SWEET & MAXWELL

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Archbold Review

Cases in Brief

Appeal—application for extension of time—delay advised by counsel to avoid possible prejudice at sentence—merit

COOK [2017] EWCA Crim 353; February 7, 2017

C's counsel's explanation that an application for an extension of time to seek leave to appeal was necessary because he had delayed the application to avoid her being prejudiced at the sentencing hearing, should the judge become aware of an application for leave to appeal, was entirely devoid of merit. A defendant would never be prejudiced at sentencing because an application for leave to appeal against conviction had been filed. The submission involved the starkly disrespectful suggestion that a judge may sentence a defendant less favourably because of a challenge to the safety of the conviction. The court would have been fully entitled to have refused the application for leave to appeal against conviction without considering the merits of the proposed appeal (the court did however consider the merits and refused leave).

Appeal—Criminal Cases Review Commission—references to the Court of Appeal, Criminal Division—effect of case law relating to judicial review of—effect of error of law by the CCRC

R (CHARLES) v CCRC [2017] EWHC 1219 (Admin); May 25, 2017

(1) The court summarised the effect of the authorities (*Criminal Cases Review Commission, ex parte Pearson* [1999] 3 All ER 498; *R (Hunt) v Criminal Cases Review Commission* [2001] QB 1108 (DC); *R (Mills and Poole) v CCRC* [2001] EWHC Admin 1153 and *Neuberg* [2016] EWCA Crim 1927) on judicial review of a CCRC decision not to refer an application to the Court of Appeal: (a) the CCRC exercised an important residual jurisdiction in the interests of justice; (b) the decision whether or not a case satisfied the threshold conditions and was to be referred to the Court of Appeal was for the CCRC and not the court; (c) the judgement required of the CCRC was unusual, being a predictive exercise as to the view the Court of Appeal might take; (d) the threshold conditions served as an important filter, not least in preventing the Court of Appeal from inundation and assisted in striking the right balance between the interests of justice and finality; (e) even if the threshold conditions were satisfied, the CCRC retained a discretion not to refer a case to the Court of Appeal; and (f) though the decisions of the CCRC were clearly subject to judicial review, the CCRC should not be vexed with inappropriate applications impacting on scarce resources; the court's scrutiny at the permission stage was thus of importance, and on a judicial review, CCRC reasons should not be subjected to a "rigorous audit" to establish that they were not open to legal criticism.

(2) The court considered, *obiter*, what the approach of the Administrative Court on judicial review should be, where a conclusion of the CCRC as to the substantive criminal law was or might be wrong. The issue was difficult. In a case where CCRC decisions were dependent on judgements on the criminal law, questions of some awkwardness could arise as to the role of the Administrative Court and that of the Court of Appeal were the former to purportedly decide unsettled issues of substantive criminal law. The court should be slow to intervene where the CCRC has taken a tenable and not irrational view, whatever the court's own view might be. Nonetheless, it may be that there could be cases where the CCRC's decision was vitiated by an error of substantive law.

Appeal—implied jurisdiction identified in Yasain *[2015] EWCA Crim 1577, [2016] QB 14—exceptional nature—procedural guidance, pending consideration by the Criminal Procedure Rules Committee*

HOCKEY [2017] EWCA Crim 742

The court considered the implied jurisdiction for the Court of Appeal to entertain the re-opening of an appeal set out in *Yasain* [2015] EWCA Crim 1577, [2016] QB 14, to the effect that there was no distinction between the jurisdictions of the Criminal and Civil Divisions of the court

