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Archbold Review

Cases in brief

Abuse of process—where payment of fixed penalty notice declined and more serious charge brought

R. (GAVIGAN AND GAVIGAN) v CPS [2013] EWHC 2805 (Admin); July 24, 2013

G and G were issued with a penalty notice under Criminal Justice and Police Act 2001 s.2, relating to an offence contrary to Public Order Act 1986 s.5, but returned the notice requesting a court hearing. The District Judge had not been wrong to decline to stay their prosecution for an offence under s. 4 of the 1986 Act. Although the notice offered the opportunity, by paying a fixed penalty, "to discharge any liability to be convicted of the offence to which the notice relates" (s.2(4) of 2001 Act), there was no principle or policy reason that required that a person who had rejected the opportunity to pay a fixed penalty should not thereafter be prosecuted for any offence arising out of the same set of facts as those in respect of which the notice was issued, including a more serious offence. The notice should perhaps contain a warning to the effect that payment of the penalty did not relieve the payer of potential liability for a more serious offence. If G and G had paid the penalty, rather than exercising their right to have the issue determined by the court, then, by analogy with *Beedie* [1997] 2 Cr.App.R. 167, it might have been unfair subsequently to prosecute them for a more serious offence. If and when such an issue arose it would have to be determined.

Bad character—trial for sexual offences against 13-year-old boy—admissibility of conviction for homosexual act which would now be legal

LAWS-CHAPMAN [2013] EWCA Crim 1851; October 25, 2013

At his trial for historic sexual offences against a 13-year-old boy, L's later conviction for buggery with a 17-year-old was wrongly admitted as relevant as correcting a misleading impression; that it showed a relevant propensity; and that it was relevant to whether L, as opposed to another man, who had convictions for child sexual abuse, was the perpetrator. All that was known about the previous conviction was that it took place in the same place as one of the instant offences was alleged to have taken place. The sentence suggested that it was not non-consensual, and it was highly likely that the incident would no longer constitute a sexual offence of any kind. That offence had no relevance to whether L would have committed violent and paedophile offences against a 13-year-old boy. To transpose the situation into a heterosexual context, it would be inconceivable that an attempt would be made to introduce the fact that a male defendant had at some stage in his past had lawful, consensual sexual intercourse with a female—however great the age difference between them—in support of a prosecution for violent and paedophile offences, committed against an unwilling young victim.

Indictment—rape of male in 2008 charged as rape contrary to Sexual Offences Act 1956—whether indictment invalid

STOCKER [2013] EWCA Crim 1993; November 13, 2013

To an indictment charging various historic sexual offences under the Sexual Offences Act 1956 was added by amendment a count to charge an anal rape of a male in 2008. An error in producing the count electronically led to it being specified as rape contrary to s.1(1) of the 1956 Act, not the Sexual Offences Act 2003. S was convicted and the error remained unremarked until an appeal against sentence was under consideration. The authorities (many of which were reviewed in *Clarke and McDaid* [2008] 2 Cr.App.R. 2) revealed the courts taking either a formalistic approach to a defective indictment (*Taylor* (1924) 18

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Cr.App.R. 105; *Hyde* (1934) 24 Cr.App.R. 149 (later disapproved); *Meek v Powell* [1952] K.B. 164; *Franks* (1950) 34 Cr.App.R. 222; *Crook* (1977) 65 Cr.App.R. 66 (later disapproved); *McKenzie* [2011] EWCA Crim 1550; and *Abdul* [2012] EWCA Crim 1788) or a more flexible approach, focussing on the absence of prejudice and the safety of the conviction (*Thompson* (1914) 9 Cr.App.R. 252; *Miller and Hanoman Ltd* (1959) Crim.L.R. 50; *McVitie* (1960) 44 Cr.App.R. 201; *Nelson* (1977) 65 Cr.App.R. 119; *Power* (1978) 66 Cr.App.R. 159; *Molyneux* (1981) 72 Cr.App.R. 111; *Ayres* (1984) 78 Cr.App.R. 232; and *Pickford* [1995] 1 Cr.App.R. 420). A significant change occurred with the amendment to Criminal Appeal Act 1968 s.2(1) (Criminal Appeal Act 1995 s.2(1)) removing the proviso and introducing safety as the only test on appeal. The appropriate approach to errors in the indictment was considered in *Graham* [1997] 1 Cr.App.R. 302—drafting or clerical errors or discrepancies would not render a conviction unsafe, and *McVitie* would be decided in the same way; but if the particulars of the offence could not support the alleged offence, a conviction would be unsafe. The Court considered *Ashton, Draz and O'Reilly* [2007] 1 W.L.R. 181 (itself considering *Soneji* [2006] 1 A.C. 340 and *Sekhon* [2003] 1 W.L.R. 1655) and the treatment of that case in *Clarke and McDaid*; and *K* [2007] 1 W.L.R. 3190; [2008] 1 Cr.App.R., drawing the important distinction between indictments which charged the wrong offence or an offence unknown to law, and those that were partially defective and could be cured by amending the particulars of the offence. The Court concluded that there was a clear judicial and legislative steer away from quashing an indictment and allowing appeals on the basis of a purely technical defect. The overriding objective of the criminal justice system was to do justice. To that end, procedural and technical points should be taken at the time of the trial. The question was whether in S's case, it was a purely technical defect or whether the count itself was fundamentally flawed because it breached Criminal Procedure Rules 2013 r.14(2) by failing to identify accurately the legislation allegedly contravened. The purpose of the rule was to ensure an accused had sufficient information to know the case that had to be met and the correct statutory provision. There was no possible doubt in S's case, and the judge summed up as if the charge had been one under the 2003 Act (which distinguished *Shields* [2011] EWCA Crim 2343 and *MC* [2012] EWCA Crim 213). As far as the judge, jury, prosecution and defence were concerned S was tried on and convicted of the right offence under the right Act. The only error here was that someone clicked the 1956 box rather than the 2003 box when the amendment was electronically generated. It could have been cured easily by an amendment at any time. Bearing in mind Lord Bingham's warning in *Clarke and McDaid* against "wholesale jettisoning of all the rules affecting procedure", the Court had focussed on the legal effect of the breach of the rules. Having done so, it could not accept that an error in the date of the statute on these facts was so fundamental as to render the proceedings a nullity. It was a pure technicality.

