted.[14]

Precisely because of the need to avoid precipitate action and the need to ensure fairness, there is a power to remand the alleged contemnor in custody, at the very least overnight. In *Santiago*,[15] Hooper LJ said:

> We conclude that a judge is entitled to defer taking action on a prima facie contempt. He may adjourn the issue of whether a contempt was committed and any issue of punishment until later.[16]

In *Huggins*, Moses LJ said:

> The matter could and should have been dealt with by adjourning the case overnight with the appellant in custody whilst the Judge considered the appropriate course to take.[17]

[11] *Ibid*, at p 53.
[12] (1994) 98 Crim App R 224 at p 225.
[13] (2003) EWCA Civ 95; (2003) 1 WLR 1254.
[14] *Ibid*, at para 23. See also *Hill* (1986) Crim LR 457, *Santiago* (2005) EWCA Crim 556 and *Murray* (2006) EWCA Crim 2251.
[15] (2005) EWCA Crim 556.
[16] *Ibid*, at para 27.
[17] (2007) EWCA Crim 732 at para 23. See also *Balogh v St Albans Crown Court* (1975) QB 73.

He went on to say:

> We emphasise that the court has the power … to detain a contemnor whilst it considers the proper approach to adopt.

In *Wilkinson*,[18] Hale LJ said:

> The question is how long she can or should wait before bringing the case back. In many cases it need take no longer than the remainder of the court day … or overnight. But where the delay is no longer than necessary in order to make arrangements for a summary trial in which the rights of the alleged contemnor can be properly protected, it cannot be unlawful. It would be illogical to hold that a judge can impose up to two years' imprisonment virtually on the spot but not wait a short time in order to achieve a fairer procedure. As a matter of good practice however, if the case cannot be heard the next day, the Judge should ensure that the alleged contemnor is brought back to court in any event, or if this is not possible, that enquiries are made and the case is mentioned in open court so that the reason for any further delay is both known and recorded and the question of bail can be considered.[19]

16.5 Not only should a judge take time for reflection, he must ensure that the contempt proceedings themselves are fair. In *Griffin*,[20] Mustill LJ said:

> We are here concerned with the exercise of a jurisdiction which is sui generis so far as English law is concerned. In proceedings for criminal contempt there is no prosecutor or even a requirement that a representative of the Crown or of the injured party should initiate the proceedings. The Judge is entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor … nor is the system adversarial in character. The Judge himself enquires into the circumstances so far as they are not within his personal knowledge. He identifies the grounds of complaint, selects the witnesses and investigates what they have to say … decides on guilt and pronounces sentence. This summary procedure, which by its nature is to be used quickly if it is to be used at all, omits many of the safeguards to which an accused is ordinarily entitled and … the Judge should choose to adopt it only in cases of real need.[21]

In *Hill*,[22] it was held that the power of the court to punish contempt was part of its inherent jurisdiction. It was for the Judge to take steps to safeguard the court's authority. In appropriate cases those steps will include:

(1) The immediate arrest and detention of the offender.
(2) Telling the offender distinctly what the contempt is stated to have been.
(3) Giving a chance to apologise.

[18] (2003) EWCA Civ 95; (2003) 1 WLR 1254.
[19] *Ibid*, at para 23. As an object lesson in how proceedings should not be conducted, reference should be made to Jales (2007) EWCA Crim 393, whose 'unhappy proceedings transgressed almost all the norms which the court has imposed on courts when dealing with alleged contempt of court summarily'.
[20] (1989) 88 Crim App R 63.
[21] *Ibid*, at p 67.
[22] (1986) Crim LR 457.

(4) Affording the opportunity of being advised and represented by Counsel and making any order for legal aid necessary for that purpose.
(5) Granting any adjournment that may be required.
(6) Listening to Counsel's submission.
(7) If satisfied that punishment is merited imposing it within the appropriate limits.

It is respectfully submitted that:

(a) The Judge should record in writing the nature of the allegations against the contemnor and ensure that he has a copy (in spite of what was said in *Griffin*).
(b) The Judge should order the taking of statements from any witnesses in court, for example prison officers, lawyers or police. Copies of these statements should be provided to the contemnor.
(c) The Judge should ensure that the contemnor has legal representation if he so requires.
(d) If and insofar as there is any dispute by the contemnor as to the factual content of (a) and (b), he should be given the opportunity of disputing it.
(e) The Judge should listen to any submissions by Counsel before deciding the issue of contempt or no contempt.[23]

16.6 As already indicated, the maximum punishment is two years' imprisonment. Depending upon the circumstances and who is alleged to have been in contempt, it may be wise not to sentence immediately. In *Macleod*,[24] the defendant spoke to a prosecution witness who was still giving evidence and accused her of lying. The Judge held the contempt hearing the next day and found it proved. The Court of Appeal suggested that, given the circumstances, the Judge should not have carried out the examination in chief of the witness as to the contempt—presumably prosecution Counsel should have done it. In addition it

[23] In the case of a juror who failed to comply with a summons to attend, such failure is, by virtue of s 20 of the Juries Act 1974, punishable as a contempt. In *Dodds* (2002) EWCA Crim 1328; (2003) 1 Crim App R 3, Hedley J said:

'In our judgement the following are the minimum requirements for a fair hearing in a case of this kind.
(1) The juror must understand what he is said to have done wrong.
(2) The court must be satisfied that the juror when (by act or omission) he did wrong, had the means of knowing that it was wrong.
(3) The juror must understand what defences (if any) may be available to him.
(4) The juror must have a reasonable opportunity to make any relevant representations he wishes.
(5) If necessary the juror must have an opportunity to consider what representations he wishes to make once he has understood the issues involved'.