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as to the existence of the implied jurisdiction (see *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528), but that the jurisdiction would not necessarily be exercised in the same way, given the differences inherent in criminal proceedings and the alternative remedies that may be available. The court gave guidance, applicable until such time as the Criminal Procedure Rules Committee addressed the matter by formulating a rule similar to that set out in CPR 52.17 in relation to the Court of Appeal, Civil Division but delineating the different factors and circumstances applicable to the Criminal Division. The guiding principles were the interests of the public (including in the finality of proceedings), the defendant and any victim. Until that time: (a) If a party wished the court to re-open a final determination based on the implicit jurisdiction identified in *Yasain* it must (i) apply in writing for permission to re-open the decision, as soon as practicable after becoming aware of the grounds for doing so, and (ii) serve the application on the Registrar and all other parties; (b) the application must specify the decision which the applicant wished to re-open and provide reasons identifying (i) the circumstances which make it necessary for the court to re-open that decision in order to avoid real injustice, (ii) what made those circumstances exceptional and thus appropriate for the decision to be re-opened notwithstanding the interests of other parties to the proceedings and the importance of finality, and an explanation and reasons for the absence of any alternative effective remedy and for any lapse of time in making the application having discovered the facts which form the grounds for so doing; (c) on receipt of an effective application, the Registrar would refer the application to the full court for determination on paper. There was no right to an oral hearing unless the full court so directed; and (d) the court must not give permission to re-open a final determination unless each other party to the proceedings had had an opportunity to make representations. In making any such representations, the prosecution had a duty to obtain the views of any victim or the family of such a victim.

Trial—defendants under 18—anonymity (Youth and Criminal Justice Act 1999 s.39—dispensation (Youth and Criminal Justice Act 1999 s.45(4)—burden of proof—relevance of international obligations—effect of end of proceedings—effect of termination of anonymity at 18

MARKHAM AND EDWARDS [2017] EWCA Crim 739; June 9 2017

The restrictions imposed by the Youth and Criminal Justice Act 1999 s.39 on the reporting of the identities of M and E, both of whom were under 18, were properly dispensed with under s.45(4) of the 1999 Act after the conviction of E for the murder of her mother and sister, M having pleaded guilty. It was a notorious case of particular gravity.

(1) The arguments of M and E had started with a dispute as to the burden of proof based on the different language of s.45 of the 1999 Act (in force from April 2015) compared to its predecessor, the Children and Young Persons Act 1933 s.39. Given that the court had to exercise a judgment based on balancing the different factors involved, the burden of proof took the argument no further.

(2) Arguments based on the failure of the judge to take sufficiently into account the UK's international obligations (UN Convention on the Rights of the Child 1989, Arts.3 and 40, and UN Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules")) ignored the well-established domestic law which itself took the international dimension relating to the protection of children into account (see *Leicester Crown Court, ex parte S (A Minor)* [1993] 1 WLR 111 and *McKerry v Teesdale and Wear Valley Justices* (2000) 164 JP 355; [2001] EMLR 5).

(3) The prohibition on making an excepting direction "by reason only of the fact that proceedings had been determined" (s.45(5) of 1999 Act) did not prevent reconsideration of an application to dispense after the conclusion of proceeding where, as here, the judge spoke of the picture having changed post-trial not only because the integrity and smooth running of the trial process had then fallen away as a justification or were of much less significance but also that it was now known that both defendants were guilty of murder and there was more up-to-date medical and other evidence in relation to each and to their welfare. Were the contrary true, it would mean that the judge should not postpone publication only because there was concern about the impact of the trial process on the child or young person being tried although that could well, at that stage, be a compelling reason on the basis that, if he or she did so, the statute would forbid the revisiting of the question at the conclusion of the trial.

(4) The judge was entitled to take into account that M and E's anonymity would in any event come to an end when they became 18, which would be many years before their minimum terms elapsed.

Trial—case management—excess alcohol cases—importance of active case management—guidance

R (HASSANI) v WEST LONDON MAGISTRATES' COURT [2017] EWHC 1270 (Admin); April 5 2017

H sought to withdraw a renewed application for permission to apply for judicial review in relation to a conviction for driving with excess alcohol. The case nonetheless called for a ruling, which the court said was an intentional reminder to criminal courts that active case management using the Criminal Procedure Rules was their duty, and that increased rigour and firmness were needed.

(1) The criminal law was not a game to be played in the hope of a lucky outcome, a game to be played as long and in as involved a fashion as the paying client was able or prepared to afford. The District Judge was right to practice firm case management and other courts faced with this kind of approach must do the same, whether a District Judge or lay magistrates.