Indictment—regulatory offences—provisions rendering director liable for offence by corporate body—whether separate offences or not—whether mis-statement rendered indictment a nullity

WILSON [2013] EWCA Crim 1780; October 23, 2013

(1) A provision (Regulatory Reform (Fire Safety) Order 2005 Art.32(8)) that, where a body corporate was proved to have committed an offence, a director would also be guilty of "that offence" if it were committed with his consent, connivance or due to his neglect did not create a distinct offence, and particulars of offence that specified this provision rather than the underlying offence committed by the body corporate were defective. (The Court noted that similarly or identically framed provisions as Art.32(8) were to be found in Health and Safety at Work Etc Act 1974 s.37(1), Theft Act 1968 s.18(1), Fraud Act 2006 s.12, Terrorism Act 2006 s.18(1), Safeguarding Vulnerable Groups Act 2006 s.18(1) and Bribery Act 2010 s.14.)

(2) The Court concluded that the indictment was not a nullity. While it was right that the accuracy of an indictment should be closely scrutinised, and it was indisputable that where the consequence of an error was that the indictment was a nullity, then, regardless of the merits, a conviction could not stand, where an indictment was merely defective but not a nullity, a conviction may not be unsafe. Whether it was safe or not was a question of fact and degree, in which considerations of prejudice or unfairness to the defendant loomed large: *Mohammed* [2004] EWCA Crim 678. In W's case, the particulars were impeccable, which could be prayed in aid of a defective statement of the case: *Ayres* [1984] 1 A.C. 447*; Searle* [1995] 3 C.M.L.R. 196; and *Mohammed*. The error was merely one of labelling. The error manifestly occasioned no unfairness or prejudice. Reliance on such an error would involve a "resort to undue technicality" of the sort deprecated in *Graham* [1997] 1 Cr.App.R. 302. The Court, in addition, considered *Bhagwan* [1972] A.C. 60*; Withers* [1975] A.C. 842*; Whitehouse* [1977] 1 Q.B. 868*; Shields* [2012] 1 Cr.App.R. 9; *Mandair* [1995] 1 A.C. 208*;* and *McLaughlin* (1983) 76 Cr.App.R. 42.

Local Government—decisions to prosecute—what must be decided by Borough Solicitor—authorisation to prosecute—form and availability; Administrative Court—expedition where summary prosecution delayed

R. (UK REAL ESTATE LTD) v LONDON BOROUGH OF CAMDEN [2013] EWHC 3505 (Admin); October 8, 2013

(1) It was not necessary, in the light of either Local Government Act 1972 s.222 or Camden's constitution, for the Borough Solicitor to personally approve each specific charge where the council prosecuted a company in relation to unauthorised advertising (Town and Country (Control of Advertisements (England) Regulations 2007 (SI 2007/783) regs 4 and 30). The Court was prepared to infer that the Borough Solicitor had provided a broad enough authority to prosecute to lawyers employed by the Council to encompass changes and additions to charges over a significant period of time. The expediency of the prosecution and other matters, including consideration of the test in the Code for Crown Prosecutors, had to be considered by someone, but, provided the authorisation was broad enough, there was no requirement that that need be done by the Borough

Solicitor in person. It was, however, unsatisfactory that the authority to prosecute was not available, the form in which it was recorded being such that it was subject to legal professional privilege. An authority to prosecute ought, absent special reasons, to be in a position to be provided or maintained in such a state that the scope of the decision at least could be readily and publicly discerned.
(2) The judicial review proceedings had resulted in a delay of nearly a year to what should have been swift summary proceedings. Such claims should be proceeded with far more swiftly by the Administrative Court. Prosecutors were urged to seek expedition at all stages, pressing the Court to give priority to these applications, citing what had been said in this judgment.

Terrorism—definition—breadth of definition—desirability—whether should be read down