[24] (2001) Crim LR 589.

would have been wiser to have postponed giving his reasons and consideration of penalty until after the end of the trial. In *Murray*,[25] Simon J said:

> In most cases there should be an adjournment … during which the contemnor has an opportunity to apologise and the court has an opportunity to reflect on the proper course including, depending on the facts, the proper forum for sentencing.[26]

In *Huggins*,[27] Moses LJ said:

> Since the power summarily to commit a person to prison must be a matter of last resort, it is incumbent upon the Judge to consider whether some lesser alternative to protect the court's processes may be deployed. The Judge must consider whether the need to protect the court process and those who participate in it … can be met by steps other than an immediate committal to prison … The importance of the time for reflection is that it presents an opportunity to consider whether a less stringent course may be taken.[28]

[25] (2006) EWCA Crim 2251.
[26] *Ibid*, at para 9.
[27] (2007) EWCA Crim 732.
[28] *Ibid*, at paras 17 and 18.

17

The Jury

Composition of the Jury

17.1 The responsibility for summoning a jury panel rests with the Ministry of Justice and the Minister/Lord Chancellor.[1] Subject to exceptions which do not matter, every person aged between the ages of 18 years and 70 years and whose name is on the electoral register is eligible to serve and liable to serve on a jury.[2] The fact that the eligibility and summonsing procedure does not make provision for a multi-racial jury does not mean that section 1 of the Juries Act is contrary to Article 6 of the European Convention on Human Rights.[3] It is improper for a judge to try and manipulate the selection process for the membership of a jury in a particular case to seek to achieve some sort of racial or cultural balance:

> Responsibility for the summoning of juries to attend for service in the Crown Court is by statute clearly laid upon the Lord Chancellor … It is not the function of the Judge to alter the composition of the panel or to give any direction about the district from which it is to be drawn … The Judge has no power to influence the composition of the jury and that it is wrong for him to attempt to do so.[4]

Section 11(1) of the Juries Act 1974 provides that:

> the jury to try an issue before a court shall be selected by ballot in open court from the panel, or part of the panel, of jurors summoned to attend at the time and place in question.

[1] Section 2 of the Juries Act 1974 provides that 'the Lord Chancellor shall be responsible for the summoning of jurors to attend for service in the Crown Court'.

[2] Section 1 of the Juries Act 1974 as amended by s 3.2.1 of the Criminal Justice Act 2003. However, this proposition has been thrown into some doubt since the decision of the House of Lords in *Abdroikov* (2007) UKHL 37. Although not entirely clear, the reasoning of the majority would seem to suggest that employees of the Crown Prosecution Service and some police officers (dependent upon the division to which they are attached) should not sit on juries because of the danger that the notional fair-minded observer might perceive bias, albeit unconscious. Whether this applies generally in the case of the police, or only where there is a dispute about the police evidence, is again unclear. Certain questions arise. Should a judge now enquire of the jury panel before swearing in whether any police officer is amongst their number? If yes, can the defence object or only where there is a dispute about police evidence? The decision is a mess and it is suggested with respect that the Court of Appeal in the court below got it right. The real solution of course would be to go back to the law as it was prior to the 2003 Act amendments.

[3] *Smith* (2003) EWCA Crim 283; (2003) 1 WLR 2229, per Pill LJ at para 42. 'We are not persuaded by the submission … that section 1 of the 1974 Act is incompatible with Article 6 of the Convention'.

[4] Lord Lane in *Ford*, 89 Crim App R 278 at pp 282 and 283.

Normally, individual jurors are called into the jury box by name. However, where 'jury nobbling' is expected or anticipated, it may be permissible to refer to individual jurors by number.[5]

It is not now necessary to devote any considerable space to a defendant's right to challenge a juror. His right to challenge 'for cause' remains[6]—he has to have a reason. Likewise the prosecution retain the right to ask a juror to 'stand by'.[7]

Where the case is going to be a long one which is likely to last well beyond the two-week period for which a juror is normally summoned:

> it is good practice for the Trial Judge to enquire whether the potential jurors on the jury panel will see any difficulties with the length and, if the judge is satisfied that the jurors' concerns are justified, he may say that they are not required for that particular jury.[8]

Where there is doubt about whether a person summoned has a sufficient understanding of the English language to function effectively as a juror, the Judge should decide the matter and may discharge that juror from further service.[9] Likewise, when a person summoned as a juror has a physical disability giving rise to doubts as to his capacity to act effectively as a juror, the question of his capacity should be decided by the Judge and if not capable, that juror should be discharged.[10]

Power to Discharge a Juror Before or During a Trial

17.2 A judge has power to discharge an individual juror from sitting or continuing to sit on a jury. As appears from the preceding paragraph, this power may be exercised prior to the jury being sworn or whilst the particular jury is being sworn.[11] It may also be exercised during the course of the trial. This is implicit in section 16 of the Juries Act 1974 which provides as follows:

[5] 'It is highly desirable that in normal circumstances the usual procedure for empanelling a jury should be followed. But if, to thwart the nefarious designs of those suspected of seeking to nobble a jury, it is reasonably thought to be desirable to withhold a juror's name, we can see no objection to that course provided the defendant's right of challenge is preserved'—per Lord Bingham in *Comerford* (1998) 1 Crim App R 235 at p 246.

[6] Section 12 Juries Act 1974 as amended by Sch 16 of the Criminal Justice Act 1988. The right to peremptory challenge (without cause) was abolished by s 118 of the Criminal Justice Act 1988.

[7] As to the approach which the Crown should adopt in the exercise of this right, see the Attorney General's Guidelines on the exercise by the Crown of its right to stand by at 88 Crim App R 123.

[8] Consolidated Criminal Practice Direction Pt IV.42.2.

[9] Section 10 Juries Act 1974.

[10] Section 9B Juries Act 1974.

[11] 'At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving on the jury. This is part of the Judge's duty to ensure that there is a fair trial … A judge must achieve that for example by preventing a juryman from serving who is completely deaf or blind or otherwise incompetent to give a verdict'—per Lord Lane in *Ford,* above n 4, at p 218.

(1) Where in the course of a trial … any member of the jury dies or is discharged by the court whether as being through illness incapable of continuing to act, or for any other reason, but the number of its members is not reduced below 9, the jury shall nevertheless … be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly.