(2) The court appended to the judgment passages from a decision by Senior District Judge Riddle, as he then was, in *Cipriani*, Westminster Magistrates' Court, 24 June 2016, an excess alcohol case. The written decision dealt authoritatively with many aspects of such litigation and would be helpful for those addressing them. The appended passages (which dealt with such matters as disclosure, evidence of calibration of the Intoximeter, record of the hearing, the calling of experts, a submission of no case to answer and a series of conclusions of fact and law arising in that case) should be read in conjunction with the Administrative Court's judgment. This judgment should be cited when case management issues arose and brought to the attention of magistrates.

Trial—cross-examination—whether witness "vulnerable"—duty and powers of court—approach to requirement for questions to be set out in writing

R v SG [2017] EWCA (Crim) 617; May 18, 2017

(1) At SG's trial for sexually assaulting his sister (just over 18 at trial) by penetration, where the defence was that the alleged events did not happen, the recorder had been wrong, having concluded that the sister was vulnerable, to characterise questions in cross-examination as being objectionable because they were speculative or because they had not been foreshadowed in the Defence Statement. The defence was entitled to test the truth and accuracy of prosecution evidence by questions which tested their likelihood. Cross-examination on the "mechanics" of how something happened may lead a jury to conclude that it may not have happened, in the way described by the witness. Such a challenge did not have to be specifically pre-figured in a Defence Statement provided the Defence Statement otherwise complied with the Criminal Procedure and Investigation Act 1996 s.6A.

(2) When a witness becomes distressed while giving evidence, it was important for the court to hold a balance. On the one hand the court must bear in mind the importance of a witness being able to give the best evidence they can (see CPD1 3E.4) without being harassed by the questioning. On the other hand, it must also weigh in the balance the potentially conflicting interest of a defendant in being able properly to challenge a witness's account. There may be a number of reasons for signs of distress. Witnesses may find giving evidence in court (and reliving their experiences) highly stressful. Or, there may be a reason which might be said to favour the defence: a witness may have been caught out in a lie or may be apprehensive about being challenged in relation to an untruthful account. A witness exhibiting signs of distress was not necessarily to be treated as a vulnerable witness. The recorder elided the issues, concluding summarily that the sister's distress meant that she was vulnerable and that consequently the cross-examination from that point should be confined. Nor did it follow from a conclusion that a witness was vulnerable that the only course was to direct the form of the cross-examination. Advocates were aware of the dangers of alienating a jury by the inappropriate tone or content of the questioning, and had a professional duty to treat witnesses with proper consideration. Rulings that the defence must set out in writing the questions to be asked will be the norm in those cases that were, and would become, subject to the s.28 of the Youth Justice and Criminal Evidence Act 1999 procedure. However, in the generality of cases the court should bear in mind the disadvantages to the defence in prescribing the form of questioning, not least because it may inhibit the development of cross-examination in response to a particular answer. This was particularly so if the ruling was made during the course of cross-examination. Requiring an advocate to prepare a list of questions for the court's approval during the course of cross-examination in such a case should be regarded as an exceptional course.

Youth Court—procedure—standard of proof—apparent failure to apply—reasons—obligation as to

JS v DPP [2017] EWHC 1162 (Admin); May 18, 2017

In rejecting a defence submission of no case to answer and convicted JS of tampering with a motor vehicle contrary to s.25 of the Road Traffic Act 1988, the justices stated that: "We were of the opinion that the prosecution had made out a viable case. We listened to the Appellant's evidence which did not persuade us that there was no intention to tamper with the moped. We were satisfied so that we were sure that the Appellant did tamper with moped. Accordingly we convicted the Appellant."

(1) While no objection could be taken to the colloquial word "viable" to indicate a case to answer, the omission of the words "or may not have tampered" by the justices indicated that they had not properly applied the standard of proof, which was not cured by the use of the word "sure" in the third sentence. While they may have properly applied the standard, they nonetheless created the impression that they may not have done so.

(2) Justices were not obliged to state reasons in the form of a judgment or any elaborate form (*Mckerry v. Teesdale and Wear Valley Justices* [2000] EWCA Crim 3553, [2001] EMLR 5, [23],) and the court should not engage in too technical a semantic exercise when considering their reasons (*Ukpabi v. CPS* [2008] EWHC 952 (Admin), [17]). But it was important not only that that the decision-making tribunal applied the correct test but that it was clearly seen to do so (*Evans v. DPP* [2001] EWHC 369, [9]-[12]). Simplicity and brevity of expression in the Youth Court should not be at the expense of clarity and legal accuracy. Indeed, there was all the more reason for the courts to express themselves in the clearest possible terms when dealing with young and vulnerable defendants. The relative informality of the Youth Court should not lead to a less rigorous approach to the law, nor to a lesser standard of explanation for a finding of guilt than was required in an adult court.