GUL [2013] UKSC 64; October 23, 2013

G was convicted of disseminating terrorist publications contrary to Terrorism Act 2006 s.2. He contended that the definition of "terrorism" in s.1 of the Act should be read so as not to include military action by non-state armed groups against state or inter-governmental organisation armed forces in the context of a non-international armed conflict.
(1) Considered as a matter of domestic law, it was clear that the definition of "terrorism" in the Act was, if read in its natural sense, very far reaching indeed. Activities which might command public understanding or support may fall within it, and could include military activity aimed at bringing down a foreign government even when that was approved by the UK Government. The Crown argued that such a broad definition was necessary, but its effect was mitigated by the requirement for approval by the DPP or Attorney-General for prosecutions (s.117). Prosecutorial discretion was never intended to assist in the interpretation of legislation which involved the creation of a criminal offence or offences. Either specific activities carried out with a particular intention or with a particular state of mind were criminal or they were not. The Crown's reliance on prosecutorial discretion was intrinsically unattractive. It amounted to saying that the legislature had effectively delegated its function of making proper law to an appointee of the executive, which (unless very rarely used, where there was no alternative) constituted a risk to the rule of law. It also meant that, because the consent focussed on *prosecution*, the lawfulness of executive acts such as detention, search, interrogation and arrest could be questioned only very rarely indeed in relation to any actual or suspected involvement in actual or projected acts involving "terrorism", in circumstances where there would be no conceivable prospect of such involvement being prosecuted; and that where an activity technically involved "terrorism", it would be criminal long before, and indeed quite irrespective of whether, any question of prosecution arose. Nevertheless, despite the undesirable consequences of the combination of the very wide definition of "terrorism" and the provisions of s.117, it was difficult to see how the natural, very wide, meaning of the definition could properly be cut down by the Court. The definition of "terrorism" was indeed intended to be very wide. Unless it was established that the natural meaning of the legislation conflicted with the European Convention on Human Rights (which was not suggested) or any other international obligation of the United Kingdom (see below), the Court's function was to interpret the meaning of the definition in its statutory, legal and practical context. The wide interpretation favoured by the prosecution was correct.
(2) G argued that (a) the provisions, or some of them, of the Act were enacted to give effect to the UK's international obligations arising under treaties concerned with the suppression of terrorism, and that "terrorism" should therefore be given a meaning which accorded with the international law norm, and at any rate with the definition in the relevant international documents to which effect was intended to be given; and (b) that as the Act criminalised certain "terrorist" actions committed outside the UK, the meaning of "terrorism" should not be wider than what was accepted as an international norm. Both arguments failed because there was no accepted norm in international law as to what constituted terrorism: see *Al-Sirri v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening)* [2013] 1 A.C. 745 at [37]. Even if there were, as G argued, significant support for the proposition that "terrorism" did not encompass the activities of insurgents or "freedom-fighters" in non-international armed conflicts, that fell far short of amounting to a general understanding. Further, even if some of the provisions of the Act were enacted to give effect to the UK's obligations under the International Convention for the Suppression of Terrorist Bombings 1997 and the International Convention for the Suppression of the Financing of Terrorism 1999 (and, for some provisions of the Terrorism Act 2006, the Council of Europe Convention on the Prevention of Terrorism 2005 and the International Convention for the Suppression of Acts of Nuclear Terrorism 2005), there was no rule that the UK Government could not go further than was required by an international treaty when it comes to legislating ("gold-plating"); and in any event, that argument did not apply to the provision of the Act relevant to this case. It was unnecessary for the Court to determine whether the Court of Appeal was right to decide that there is no reason why Parliament could not criminalise acts of "terrorism" committed outside the UK, as G's case did not fall into that category. That question raised points of some difficulty, to be dealt with in an appropriate case.

Using threatening, abusive or insulting words or behaviour or disorderly conduct—Public Order Act 1986 s.5—walking naked through town centre—whether "disorderly conduct"

GOUGH v DPP [2013] EWHC 3267 (Admin); October 31, 2013

The District Judge had been entitled to conclude that G (who habitually rambled naked) had committed the offence in Public Order Act 1986 s.5 when he had walked naked (though shod and be-hatted) through a town centre, in that he was violating public order or, as the District Judge put it, contributing "to a breakdown of peaceful and law-abiding behaviour as evidenced by the reactions of the public", and he was thus disorderly. Contrary to G's submissions, there was nothing passive about his conduct in that he knew full well (not least from his past experience) that many members of the public would both be alarmed and distressed by the sight of his naked body. The judge was entitled to find that, although European Convention on Human Rights Art.10 was engaged, there was a pressing social need for the restriction of his right to be naked in the context of this case, and that prosecution for a summary-only offence punishable by a level 3 fine was a proportionate response.

Comments

Jurors Behaving Badly

By Paul Humpherson, Barrister[1]

This article coincides with the publication this month of the first of the Law Commission's reports on Contempt of Court,[2] and focusses on one issue considered by the Commission, namely the question of the law's treatment of contempt by jurors.

The Current Law

Under the current law, contempt proceedings against errant jurors are brought either by the Attorney General in the Divisional Court or instituted by the trial court of its own motion. In such proceedings it must be proved to the criminal standard that the juror in question committed an act or omission calculated to interfere with or prejudice the due administration of justice, with specific intent to interfere with or prejudice the administration of justice. As explained by the Lord Chief Justice in *Att.-Gen. v Dallas*,[3] the proof of four elements would usually be sufficient to make out a contempt, namely that:

(i) the juror knew that the judge had directed that the jury should not do a certain act;

(ii) the juror appreciated that that was an order;

(iii) the juror deliberately disobeyed the order; and

(iv) by doing so the juror risked prejudicing the due administration of justice.

Recent cases of juror contempt brought before the Divisional Court have included instances of jurors conducting internet research,[4] a case of a juror instituting a dialogue with a defendant via Facebook[5] and a case of a defendant, after being empanelled onto a jury trying allegations of sexual misconduct with children, posting a status on Facebook including "I've always wanted to Fuck up a paedophile & now I'm within the law!".[6] These cases were high profile and resulted in each instance in sentences of imprisonment.

Identified Problems

Unsatisfactory elements of the current law identified by the Commission and the respondents to its consultation included the following:

(i) *Legitimacy and Rule of Law concerns.* At present, a successful contempt prosecution appears to depend upon proof of disobedience to a specific judicial direction. This means that the criminality in every case depends on the exact wording of directions given by the trial judge. This raises problems both in terms of legal certainty and legitimacy (the source of the criminal liability in each case being in part the trial judge, or at least, even if standard directions are promulgated and employed, the judiciary).

(ii) *Procedural inconsistency/unfairness.* The absence of procedural safeguards caused by the use of the civil procedure in contempt proceedings before the Divisional Court seems unjustified when compared with the way in which similar criminal conduct is dealt with and raises concerns regarding ECHR compatibility.[7]

(iii) *Sentencing.* As was recognised by an overwhelming majority of the respondents to the Commission's consultation, the fact that contempt of court is currently punishable by imprisonment and an unlimited fine, but not by any form of community penalty, is unsatisfactory.

(iv) *Judges' rapport with jurors.* Responses to the consultation from circuit judges indicated concerns regarding the evident conflict between a judge's desire to establish a rapport with jurors at the outset of a trial and their obligation to direct them in stern terms that breaches of their instructions would constitute an imprisonable contempt.