(3) Notwithstanding sub-section (1) above, on the death or discharge of a member of the jury in the course of a trial … the court may discharge the jury in any case where the court sees fit to do so.

The power of discharge was made explicit in *Hanbery*[12] where Lawton LJ said:

> Whatever doubts about the discharge of juries existed before 1866, they were dissipated in that year by the decision in the Exchequer Chamber in *Winsor v Harris*.[13]

He went on to say that:

> those summoned to serve as jurors are entitled to such consideration as it is within the power of the courts to give them. If the administration of justice can be carried on without inconveniencing jurors unduly, it should be. Discharging a juror whose holiday arrangements would be interfered with by having to stay on the jury after being sworn no longer hinders the administration of justice: trials can go on as long as there are nine jurors. Anyway, an aggrieved and inconvenienced juror is not likely to be a good one.[14]

To similar effect is *Richardson*.[15] In that case the husband of a juror died during an overnight adjournment and the juror herself did not turn up for court the following morning. When the Judge was told of this, he immediately discharged the juror though he did not say anything about it to Counsel when the case continued. In the Court of Appeal, the Lord Chief Justice said:

> We have no doubt that she was properly discharged. It is not in our judgement right to say that the operation of the discharge of a juror can only take place in open court. All sorts of situations might arise. Jurors who are in considerable difficulties and who seek a discharge, should not have to come personally to court and make their application there. The fact that it (the discharge) was not done in open court is neither here nor there.[16]

In *Hornsey*,[17] the Court of Appeal approved the decision of the Trial Judge who discharged a juror who had become ill after the jury had retired to consider its verdict. Indeed, a judge has power to discharge a juror even after some but not all verdicts have been returned. The subsequent verdicts were not vitiated by the discharge of that juror.[18]

[12] (1977) 65 Crim App R 233.
[13] *Ibid*, at p 236.
[14] Above n 12,at p 238.
[15] 69 Crim App R 235.
[16] *Ibid*, at p 238.
[17] (1990) Crim LR 731.
[18] *Wood and Furey* (1997) Crim LR 229.

Some Particular Problems

The Sleeping Juror

17.3 In *Tomar*,[19] a juror appeared to fall asleep during the summing up. This was brought to the attention of the Judge. The Judge asked the juror whether he had missed much and the juror said that he had missed very little! No application to discharge that juror was made. The Judge carried on and the defendant was convicted. His appeal was dismissed. The court held that:

> if it appears to Counsel … that the jury are unable to keep awake, then he or she must bring that to the attention of the Trial Judge then and there. When the Judge deals with it, if he is asked to discharge the jury he can consider whether or not that is an appropriate course to take. If he is asked to discharge a particular juror he can decide whether or not that is an appropriate course to take … What is quite impossible is for us to take a decision which the Trial Judge was not even asked to consider.

In other words, Counsel must take the point at the time.

The Absent Co-Defendant and the Co-Defendant who Pleads Guilty

Every case is fact-specific and, inevitably, the authorities do not necessarily point in the same direction. The overriding approach has to be fairness. In *Frederick*,[20] two defendants were facing allegations of fraud. There was no count of conspiracy but the case had been opened on the basis that both defendants were 'in cahoots'. One defendant pleaded guilty halfway through the trial. The Judge refused to discharge the jury in respect of the remaining defendant, who was subsequently convicted. The Court of Appeal held that the jury should have been discharged because they could not properly consider the remaining defendant's case in isolation from that of the defendant who had pleaded guilty.

In *Genese*,[21] one of the defendants in a multi-handed case absconded. Application was made to discharge the jury but the application was refused. The trial went on against the remaining defendants including the one who had absconded and they were convicted. The Court of Appeal said that there was nothing wrong with the approach of the Judge. The proper approach to the problem of the absconding co-defendant was fully considered by the Court of Appeal in *Panayis*.[22] Potter LJ said:

> The situation arising as a result of a defendant voluntarily absconding during the course of a trial, together with the question whether or not it is proper to discharge the jury

[19] (1997) Crim LR 682.
[20] (1990) Crim LR 403.
[21] (1998) Crim LR 679.
[22] (1999) Crim LR 84—no 97/5869/Y5.

> and allow the trial to continue is entirely within the discretion of the Trial Judge. The question must be decided, having regard to the due administration of justice rather than to the convenience or comfort of anyone … To introduce a rule, or even a presumption, that the absconding of one defendant should ordinarily lead to a retrial being ordered in relation to one or more co-accused would be to open an avenue to abuse by defendants on bail during the course of a conspiracy trial.

Jury Hearing Things That They Should Not Hear

Again it has to be remembered that cases are fact-specific and that fairness is the key. A number of older authorities suggest that sometimes fairness will not require the discharge of the jury. In *Wright*,[23] a prosecution witness said in evidence that he had seen a photograph of the defendant in the 'rogues gallery' at Scotland Yard. Avery J said that:

> we have come to the conclusion that in a case of this kind, where by accident an observation of this nature has been made, it may very well be that the best course for all parties … to pursue is to abstain from making any reference to it at all. The making of any reference to the matter may only lead to impress it more strongly on the minds of the jury.

In *Sutton*,[24] one defendant during the course of his cross-examination referred to the bad character of both his co-accused. In spite of having told Counsel that he would deal with the matter during the course of his summing-up, the Trial Judge failed to do so. The Court of Appeal held that the Judge was justified 'in letting sleeping dogs lie'. They said:

> We would certainly be slow to lay down as a general rule that when one co-defendant says something of this nature about his co-accused, a judge must automatically allow a fresh trial, because it would simply make it too easy if a trial is not going well for one co-accused to say something which would secure his co-accused the advantage … of a new trial.