(3) The term *"tampering"* was not defined by the Road Traffic Act 1988. Its ordinary, everyday meaning clearly was something more than mere "touching". The Oxford English Dictionary defines tampering as: "interfering with something without authority or so as to cause damage" (*obiter*).

SENTENCING CASE

Sentencing remarks—publicity

BILLINGTON [2017] EWCA Crim 618, 12 April 2017

The appellant had pleaded guilty to two counts of making a threat to kill and assault occasioning actual bodily harm and had been sentenced to an extended sentence of six years pursuant to s.226A of the Criminal Justice Act 2003, made up of a custodial term of four years and an extension period of two years.

When passing sentence, the recorder did not give his reasons for sentence publicly, and indicated that he would provide the appellant and his lawyers with written reasons for the sentence that he intended to impose. He then imposed the sentence described above. Shortly thereafter, he issued written reasons for the sentence. These reasons were described as detailed, lengthy and carefully crafted.

The appellant argued that the sentence was manifestly excessive, submitting that the Recorder had failed to give sufficient credit for the appellant's guilty plea and that in the light of case law it was wrong to reach a sentence of four years' imprisonment for the offence of threats to kill. In granting leave, the single judge observed that it was most unusual and contrary to current sentencing practices for a judge to fail to give reasons in public and only to supply reasons privately to the appellant's lawyers.

Dismissing the appeal, the court stated that the Recorder had imposed a lawful sentence and outlined the facts of the case supporting this conclusion. The court then considered the failure of the Recorder to issue his sentencing remarks in public.

The court commended the judge for reducing his remarks to writing and for the care taken in their preparation. The court recognised that sentencing can frequently be complex and technical and the analysis which must occur in relation to an extended sentence might be a good illustration of the sort of sentence where a judge might wish to adjourn to consider carefully either sentence or how it should be explained.

Where this happens, it is crucial that the articulation of the reasoning takes place orally in public. This is to ensure that the public at large, which includes the press, are made fully aware of the reasons for the sentence. Transparency in the working of the justice system is integral to the maintenance of public confidence in that system. Transparency is equally critical in ensuring that the defendant knows exactly why the sentence has been passed and it facilitates consideration of possible grounds of appeal. For similar reasons, it enables the Crown to know whether they should oppose an appeal and, if so, upon what basis and even whether they would wish to challenge a sentence as unduly lenient.

The court drew attention to s.174(2) of the Criminal Justice Act 2003 which when referring to the duty to give reasons for sentences stipulates that such reasons must be given in "*open court*" and using "*… ordinary language and in general terms*".

It should be noted that the court emphasised that requiring sentencing remarks to be delivered orally and in public does not prevent the increasingly common practice of the judge handing out printed copies of the sentencing remarks to those in court once they have been delivered.

Features

The Smallest Fault in Manslaughter

By Matthew Dyson[1]

What is the lowest level of fault in conduct causing death which can lead to a conviction for manslaughter? What should it be? As a matter of principle and authority, the base offence in constructive manslaughter, which is objectively dangerous and causes death,[2] must require more than negligence or strict liability unless a statute expressly says otherwise.

The other general forms of manslaughter recognise that fault is needed for a homicide conviction; many of them specifically require fault in respect of death. Voluntary manslaughter offences are obvious examples. It is also true that reckless manslaughter, though rarely charged, requires D to foresee the risk of death and unjustifiably to take that risk and thus effectively demonstrates both culpability and fair labelling of an offender.[3] The fault requirement in gross negligence manslaughter is also in respect of death, though we here move into objective registers of fault. Gross negligence manslaughter requires a lack of care, which is so gross with *regard to the risk of death*, that the jury can properly call it criminal;[4] it is said that, in practice, prosecutors indict, and juries convict, more readily when the defendant foresaw a risk of death. Even under s.5 of the Domestic Violence, Crime and Victims Act 2004, the prosecution will normally be on the basis that D knew, or ought to have known, of a risk of serious physical harm to a vulnerable person in the same household, and failed to take reasonable steps to prevent that risk.[5] Leaving aside the specialist homicide offences in road traffic situations, constructive manslaughter is the only offence where, *ex hypothesi*, the base crime has the only fault requirements, and they are not in respect of death.