The Commission's recommendation

The Commission recommends that a new offence should be capable of being committed by any act of a person sworn as a juror[8] done with the intention of discovering information related to the proceedings that the juror is trying, other than evidence communicated to the juror in court or by the appropriate officer of the court. The Commission further countenances the possibility of the offence being extended to conduct of a sworn juror demonstrating an intention not to try the case solely on the evidence.[9]

The Commission recommends the offence should be triable only on indictment and subject to the usual procedures for criminal offences of this type. Prosecutions should require the consent of the Attorney General, and the maximum penalty on conviction should be two years' imprisonment, with the full range of sentencing options including community penalties and suspended prison sentences available.

Discussion

Given the dramatic potential consequences of a finding of

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2 Law Commission, *Contempt of Court (1): Juror Misconduct and Internet Publications.* (HMSO 2013), Law Com. No.340, HC Paper No.860.

3 [2012] 1 W.L.R. 991 at [2] to [4].

4 *Att.-Gen. v Davey* and *Att.-Gen. v Beard* [2013] EWHC 2317 (Admin); [2013] All E.R. (D) 391.

5 *Att.-Gen. v Fraill and Sewart; Knox* [2011] EWHC 1629 (Admin).

6 *Att.-Gen. v Davey* and *Att.-Gen. v Beard* [2013] EWHC 2317 (Admin); [2013] All E.R. (D) 391 (Jul).(combined judgment) at [6].

7 The Law Commission notes concerns in particular regarding Arts 5 and 6 compatibility, and there may also be questions over Art.7 compliance given the uncertainty regarding the scope of the contempt.

8 Not limited to those sitting on criminal trials, but extending to coronial proceedings and civil jury trials according to the views of respondents to the consultation.

9 This extension would cover fact patterns such as that in *Davey* (above) where the conduct neither constitutes prohibited research, nor breaches the statutory prohibition on disclosure of jury deliberations (since such deliberations have yet to commence) but nonetheless demonstrates an intentional interference with the administration of justice by the failure of the juror to abide by their oath.

contempt for the alleged contemnor, the current state of the law is clearly deficient. The lack of clarity around the scope of the offence, lack of procedural protection for alleged contemnors, questions of legitimacy given the source of the current contempt[10] and irregularity regarding the available sentence could all be substantially improved by statutory reform. Given the high profile nature of recent cases involving jury contempt, and the consistent strong public support for, and interest in, trial by jury[11] there is also reason for optimism that this relatively discrete and self-contained reform proposal might generate the necessary Parliamentary interest to secure its prompt enactment.

10 In each case the individual trial judge's direction.

11 See e.g. C. Thomas, *Are juries fair?*, Ministry of Justice Research Series 1/10 February 2010; J. Roberts and M. Hough, *Public Opinion and the Jury: an International Literature Review*, Ministry of Justice Research Series 1/09 February 2009.

Self-Defence and Delusional Beliefs

By L. H. Leigh

Introduction

The appellant in *Oye (Seun)*[1] was charged with two counts of affray and one of inflicting grievous bodily harm contrary to s.20 of the Offences Against the Person Act 1861. He advanced defences of insanity and of self-defence based fundamentally on the same psychiatric evidence coupled with his own evolving recollection of his mental state at the time of the acts complained of. The prosecution chose not to probe the defence of insanity but, in respect of self-defence, contended that the force used by the appellant was unreasonable having regard to what a reasonable person would have apprehended from the conduct of police officers and others. The jury declined to accept either defence and convicted on all counts.

The appellant was found behaving strangely in the staffroom of a coffee shop, where he had no right to be. When the police came they found him hiding in a roof void and he behaved violently towards them. That conduct founded the first charge of affray. The appellant continued to act strangely at the police station. Although reporting a history of cannabis abuse he was not found to be under the influence of alcohol or drugs. The following morning the appellant, following an interview with a specialist drugs worker, sought to leave the police station and, on being prevented from doing so, violently assaulted police officers, breaking the teeth of a female police officer. This conduct founded the grievous bodily harm charge. Police officers said that he was absolutely manic and possibly subject to acute mental disorder. The appellant was then sectioned under the Mental Health Act 1983 and taken to a mental hospital. His overall conduct in the custody suite founded the second affray charge.

The case at trial

At trial unchallenged psychiatric reports (which indicated that the appellant had no recollection of the acts complained of) stated that the defendant was, at the time of the acts, suffering from a psychotic episode such that he did not know that what he was doing was wrong. The defence statement specifically said that the appellant believed that he was being watched and pursued by evil spirits whose agents he believed the police to be. The Crown apparently accepted during the trial that at the time of the incidents the appellant genuinely did, by reason of his insane delusions, believe that he was being confronted by evil spirits intent on harming him—but fully cross-examined him in relation to the force used in self-defence. The appellant said in re-examination that he thought the evil spirits would "exterminate" him.

The issues on appeal

As regards self-defence, the prosecution put its case simply on the basis that the appellant, even in the light of his deluded belief as to the facts, used unreasonable force in defending himself. It is in this somewhat surreal context that, following his conviction, the case later came before the Court of Appeal.

Accepting that the case proceeded on the basis of the psychiatric reports, which concluded that the accused was suffering from a psychotic state, the Court questioned whether there was clear-cut and irrefutable evidence that the danger actually perceived by the appellant in his deluded state justified his actual response ([48]). The Court's reasoning is based on the proposition that a person's subjective belief satisfies the first limb of the defence of self-defence even though it is delusional, but that the reasonableness of the force used is to be determined objectively in the light of the evidence concerning the precise nature of his belief. The Court then looked at the defendant's evidence, and concluded that, though it was clear that the defendant was suffering from delusions, it was not clear that, if the facts had been as he deludely imagined them to be, his acts of violence would have been a reasonable response to them—and it was therefore open to the jury to find that they were not (as their guilty verdict suggested they had done).

But what if the Court had concluded that the defendant believed himself to be assailed by agents of evil spirits in such a way that his violent actions would have been an unquestionably reasonable response?