The modern approach is best exemplified in *Lawson*.[25] In that case, the Judge himself disclosed a piece of highly prejudicial information to the jury during the course of his summing-up, having earlier ruled that that evidence should not be given. On appeal, Auld LJ said:

> The ultimate question for the court in determining whether the Judge correctly ruled against the appellant's application to discharge the jury is whether, given the error he made and the steps he took to mitigate it, it is satisfied that the conviction is safe: *Docherty*. And in determining that question in a case such as this of wrongly admitted prejudicial material, the appropriate test for the Trial Judge is that identified in *Docherty*, namely as to 'the most prejudicial interpretation' and its possible effect on the jury. Perhaps more useful is the simpler and more broadly expressed formulation in *Medicaments* namely whether a fair-minded and informed observer would conclude

[23] Crim App R 35.
[24] 53 Crim App R 504.
[25] (2007) 1 Crim App R 20.

> that there was a real possibility or real danger, that the jury would be prejudiced against a defendant by wrongly admitted prejudicial information.[26]

He went on to say:

> Whether or not to discharge the jury is a matter for evaluation by the Trial Judge on the particular facts and circumstances of the case, and the court will not lightly interfere with his decision. It follows that every case depends upon its own facts and circumstances including (1) the important issue or issues in the case, (2) the nature and impact of improperly admitted material on that issue or issues, having regard inter alia to the respective strengths of the prosecution and defence cases, (3) the manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a defendant, (4) the extent to and manner in which it is remediable by judicial discretion or otherwise, so as to permit the trial to proceed.[27]

During the course of the foregoing judgment, Auld LJ referred to *Docherty*.[28] In that case the jury heard evidence it should not have heard. Roch LJ said:

> In weighing up the danger of bias on the part of the jury arising from these answers, the Judge should have approached the issue on the basis of the most prejudicial meaning that could reasonably be placed on those answers rather than some lesser prejudicial interpretation.[29]

In other words, the Judge should assume the worst.

Miscellaneous

The following cases provide illustrations where the Court of Appeal has indicated that the Judge should have ordered a retrial.

In *Boyes*,[30] at the end of his summing-up in a rape trial, the mother of the complainant shouted from the public gallery words to the effect that the defendant had attacked five other girls. The Judge did not hear exactly what had been said but was later informed by Counsel. He had the jury back and told them to ignore the outburst. The appeal court said that the Judge should have enquired of the jury if they had heard what had been said because if they had heard it, it would have been highly damaging and he should clearly have considered the possibility of discharging them.

In *Blackford*,[31] on a charge of possession of drugs with intent to supply, a police officer in answering a question in cross-examination let the jury know that the defendant had previous convictions for supply. The Court of Appeal felt that this was a deliberate attempt by the officer 'to queer the defendant's pitch' and that the Judge should have discharged the jury.[32]

[26] *Ibid*, at para 64.
[27] Above n 25, at para 65.
[28] (1999) 1 Crim App R 274.
[29] *Ibid*, at p 280.
[30] (1991) Crim LR 717.
[31] 89 Crim App R 239.
[32] In my view somewhat charitably so far as Counsel was concerned, the court said that the Judge was wrong to conclude that Counsel had asked for it by the way he put the question.

In *Hutton*,[33] a notice under the Contempt of Court Act had been framed in such a way that it was obvious that further trials of the defendant were pending. The notice had been pinned to the door of the court and a juror was observed reading it. The Judge was not told of this until after the jury had retired. He refused to discharge them and nor did he have them back and give them a direction about ignoring what had been read. The Court of Appeal said that in so acting, the Judge did not clearly exercise his discretion and that the knowledge derived from the notice might have tipped the balance against the defendant.

Baraclough[34] indicates a practical problem which can arise when a jury is discharged after the defendant's previous convictions become known. In that case a retrial was ordered for the following day. The Court of Appeal held that at a large court centre there is usually no problem with a retrial being held the following day—the court will assume that the jurors in the aborted trial will obey any instructions not to talk about it. However, at a smaller court centre where there is a greater likelihood of jurors meeting other jurors, the trial court may have to consider either discharging the first jury from further attendance or putting the retrial off for at least two weeks.

In *Azam*,[35] the Court of Appeal grappled with the problem of what to do with the uncontrollable witness. The witness had been the victim of a savage attack designed to kill him. Throughout his cross-examination he was prone to making outbursts, allegations against the defendants that were outwith the ambit of the trial and referring to them as 'gangsters'. On instructions, defence Counsel decided that they would not ask that the jury be discharged but prosecuting Counsel was concerned as to whether the trial could be fair. The Judge considered the matter and decided that the trial should continue. The defendants were convicted. One of the issues dealt with in the Court of Appeal was whether the Judge was right to have allowed the trial to continue. During the course of his judgment, the President made a number of observations relevant to all matters dealt with in this paragraph. He said:

> The starting point for the submission arising out of (the behaviour of the witness) is that as an integral part of his duty to ensure that a jury trial is fair, the Judge retains, and where necessary should exercise, requires the discharge of the jury.

He went on to say:

> We immediately acknowledge that the Judge's decision on these matters is not simply a case management decision … If the Judge were to conclude that there were real grounds for doubting the ability of the jury to bring an objective judgement to bear on the issue, the jury should be discharged. The decision requires a balanced judgement of the things said to create the risk of bias in the jury, while simultaneously taking account of the directions available to be given by the Trial Judge to address and extinguish the risk. In short, in the context of trial by jury, the question whether the jury may be biased, or

[33] (1990) Crim LR 875.
[34] (2000) Crim LR 324.
[35] (2006) EWCA Crim 161.

apparently biased, cannot be decided exclusively by reference to the material which is said to constitute the risk of bias, examined in isolation from the normal processes of the trial.[36]

The Jury Note

17.4 This topic obviously has to be considered, bearing in mind the matters set out in the paragraphs which follow in relation to things which have taken place in the jury room and about which complaint is subsequently made. The general rule was set out by Lord Lane in *Gorman*.[37] He said:

> Certain propositions can now be set out as to what should be done by a judge who receives a communication from a jury which has retired to consider its verdict. First of all, if the communication raises something unconnected with the trial … it can simply be dealt with without any reference to Counsel and without bringing the jury back to court. Secondly, in almost every other case, the Judge should state in open court the nature and content of the communication which he has received from the jury and, if he considers it helpful so to do, seek the assistance of Counsel. This assistance will normally be sought before the jury is asked to return to court and then, when the jury returns, the Judge will deal with the communication. Exceptionally, if, as in this case, the communication from the jury contains information which the jury need not and indeed should not have imparted, such as details of voting figures, then, so far as possible, the communication should be dealt with in the normal way, save that the Judge should not disclose the detailed information which the jury ought not to have revealed.[38]

In *Andriamanpandry*,[39] the jury sent 17 notes during the course of the trial, though none after retirement. The Court of Appeal stressed that *Gorman* should be followed and that unless the note related to something unconnected with the trial, the Judge should either read it out or hand it to Counsel for them to have a look at. The President reiterated the importance of what had been said in *Gorman*, namely that:

> The object of these procedures, which should never be lost sight of, is this: first of all to ensure that there is no suspicion of any private or secret communication between the court and the jury, and second, to enable the Judge to give proper and accurate assistance to the jury on any matter of law or fact which is troubling them. If those principles are borne in mind, the Judge will, one imagines, be able to avoid the danger of committing any material irregularity.

[36] *Ibid*, at paras 48 and 50.
[37] 85 Crim App R 121.
[38] *Ibid*, at p126.
[39] (2003) EWCA Crim 1974.

Bias

17.5 Inevitably, matters in this paragraph overlap with matters already dealt with. In *Gough*,[40] Lord Goff said:

> The Judge in deciding whether to exercise his discretion to discharge one or more members of the jury should apply the same test that falls to be decided on appeal by the Court of Appeal—whether there is a real danger of bias affecting the mind of the relevant juror or jurors. Even if the Judge decides that it is unnecessary to do more than issue a warning to the jury or to a particular juror and thereby isolate and neutralise any bias that might otherwise occur, the effect of his warning is not merely to ensure that the jurors do not allow any possible bias to affect their minds, but also to prevent any lack of public confidence in the integrity of the jury … Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias … Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour, the case of a party to the issue under consideration by him.[41]

This approach has now to be slightly modified in line with *Re Medicaments*.[42] In that case, Lord Philips said:

> When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *Gough* is called for … The court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the Tribunal was biased.
>
> The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances … The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced.[43]

In *Panayis*,[44] there was evidence of some out-of-court conversation between a solicitor's clerk acting for the defendant and a member of the jury. The juror told the Judge that what was said had not prejudiced her and she had not mentioned the matter to other jurors. Further evidence of contact emerged. The Judge sent a note to the jury through their foreman. They replied that nothing had influenced

[40] 97 Crim App R 188.
[41] *Ibid*, at pp 199 and 200.
[42] (2001) 1 WLR 700.
[43] *Ibid*, at paras 85 and 86.
[44] 18 Jun 1998.

them. The Judge, having applied the *Gough* test, concluded that the case should go on. In the Court of Appeal, Potter LJ said:

> Whether or not a jury may be taken at its word when it declares itself uninfluenced by some irregularity which has occurred, is very much a matter for the Judge on the spot to decide … When a judge has, in consultation with Counsel, followed an open procedure by which to ascertain the extent of any contact with a juror and whether any real danger of bias has resulted and when he decides that, subject to appropriate directions, no real danger exists, the court will be slow to form a different view.

In *Brown*,[45] the appellant was charged with indecent assault. His brother and brother's wife and daughter attended the trial. The appellant had bail during the trial. The jury had to pass through part of the public area to get to their room. Two jurors alleged that at lunchtime the brother and his daughter had made a remark directed at them as they passed. The appellant may or may not have been present at the time. One of the jurors also said that on her return after lunch, another offensive remark was made. Another juror heard that remark. Two jurors complained to the Judge. He caused an investigation to be made by a police officer of all the jurors. The two complaining jurors gave statements. The Judge had the jury back and asked them two questions which required them to respond individually. In the Court of Appeal Mann LJ said:

> questions to a jury en bloc in open court and without opportunity to consider or respond to them individually and privately, may not have been the best way of dealing with the problem. We add for completeness that the Judge did not seek at any point in his summing-up to address the problem that had arisen … Counsel for the defendant thus … accepted before us that it cannot be open to a defendant to obtain the discharge of a jury by deliberately creating some ground of aggravation or discord between himself and the jury, whether inside or outside court. But, in order for a judge to rely on the appellant's responsibility for events occurring as a ground for not discharging a jury, the circumstances giving rise to such responsibility must, it seems to us, either be agreed or ascertained by the Judge to exist. They cannot be assumed simply because there is a prima facie case which the defendant disputes.[46]

He went on to say:

> We are not satisfied in the circumstances that he ever properly addressed his mind to the true test indicated by the European authorities, particularly the objective aspect of the test which has now … been authoritatively introduced into English law by the decision in *Re Medicaments*.[47]

Finally, he said:

> That the court can and that a fair-minded and informed observer would have in mind, as a background factor, the undesirability of discharging juries too freely and the hardship that any discharge can involve for complainants, not to mention the waste of time and

[45] (2001) EWCA Crim 2828.
[46] *Ibid*, at para 24.
[47] Above n 45, at para 31.