The resulting law would be both simpler, and better, surely, if the Court had felt able to rule that self-defence is to be assessed by reference to a non-delusional mind. It seems paradoxical that a person is entitled to have a delusional belief taken into account on the first limb of the defence but not the second. It seems unlikely that the courts or Parliament had this possibility in mind when settling the terms of the defence. Section 76 of the Criminal Justice and Immigration Act 2008 is intended to clarify, but is explicitly not intended to supplant, the common law defence of self-defence. The Court, and commentators, assume that s.76(3) establishes, without qualification, express or implied, that whether the degree of force used was reasonable is to be assessed having regard to the circumstances as the defendant believed them to be. Section 76(4) provides that a defendant is entitled to rely on a belief, however mistaken it

1 [2013] EWCA Crim 1725.

may be. It does not address the question of delusional beliefs. Section 76(5) does exclude the case where the mistake is due to voluntary intoxication. This addresses the most common problem. Delusional belief was, one suspects, assumed to bring the defendant under the insanity defence and so, it may be thought, was not specifically addressed in s.76.

If one turns to the issue of subjective belief at common law, in *Martin (Anthony)*[2] the Court held that whereas in self-defence cases the jury is entitled to take into account the physical characteristics of the accused, only in exceptional circumstances which would make the evidence especially probative (circumstances which the Court does not seek to define and a possibility later doubted in *Canns*,[3] and again in *Press and Thompson*[4]) would it be appropriate to take into account whether the defendant is suffering from some psychiatric condition ([67]). *Martin*, furthermore, appears to deal with, at most, extremes of eccentricity and not delusions and only with the issue of reasonable force. This is the limb with which the Court dealt in *Canns*, involving a killing under delusion. The Court there held, and the Court in the instant case agreed, that the defendant's delusional perception of events could not be relied on as regards the issue of whether he used reasonable force. But none of this need preclude an exclusionary rule which would hold that a mistake engendered by delusion cannot be relied on as regards the "actual belief" head of self-defence. The authorities cited by the Court assume rather than establish that the subjective limb of self-defence may be satisfied by reference to delusional beliefs. But the authorities establishing the subjective nature of this limb appear to contemplate a rational mind, albeit one which may be timorous, excitable or eccentric: see *Beckford*,[5] and cases cited therein. There seems no hint in either this country, or elsewhere in the Commonwealth where the common law defence applies, that the subjective element of the defence comprehends delusional beliefs. In *Martin (David Paul)*[6] schizoid-affective disorder which made it more likely that the sufferer would regard a situation as threatening was held relevant on the subjective limb, but an apparently distorted perception of an actual situation, engendering a mistake which might have occurred to a rational mind, is a long way from the facts of the instant case.

The Court was anxious not to countenance a rule which would permit a violent and mentally disordered individual to fall outwith the control structure provided by the defences of insanity and in murder cases diminished responsibility and the dispositions which the Mental Health Act 1983 provides for mentally disordered, but convicted, offenders. But that concern would not preclude a holding that a delusional mistake falls outside the subjective limb of self-defence.

In the Result?

The Court, as noted, rejected self-defence. It was, however, troubled by the jury's rejection of the insanity defence. It therefore substituted a verdict of not guilty by reason of insanity. This seems at first glance surprising given the accused's evidence which suggests that such a rejection would not have been irrational. Given the totality of the considerations peculiar to the trial of this case, however, the Court's unease with the verdicts reached seems justifiable ([61]–[63]). How should such cases as these be dealt with? If psychiatric and other evidence clearly establishes that the defendant's belief is attributable to mental illness and falls within the *M'Naghten* rules the defence should be restricted to insanity. It should not be possible to advance self-defence either as a primary or as a fall-back defence. Equally, self-defence should not be available if the defendant's belief is attributable to severe mental illness of a sort seriously to distort perception. A court should not be required to determine what force is reasonable in the light of a severely mentally disordered person's perceptions. The defendant should be found guilty and the Court should then consider whether to make an order under s.37, possible with a restriction under s.41, of the Mental Health Act 1983.

Finally, one might suggest a further restriction to subjectivism: what should be done with an individual whose distorted perceptions are attributable not to mental illness but to cultural factors such as a belief in witchcraft? To convict a person who claims that he believed himself to be acting in self-defence against a person animated by witchcraft might be thought an acceptable way of demonstrating that such cultural preconceptions cannot be relied upon as excusing violence in this country.

2 [2001] EWCA Crim 2099; [2003] Q.B. 1.
3 [2005] EWCA Crim 2264.
4 [2013] EWCA Crim 1849.
5 [1988] 1 A.C. 136.
6 [2000] 2 Cr.App.R. 42.

Feature

Reforming the Cross-examination of Children:

The Need for a New Commission on the Testimony of Vulnerable Witnesses

By Dr Emily Henderson[1]

Cross-examination, say the lawyers, is the "greatest legal engine ever invented for the discovery of the truth," and this is the reason for its centrality in the criminal trial. Undoubtedly, the defendant must have a robust method of testing the evidence of his or her accusers in order to achieve a fair trial. Unfortunately, at least when it comes to the youngest and most vulnerable witnesses, even this writer, a criminal barrister, has to acknowledge that we are wrong in our estimation of cross-examination's efficacy as an investigative technique.

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Thirty-plus years of empirical research in the UK and other common law jurisdictions has shown again and again that conventional cross-examination is more likely to confuse and mislead the very vulnerable than to draw out accurate and reliable evidence.

The crucial importance of cross-examination cannot be doubted. The efficacy of the current methodology is a very different matter.