> costs seems to us correct … But they are part of the background to any consideration whether there is a sufficiently real risk of a lack of impartiality to justify discharge.[48]

This last observation should be treated with caution. It is respectfully suggested that the proper position is set out in the speech of Lord Hailsham in *Spencer*[49] when he said:

> In considering such an application, the interests of justice should be paramount and neither the inconvenience of a second trial nor the necessity which would have been involved in calling again as witnesses the victims of the alleged assault, possibly to their detriment, should have outweighed the necessity of the accused receiving and being seen to receive, a fair trial.[50]

The Investigations Which Can be Made

17.6 We must now consider what powers a judge has to investigate problems with the jury. It is necessary first to consider the provisions of section 8(1) of the Contempt of Court Act 1981 which provides as follows:

> it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

In *Mirza*,[51] after the defendant had been convicted a letter was received from a juror alleging that the other jurors were racially prejudiced. The Court of Appeal refused to admit evidence about the letter by reference to both section 8 and the common law prohibition on admission of evidence relating to jury deliberations. Insofar as they relied upon section 8, the House of Lords said that they were wrong to do so. Lord Slynn said:

> it seems clear to me that in enacting section 8 … Parliament did not intend to fetter the power of a court to make investigations into the conduct of a trial. Properly construed, section 8(1) does not apply to the court of trial or to the Court of Appeal hearing an appeal in that case. It cannot properly be read as categorising what the court does in the course of its investigation as a contempt of the court itself.[52]

In the same case, Lord Hope said:

> The better view is that a court cannot be in contempt of itself. In my opinion section 8(1) is addressed to third parties who can be punished for contempt and not to the court which has the responsibility of ensuring that the defendant receives a fair trial.[53]

[48] Above n 45, at para 32.
[49] (1986) 83 Crim App R 377.
[50] *Ibid*, at p 280.
[51] (2004) 2 Crim App R 8.
[52] *Ibid*, at para 57.
[53] Above, n 51 at para 90.

In *AG v Scotcher*,[54] Lord Rodger said:

> Prior to the decision of the House in *Mirza*, the general assumption in the English courts was that the terms of section 8(1) were so broad as to apply to any court … which might have wished to enquire into a matter relating to the jury's deliberations … The House held however, that if a trial judge were informed about any misconduct during the jury's deliberations but before they had returned their verdict, then section 8(1) did not prevent him from looking into the matter.[55]

To some extent, these decisions have liberated the Court of Appeal in dealing with matters which emerge after trial.[56] However, it is less than clear that the new interpretation of section 8 assists the Trial Judge very much. This is because of the common law. In *Mirza*,[57] referring to the common law, Lord Slynn said:

> Thus the prohibition on receipt of evidence takes effect from the moment the jury is empanelled and covers not only what took place in the jury box or the jury room, but covers any statement as to what the juror believed the attitude of other jurors to be as deduced from their behaviour ... Once the verdict is given in the presence of all the other jurors, then that is the end of the matter.[58]

In the same case, having gone on to assert that the present common law rule should be maintained but that section 8 did not preclude all enquiry, he said:

> the court is restricted in its enquiry into what happened in the jury's deliberations, not by section 8 of the Act but by the long-standing rule of the common law.[59]

Lord Hope said:

> When allegations are made which suggest that a defendant is not receiving, or did not receive, the fair trial to which he was entitled … they must be considered and investigated. Any investigation must of course be within the limits that are set by the common law. Evidence which is struck at by the common law rule will be inadmissible and the court should not ask for or receive such evidence … the court must look to the common law for guidance as to the extent to which any such investigation is permissible.[60]

He went on to define the common law rule:

> The general rule is that the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations whilst they are considering their verdict in their retiring room.[61]

Accordingly, it followed that:

> allegations of misconduct by jurors may surface at any stage of a trial before the jury has retired or verdict. In such cases there is no reason why the allegation should not be

[54] (2005) 2 Crim App R 35.
[55] *Ibid*, at para 16.
[56] See eg *Karakaya* (2005) 2 Crim App R 5 and *Marshall* (2007) EWCA Crim 35, both cases in which, after the jury had delivered their verdicts, documents which had clearly been downloaded from the internet were found in the jury room. The Court of Appeal in both cases examined the documents.
[57] (2004) 2 Crim App R 8.
[58] *Ibid*, at para 41.
[59] Above n 57, at para 57.
[60] Above n 57, at paras 92 and 93.
[61] Above n 57, at para 95.

investigated. The Judge must accordingly take appropriate steps to investigate and deal with any such matters that arise then.[62]

Such sentiments are of little use to a trial judge since no help is given as to what permissible steps may be taken to investigate problems that arise, given the common law prohibition. This dilemma was recognised (though not fully answered) by Lord Carswell in *Smith*.[63] He first set out the general position. He said:

(1) The general rule is that the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations while they are considering their verdict in their retiring room …
(2) An exception to the above rule may exist if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or tossing a coin …
(3) There is a firm rule that after the verdict has been delivered, evidence directed to matters intrinsic to the deliberations of the jury is inadmissible …
(4) The common law has recognised exceptions to the rule, confined to situations where the jury is alleged to have been affected by what are termed extraneous influences, for example contact with other persons who may have passed on information which should not have been before the jury …
(5) When complaints have been made during the course of trials of improper behaviour or bias on the part of jurors, judges have on occasions given further instructions to the jury and/or asked them if they feel able to continue with the case and give verdicts in the proper manner. This course should only be taken with the whole jury present and it is an irregularity to question individual jurors in the absence of the others about their ability to bring in a true verdict according to the evidence …
(6) Section 8(1) of the Contempt of Court Act 1981 is not a bar to the court itself carrying out necessary investigations of such matters as bias or irregularity in the jury's consideration of the case. The members of the House who were in a majority in *Mirza* all expressed the view that if matters of that nature were raised by credible evidence, the Judge can investigate them and deal with the allegations as the situation may arise.[64]

He went on to say:

None of their lordships specified the steps which it is open to the Trial Judge to take in the last mentioned type of case, and the issue now before the House is the nature of the enquiry which can properly be made and the extent to which, if at all, it is permissible to question jurors about matters which took place during their deliberations.[65]

His conclusions were as follows:

I am unable however to accept that it would have been appropriate for him to question the jurors about the contents of the letter, let alone that he was obliged in law to do so. If he had gone into the allegation, he would inevitably have had to question them about the subject of their deliberations … In my opinion, the common law prohibition against

[62] Above n 57, at para 156.
[63] (2005) 2 Crim App R 10.
[64] *Ibid*, at para 16.
[65] Above n 63, at para 17.

> enquiry into the events in the jury room certainly extends to matters connected with the subject matter of the jury's deliberations. I do not think it necessary or desirable to attempt to draw up a precise definition of the situations in which it would be legitimate for the Judge to question jurors. There may be some matters into which the Judge can and should enquire in this way, for example that a juror has used a mobile phone to make a call from the jury room, but I would prefer to leave for future discussion the limits of any such enquiry.
>
> I accordingly consider that questioning of jurors, even if it were within legitimate bounds, would have been likely to make the situation worse rather than better.
>
> The Judge was accordingly left with the choice of two courses of action, to discharge the jury or to give them further instruction, along the lines of the familiar direction set out in *Watson*, re-emphasising their duty to carry out their discussions with proper give and take. The Judge took the latter course and I consider it was justified in the circumstances.[66]

What follows hereafter is an examination of some of the cases which suggest what is and is not permissible by way of enquiry when dealing with jury problems, including bias. It has to be said that the authorities do not necessarily speak with the same voice.

In *Orgles*,[67] there was friction amongst members of the jury and two jurors complained. The Judge asked those two jurors if they still felt able to give a true verdict and they said they could. The whole jury was then reassembled and the Judge asked them if they could continue to act as a body and the foreman said they could. This was held to be a wrong approach. Holland J said that if the problem arose from something external to the jury and affecting only an individual juror:

> it is appropriate to commence and continue the enquiry with the juror concerned separated from the body of the jury', but 'such separation of a juror for the purposes of an enquiry cannot be justified if the circumstances are internal to the jury …' The problem is not the capacity of one or more individuals to fulfil the oath or affirmation, but the capacity of the jury as a whole. When this type of problem arises, then the whole jury should be questioned in open court through their foreman to ascertain whether as a body, it anticipates bringing in a true verdict according to the evidence. It will be a matter for the Judge's discretion as to how he reacts to the response, that is whether he makes no order, whether he discharges the whole jury or whether he discharges individual jurors up to three in number.

He went on to say:

> What we regard as irregular was the initial separation and questioning of the individual members which, given the nature of their respective complaints, should not have happened.[68]

[66] Above n 63, at paras 20, 21 and 22.
[67] 98 Crim App R 185.
[68] *Ibid*, at p 190.

Bryan[69] is broadly consistent with this approach. In that case and after the jury had returned some verdicts, they were sent home for the night. A woman on the bus overheard two jurors talking about the case including a suggestion that one elderly member of the jury always thought the defendant was guilty. The woman reported the matter to the police, who in turn informed the Judge. The Court of Appeal said that the woman should have been brought to court to give evidence about what she had heard. Waller LJ said:

> Some suggestion was made by the court during argument of the possibility that having established the position with (the witness), the Judge ought to have gone on to identify the two jurors and possibly even thereafter to have identified the elderly juror. On reflection, we think there would have been risks in taking that course and no benefits.[70]

He went on to say that:

> Having established the position so far as (the witness) was concerned, we think that the Judge would have had to make up his mind whether a firm direction which warned the jury to approach the matter without any preconceived ideas and by reference to the evidence alone, would expunge any damage of an unfair trial. If he had concluded that such a direction could not suffice then the discharge of the jury in relation to the remaining counts would have been the only course open to him.[71]

On the other hand, in *Blackwell*,[72] a female juror was seen talking to a man who had been present in court throughout the trial. Counsel asked the Judge to investigate. He refused. Later, having heard that the juror and the man were going to get married, he agreed to discharge the juror. He refused to make any enquiries of her before discharge and refused to make any enquiries of the remaining jurors. In the Court of Appeal, Morland J said:

> If there is any realistic suspicion that the jury or one or more members of it have been approached or tampered with or pressurised, it is the duty of the Judge to investigate the matter and probably, depending on the circumstances, the investigation will involve questioning of individual jurors or even the jury as a whole. Any such questioning must be directed to the possibility of the jury's independence having been compromised and not the jury's deliberations or the issues in the case … When the Judge has completed his investigation … the Judge is in a position to make an informed exercise of judicial discretion as to whether or not the trial should continue with all twelve jurors, or continue after the discharge of an individual juror, or the whole jury may have to be discharged.[73]

In *Oke*, [74] a member of the public was seen having a drink with a juror and that person had been in court during legal argument in the absence of the jury. The juror told the Judge that the man was her husband and the Judge declined to

[69] (2001) EWCA Crim 2550.
[70] *Ibid*, at para 47.
[71] Above n 69, at para 48.
[72] (1995) 2 Crim App R 625.
[73] *Ibid*, at p 633.
[74] (1997) Crim LR 898.

question her further. The Court of Appeal said it would have been better had the Judge asked a few more questions as to what had passed between her and her husband.

In *Appiah*,[75] a juror noted that on three days she was being watched. This unnerved her. She told a fellow juror about what had happened and it subsequently became clear that she had told other jurors as well. The following day, having heard about the matter, the Judge discharged the juror. In respect of the remaining jurors, the Judge told them what had happened. He asked them individually whether they felt that they could properly carry on or whether they might feel uneasy about giving a verdict. No member of the jury indicated any unease. On appeal, it was argued that jurors should not have been questioned individually but should have been addressed through their foreman. The Court of Appeal held that the Judge had adopted an entirely correct approach. There was no reason why he should not have asked each juror individually whether he or she felt intimidated by what had happened.

Perhaps the best approach is illustrated by what happened in *Momodou*.[76] After a four-month trial, the jury were on their second day of retirement when a juror wrote a letter to the Judge saying that 'two of her fellow jury members were being discriminatory and prejudicial against the defendants and not judging the case on the evidence'. The Judge did not discharge the jury straightaway. What he did was as follows:

(a) Had them into court and expressed his concern about the contents of the letter.
(b) Each juror was then provided with an edited copy of the letter.
(c) The jury were then told to retire and consider the letter and decide whether they felt able to continue deliberating together impartially and to consider whether their collective ability to give an impartial verdict had been compromised.
(d) He indicated that he would only accept a response in general terms and would not consider individual responses.
(e) Through their foreman, the collective response was that they took their obligations seriously and would try the case fairly.
(f) He rejected Counsel's request that more detailed enquiries of individual jurors should be made.