In 2012 the respected team of Plotnikoff and Woolfson (writers of the *Advocate's Gateway* toolkits[2]) concluded, on reviewing all the relevant studies, that *at least* 50% of all the 394 child witnesses they had interviewed over the decade reported *not understanding* cross-examination questions. In their 2009 round of interviews (conducted for the NSPCC to give an overview of whether the "special measures" for children's testimony were in fact being used), they found 64% of children reported they had found parts of their cross-examination incomprehensible.[3] As one seven-year-old to whom they spoke said: "I didn't understand all he said. He should speak a bit nicer and simpler."[4] As the researchers themselves said, can a failure rate of 50% plus be acceptable in any profession?[5]

Moreover, this was just the children who were able to recognise when they failed to understand.[6] Researchers have long known that children have a strong tendency to overestimate their own comprehension. Recent studies of transcripts of children's cross-examinations from New Zealand (where the system and culture of the Bar is very similar), by experts in children's language development, confirm that a high proportion of cross-examination questions are too complex and are likely to have been misunderstood.[7]

Examples from England include a four-year-old being asked in one continuous sentence:

"She [the police officer] touched down here and said 'Did you ever get touched by [Y] there?' You shook your head, did you not? That is right, is it not?"[8]

The same examination later put the following three questions in one sequence:

"He did not touch you with his willy, did he? Did he, [X]? I have to ask you one more time, please: He did not touch you with his willy, did he?"[9]

There is then also the emotional impact of cross-examination. We all hope that the Stafford case[10] was an extreme and isolated example of what can happen in our courtrooms occasionally, but here are some of the words Plotnikoff and Woolfson's large group of young witnesses used to describe cross-examiners: "sarcastic," "bullying", "intimidating", "rude", "cross", "snotty", "disrespectful", "angry", "badgering" and "degrading."[11] Only 28% of the children interviewed described the cross-examiner as "polite".[12]

Reform by the Judiciary and the Bar

In 2010 and 2011 the Court of Appeal released several remarkable judgments designed to clean up poor cross-examination, namely *Barker*,[13] *Edwards*,[14] *W&M*[15] and *Wills*.[16] These decisions all deal with the evidence of children, from four- and six-year-olds at one end to 15-year-olds at the other. In these cases, the Court has been very clear that cross-examiners must use language appropriate to the developmental stage of the witness. Courts should not find children to be incompetent witnesses just because counsel cannot (or will not) communicate clearly:

"[T]he competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) . . . have to be adapted to enable the child to give the best evidence of which he or she is capable." [17]

The Court has also said that advocates must avoid heavy-handed suggestion of the "that didn't happen, did it?" variety because it risks contaminating the child's evidence:

"There is undoubtedly a danger of a child witness wishing simply to please. There is undoubtedly a danger of a child witness seeing that to assent to what is put may bring the questioning process to a speedier conclusion than to disagree. . . . . It is generally recognised that particularly with child witnesses short and untagged questions[18] are best at eliciting the evidence. By 'untagged' we mean questions we do not contain a statement of the answer which is sought."[19]

Further, the Court has said counsel should avoid:

"much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. . . . Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence."[20]

They have also said that children should no longer be subject to detailed cross-examination about details in the case or to accusations of lying. This sort of examination:

"risked confusion in the mind of the witness whose evidence was bound to take centre stage, and it is difficult to see how [that] could have been helpful."[21]

These are undoubtedly amongst the most significant judgments on the cross-examination of children ever delivered in any common law jurisdiction, or indeed on cross-examination at all.

Moreover, to their real credit, the legal professions have begun to try to change practice to conform to the Court of Appeal's strictures.[22]

And yet, anecdotally and in the press, reports continue to come in of cross-examination which would appear to violate the standards of good practice.[23]

2 Free guidance on examining vulnerable witnesses hosted on the Advocacy Training Council's website at www.theadvocatesgateway.org.
3 Joyce Plotnikoff and Richard Woolfson, "Kicking and Screaming: The Slow Road to Best Evidence" in Spencer and Lamb (eds), *Children and Cross-examination: Time to Change the Rules?* (Hart Publishing, 2012) at 27.
4 Ibid at 27.
5 Ibid at 26.
6 Ibid at 26.
7 K. Hanna et al, *Child Witnesses In New Zealand (*AUT, 2010), Ch.2; R. Zajac, "Investigative Interviewing in the Courtroom: Child Witnesses under Cross-examination" in R. Bull et al (eds), *Handbook of Psychology of Interviewing (*Chichester: Wiley, 2009).
8 Excerpts from the *Barker* trial cited in Plotnikoff and Woolfson, fn.3 above.
9 Excerpts from the *Barker* trial cited in Plotnikoff and Woolfson, fn.3 above.
10 See fn.23 below.
11 Plotnikoff and Woolfson, fn.3 above, at 26.
12 Plotnikoff and Woolfson, fn.3 above, at 26.
13 [2010] EWCA Crim 4.
14 [2011] EWCA Crim 3028.
15 [2010] EWCA Crim 1926.
16 [2011] EWCA Crim 1938.
17 *Barker* [2010] EWCA Crim 4 at [42].
18 A tagged question is one which ends "didn't it?" or "isn't it?" or in a similar fashion.
19 *W&M* [2010] EWCA Crim 1926 at [30]. Tagged questions of course are not the only ones to contain the answer sought: all leading questions do this.
20 *Barker* [2010] EWCA Crim 4 at [42].
21 *Edwards* [2011] EWCA Crim 3028 at [28].
22 See the Criminal Bar Association's training DVD, *A Question of Practice* (2013), introduced by the Lord Chief Justice and released April 2013 and the fact that the Advocacy Training Council, the Bar's training wing, hosts the cross-examination guidance website the *Advocate's Gateway* at www.theadvocatesgateway.org.
23 See for instance A. Norfolk, "Abuse trial that shamed the British legal system" *The Times*, May 23, 2013, p.1, 13, and subsequent articles.