The Court of Appeal upheld this approach.

Once the Judge has decided that a fair trial with the jury in question is no longer feasible, there is a clear duty to discharge that jury regardless of considerations

[75] (1998) Crim LR 134.
[76] (2005) 2 Crim App R 6.

of convenience, cost and suchlike. This is apparent from *Spencer* and the passage from the speech of Lord Hailsham already quoted.[77] In *Bryan*,[78] Waller LJ said:

> If the Judge had concluded that such a direction could not suffice, then a discharge of the jury in relation to the remaining counts would have been the only course open to him. The fact that the trial had got so far; the fact that there were verdicts already returned on some counts; the fact that a discharge might lead to no trial at all on the remaining counts were simply irrelevant and should not have been taken into account in making the necessary ruling.[79]

There is a slightly Delphic passage in *Brown*,[80] which hints at a possible rider to the foregoing categoric rulings. Mance LJ said:

> That the courts can and that a fair-minded and informed observer would have in mind, as a background factor, the undesirability of discharging juries too freely and the hardship that any discharge can involve for complainants, not to mention the waste of time and costs seems to us correct … Such factors cannot be determinative, if the case is one where there is a real risk that injustice may be caused by not discharging the jury. But they are part of the background to any consideration whether there is a sufficiently real risk of lack of impartiality to justify discharge.[81]

It is respectfully suggested that this dictum should be approached with care.

[77] Above, n 49.
[78] (2001) EWCA Crim 2550.
[79] *Ibid*, at para 48.
[80] (2001) EWCA Crim 2828.
[81] *Ibid*, at para 33.

18

Submission of No Case to Answer

18.1 The approach of a judge faced with a submission at the close of the prosecution case that the defendant has 'no case to answer' is governed by what was said by Lord Lane in *Galbraith*.[1] He said:

(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty—the Judge will stop the case.
(2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
    (a) Where the Judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.
    (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury.[2]

In *Broadhead*,[3] Keene LJ said:

> One of the most overworked phrases used by defence advocates at trial when making a submission of no case is that derived from the decision in *Shippey* (1988) Crim LR 767 about not 'picking out all the plum and leaving the duff behind'. Over-used it may be, but Turner J's celebrated words in that case embody a valid and important point … The Judge's task in considering such a submission at the end of the prosecution case is to assess the prosecution evidence as a whole. He has to take account of the weaknesses of the evidence as well as such strengths as there are. He needs to look at the evidence at that stage in the trial in the round therefore.[4]

To like effect is the following paragraph from the judgment of Moses LJ in *Robson*.[5] That was a case involving historic allegations of physical abuse. He said:

> As this court has repeatedly emphasised, the dangers inherent in such cases require the Judge carefully to scrutinise the evidence himself in order to see whether it is safe to

[1] 73 Crim App R 124.
[2] *Ibid*, at p 127.
[3] (2006) EWCA Crim 1705.
[4] *Ibid*, at para 17.
[5] (2006) EWCA Crim 2754.

> leave the case to the jury … This scrutiny requires the Judge to consider not only the nature and quality of the evidence but also inconsistencies, either within the evidence of one witness or between a number of witnesses. It is not sufficient for a judge merely to remark that inconsistencies are a matter for the jury. So they may be in many cases. But in cases where the complaints are of events many years ago, it is the responsibility of the Judge to consider whether the inconsistencies are such that no jury, even when properly directed as to the significance of such inconsistencies, could safely convict.[6]

18.2 At one time it was thought that if Counsel did not make a submission of no case that was open to him, no subsequent appeal could be brought based on that omission. The responsibility of the Trial Judge did not require or entitle him to interfere.[7] That position has changed. In *Brown*,[8] it was held that a judge has a responsibility not to allow a jury to consider evidence on which they could not safely convict. If at the conclusion of the prosecution evidence the Trial Judge was of the opinion that no reasonable jury, properly directed, could safely convict, he should raise the matter for discussion with Counsel, even if no submission of no case had been made. If, having heard submissions, he was still of this same opinion, he should withdraw the case from the jury. This was confirmed in another case, also called *Brown*,[9] where Longmore LJ said:

> No doubt, this is a power which should be very sparingly exercised and only if the Judge really is satisfied that no reasonable jury, properly directed, could on the evidence safely convict.

18.3 The submission should normally be made in the absence of the jury.[10] In *Crosdale*,[11] Lord Steyne said:

> The important point is that the jury cannot assist the Judge in his decision as to whether there is sufficient evidence for the Judge to place the case before the jury. That part of the proceedings is concluded by the Judge alone … There is no sensible reason why the jury should witness that part of the proceedings. On the contrary, there are substantial reasons why, in the interests of an effective and fair determination of the issue … the jury should be asked to retire. If the jury do not withdraw, there is a risk they will be influenced by what they hear … Irrespective of whether the defence ask the jury to withdraw or not, the Judge should invite the jury to withdraw during submissions that a defendant does not have a case to answer.[12]

[6] *Ibid*, at para 6.
[7] *Jewett* (1981) Crim LR 113.
[8] (1998) Crim LR 196.
[9] (2002) 1 Crim App R 5.
[10] *Falconer-Atlee* (1974) 58 Crim App R 348.
[11] (1995) 2 All ER 500.
[12] *Ibid*, at p 507.

INDEX

Introductory Note

References such as "178–9" indicate (not necessarily continuous) discussion of a topic across a range of pages. Wherever possible in the case of topics with many references, these have either been divided into sub-topics or the most significant discussions of the topic are indicated by page numbers in bold. Because the entire volume is about "case management", the use of this term as an entry point has been minimized. Information will be found under the corresponding detailed topics.