Difficulties for the Bar in Reforming Itself

A major part of the problem for those attempting reform is that adapting to the language needs of young witnesses—or of other very vulnerable witnesses—is actually very difficult.[24] We tend to assume we know how to speak to children. After all, many of us were children once ourselves! However, as the studies of trial transcripts show very clearly, even highly qualified adults will often struggle. Even some senior criminal advocates admit they can find keeping their questions short and simple extremely hard.[25]

The real, underlying problem is the way in which advocates traditionally see cross-examination's purpose within the trial. For example, it is well-established by researchers that children give the most reliable and accurate information when they are asked open questions which do not suggest the answer and when they are allowed to tell their story in their own words, "free narrative" style, followed up by non-leading closed questions to zero in on aspects of the evidence the examiner needs to hear more about.[26]

However, in cross-examination the fundamental, most basic assumption is that questioning *should* be suggestive. As an old adage has it: "lead, lead, lead." Research shows that cross-examination is characterised by the use of closed leading questions which suggest the answer, even where children are examined,[27] and any advocacy manual proves that this is quite deliberate: leading questions are the accepted norm in cross-examination.[28] This, I believe, continues to be the model advised by those training English advocates today, including in relation to child witnesses.

Yet advocates have known about the dangers of suggestion for many years: a defence counsel would be the first to leap on ABE interviewers for using far less suggestive questions than those which form the backbone of most cross-examinations. As two academic writers once commented:

"If rule number one in the lawyers' manual of psychology seems to be that memory improves with the passage of time, and rule number two that stress improves recall, rule number three seems to be that suggestive questions produce unreliable information except when asked by lawyers in cross-examination."[29]

Leading questions assume such prominence in cross-examination because of another fundamental assumption: in cross-examination, the central teaching is still, to quote one judge, "keep control of the witness," in order to persuade them to give answers useful to your cause.[30]

"Above all, make sure the witness understands and feels your attitude about the facts of the case and your expectations in your answers . . . it will usually have a significant impact in obtaining the answers you want."[31]

The corollary of this is that cross-examiners work just as hard to prevent witnesses giving unfavourable information:

"Keep control over the witness . . . [by] asking precisely phrased leading questions that never give the witness an opening to hurt you."[32]

As another English barrister told this author "phrase the questions so you don't get the answers you don't want."[33] There are many ways to control a witness. The bullying approach of some defence counsel in the Stafford child sex exploitation trial is one way,[34] but there are others. To quote a senior psychologist describing cross-examination many years ago:

"[C]hildren can be discredited much more readily by . . . engaging their trust . . and then implanting suggestions about their capacity to tell lies . . . All this can be done in a pleasant and charming way."[35]

Most advocates know perfectly well that, as the old advocacy adage goes: "the art of cross-examination is not examining crossly." As one senior barrister once said:

"The best cross-examination you can do is the impeccably polite approach. Because then you get the respect of the jury; I'm not bullying at all; and the witness finds they go from there [holds out hand] to there [other hand to far side]."[36]

The problem with cross-examination is not just the use of suggestion: the other major driving force is that advocates see cross-examination as a rhetorical opportunity. As one senior English barrister said to the author:

"You are always really playing to the audience. Of course, it is one-on-one in that there is only one person answering the questions, but you are constantly aiming everything at the people who are ultimately going to be making the decision. So you are playing to the gallery."

Another senior barrister once said: "I have three speeches: my opening, my closing and my cross-examination."[37] Elsewhere, writing in a respected advocacy manual, a British judge advised:

"All the advocate's arts, including the techniques and devices of cross-examination, should converge to tell a party's story, in such a way as to persuade the court that it is true."[38]

Accordingly advocates see questions as opportunities to make arguments to the jury and are therefore inclined to craft questions to include comment, even though the rules of common law officially ban comment during cross-examination.[39]

When persuasion is so high on the cross-examiner's agenda it is no wonder that the reliability of the questions sits so low. Thus while the Courts and the Bar try to discourage particularly heavy-handed types of suggestion such as tag questions (questions which end in, for example, "didn't it?" or "hadn't you?"), tags are only the tip of the iceberg.[40]

24 K. Hanna, E. Davies, C. Crothers and E. Henderson, "Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-examination Fair?" (2012) 19 *Psychiatry, Psychology and the Law* 530 at 531.
25 E. Henderson: interviews with advocates in 2013, forthcoming.
26 Plotnikoff and Woolfson, fn.3 above, at 28; Rachel Zajac, "Investigative interviewing in the Courtroom: Child Witnesses Under Cross-examination" in Bull and Carson (eds), *Handbook of Psychology of Interviewing* (Chichester: Wiley, 2009); Hanna et al, "Questioning child witnesses in New Zealand's criminal justice system: Is cross-examination fair?" (2012) 19 *Psychiatry, Psychology & Law* 530.
27 Hanna et al, fn.7 above, Chs 2 and 3.
28 E. Henderson, "Psychological Research and Lawyers' Perceptions of Child Witnesses in Sexual Abuse Trials" in D. Carson and R. Bull (eds), *Handbook of Psychology in Legal Contexts*, 2nd edn (Chichester: Wiley, 2003) at Ch.21; E. Henderson, "Persuading and Controlling: The Theory of Cross-examination in relation to Children" in H. Westcott et al (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (West Sussex: Wiley, 2002), Ch.18.
29 J. R. Spencer and R. Flin, *The Evidence of Children* (London: Blackstone Press, 1993) at 272.
30 T. Eichelbaum, *Fundamentals of Trial Technique* (1989) at 204. (This writer was formerly Chief Justice of New Zealand.)
31 Eichelbaum, fn.30 above.
32 Eichelbaum, fn.30 above, at 204; for those who doubt British writers could advise similarly see Sheriff Marcus Stone, *Cross-examination in Criminal Trials*, 2nd edn, (London: Butterworths, 1995) at 128.
33 E. Henderson, *Cross-examination: A Critical Examination* unpublished PhD (University of Cambridge: 2000) at 171.
34 See Norfolk's articles, fn.23 above.
35 Eileen Vizard, quoted in Spencer and Flin, fn.29 above, at 374-375.
36 Henderson, fn.33 above.
37 Henderson (2002), fn.28 above; Henderson (2003), fn.28 above.
38 Stone, fn.32 above, at 120.
39 Henderson (2002), fn.28 above; Henderson (2003), fn.28 above.
40 For a discussion of why tag questions are so dangerous see *Fairness in Courts and Tribunals—A Summary of the Equal Treatment Bench Book* (London: Judicial College, 2010); Plotnikoff and Woolfson in Spencer and Lamb (2012) at 29-30. For alternatives to their use see the CBA's training DVD, *A Question of Practice* (2013), introduced by the Lord Chief Justice and released April 2013 and advice on questioning in *The Advocate's Gateway* at www.theadvocatesgateway.org.

Similarly, while the Court of Appeal tries to discourage comment, the fact is that, as all criminal advocates know, all cross-examination in a jury trial is intended, at least in part, as a performance.

We should accept that reforming cross-examination by retraining advocates will be the work of generations rather than a matter of few hours extra advocacy training. The new interventionist style of sex-ticketed judges is also much to be welcomed, but they too will fight an uphill battle against entrenched practices and beliefs.

A "Best Evidence" Commission

In the light of all this it is surely time to consider what more could usefully be done to do to ensure that the evidence of the most vulnerable is taken and tested in the most reliable and robust way possible.

Twenty-five years ago, the Home Secretary convened a committee chaired by Judge Pigot Q.C. to consider children's evidence.[41] Most of their recommendations were finally enacted in the Youth Justice and Criminal Evidence Act 1999 but one remains unexplored. This is not, as is sometimes thought, pre-trial cross-examination, provided for by s.28 of the 1999 Act and only now in the process of being implemented. In fact, there is another. The Committee said:

"The majority propose that the judge's discretion . . . should extend where necessary to allowing the relaying of questions from counsel through a paediatrician, child psychiatrist, social worker or person who has the child's confidence. In these circumstances nobody but the trusted party would be visible to the child, although everyone with an interest would be able to communicate, indirectly, through the interlocutor."[42]

I suggest that the Pigot Committee's recommendation of a proxy examiner in extreme cases has continuing merit as a way to overcome our continuing difficulties in eliciting and, especially, testing the evidence of certain highly vulnerable witnesses.

Nor would such a proxy be unprecedented. In other countries, including across most of continental Europe, children's evidence is taken by a specialist with expertise in questioning children safely. In Norway for example—a jurisdiction where the process is largely adversarial, albeit relaxed—children are examined by a neutral specialist interviewer while the defence counsel, defendant and judge instruct through one-way glass. The interviewer must investigate issues the defence wants raised and consults with the defence throughout the process.[43]

These are procedures which the European Court of Human Rights has repeatedly said do comply with the defendant's fundamental fair trial right to "examine and have examined" witnesses against him or her under Art.6(3)(d) of the European Convention on Human Rights.[44]

We are accustomed to thinking of intermediaries in terms of the "advisor/monitor" role currently the norm under s.29 of the Youth Justice and Criminal Evidence Act 1999, but that legislation would allow a more flexible use of a proxy examiner where necessary. Further, in our current Registered Intermediaries we already have a group of highly qualified communication specialists who are already equipped with training in the court process and who are highly regarded by the judiciary,[45] who might be prepared to take on an expanded role.

These are significant proposals with serious implications for the criminal process. They should not be embarked upon lightly or without due consideration.

A Commission of Inquiry could be established to consider what further measures might be undertaken to improve the safety and reliability of processes for the taking and investigation of children and other vulnerable witnesses by the criminal courts. Such a Commission could consider the full implications of the Pigot Committee's last and enduringly pertinent recommendation, taking evidence from experts in the forensic examination as to how such questioning could best be handled, and from legal experts as to the desirability of such a measure.

In the 25 years since the Pigot Committee, we have seen a vast increase in the extent of the research and the information available to us as to how best to examine children. We have also seen implemented many of the crucial recommendations it was hoped would overcome the difficulties of taking and testing children's evidence. However, despite all the strides we have made—and great they have been—the way in which we cross-examine children and other vulnerable witnesses continues to be a thorn in the side of justice. The issue is not merely that witnesses suffer trauma in testifying, although that is a real and significant problem. Nor should it ever be suggested that children and other vulnerable witnesses are always to be believed, because, regrettably, like other human beings they are not always truthful. The crux of this issue is the reliability of verdicts—the safety of the criminal trial process—and that is an issue which affects us all, including, most of all, the innocent defendant. This is about developing a system that is robust in the way it tests witnesses and which can be relied upon to produce evidence that is trustworthy: as it must be, if the criminal process is to fulfil the most basic of its functions, which is to acquit the innocent and convict the guilty.

41 The Pigot Report (otherwise *The Report of the Advisory Group on Video Evidence* (HM, 1989)) is reprinted in full at the end of Spencer and Lamb, fn.3 above, and can also be found on the Cambridge University Law Faculty website at www.law.cam.ac.uk/faculty-resources/summary/pigot-report/8979

42 *The Report of the Advisory Committee on Video Evidence* (1989), paras 2.32 and 2.33: appended to Spencer and Lamb 2012 and discussed at p.190-191.

43 T. Myklebust, "The Position in Norway" in Spencer and Lamb, fn.3 above, at Ch.8.

44 *SN v Sweden* (2004) 39 E.H.R.R. 13; *Magnusson v Sweden*, Application No.53972/90; [2004] Crim.L.R. 847; *Att.-Gen. v Sweden* (2012) 54 E.H.R.R. SE14.

45 Plotnikoff and Woolfson (2006); E. Henderson, "Innovative Procedures in Other Jurisdictions" in Hanna (2010), fn.7 above, Ch.6.

In the News

Reacting to the Stafford scandal, the Government has pledged to criminalise doctors and nurses who wilfully neglect their patients. Having in opposition derided the previous government's habit of reacting to scandals by creating yet more crimes, the Coalition initially pledged "to prevent the proliferation of unnecessary new criminal offences". But curing problems by creating crimes seems to be a reflex all governments find irresistible.

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