Simple negligence is insufficient for general homicide liability. Indeed, the criminal law should only be interested in grossly negligent killings, for which we have the offence of gross negligence manslaughter. In principle, the kind of slips of attention or capability that we make every day are surely not culpable enough to ground a homicide conviction. Analysis often starts with the dicta of Lord Atkin in *Andrews*:

> There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal.[6]

Interpreting this literally would mean manslaughter required some further ground of unlawfulness beyond the negligent performance of an act. The most common view is that Lord Atkin was actually suggesting that simple negligence was not a sufficient fault element for constructive manslaughter. There is, however, one case appearing to

1 Associate Professor, Faculty of Law, University of Oxford and Tutorial Fellow of Corpus Christi College, Oxford; Associate Member of 6KBW College Hill; thanks to John Spencer, Catarina Sjolin Knight, Paul Jarvis, Nathan Rasiah and Findlay Stark.

2 *Church* [1966] 1 QB 59, 70: "all sober and reasonable people would inevitably recognise it is an act which must subject the other person to at least the risk of some harm…albeit not serious harm". We typically treat objective dangerousness as a physical component of the offence but it could also be a fault element, in that it is defined by what reasonable people would think about the act.

3 *Lidar* [2000] 4 *Archbold News* 3; *Adomako* [1995] 1 AC 171, 187; there is an argument that D will be liable if he foresees serious bodily harm, not just death. Reckless manslaughter is rarely charged because other forms are easier to prove. Nonetheless, there might be gaps, such as a reckless but not grossly negligent omission which causes death, or a lawful but reckless act which causes death, but in practice they seem not to be a problem.

4 *Adomako* [1995] 1 AC 171, 187. Even the s.1 offence under the Corporate Manslaughter and Corporate Homicide Act 2007 has a link to the risk of death, in s.8(2).

5 See also s.5(d), relevant where it is alleged D was the cause of death.

6 [1937] AC 576, 584-5.

disagree. In *Meeking*, the defendant appealed a conviction under s.22A(1)(b) of the Road Traffic Act 1988 for:

> intentionally…interfere[ing] with a motor vehicle…in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous.

It may be that in this case the prosecution and defence, as well as the trial judge, did not see or think important the fact that the key fault element was negligence, noting only that the provision began with "intentionally", even though this referred only to the conduct being deliberate. Toulson LJ, in an unreserved judgment, noted the test of negligence but agreed with the appellant's decision not to raise the point. He thought it had made no difference on the facts: the jury would have convicted had the offence charged been gross negligence manslaughter and the Crown had only introduced an "unnecessary complication" by selecting a base offence of negligence.[7]

As for strict liability, in *Church* Edmund-Davies J said, "a degree of *mens rea* has become recognised as essential",[8] words echoed more recently by Sachs LJ in *Lamb* where he said that "*mens rea* [is] now an essential ingredient in manslaughter".[9] The Canadian Supreme Court has ruled that the similar Canadian offence of unlawful act manslaughter[10] cannot be founded on offences which do not have at least some element of fault.[11] No English court has explicitly stated that a strict liability offence can found a conviction for constructive manslaughter, although a defendant has been so convicted, again without discussion of the issue. In another case, coincidentally called *Andrews*,[12] the Court of Appeal dismissed an appeal against a conviction for constructive manslaughter where the base crime was one of strict liability, relating to the administration of prescription medicines.[13] The appellant injected insulin into the victim, with her consent, as a means to give her a "rush". Sadly, in her undernourished state, the insulin killed her. The defendant appealed, arguing that the victim's consent should preclude the base crime, a line of argument that failed. However, the judgment was unreserved and contained only two short paragraphs of reasoning. In addition, just as in *Meking*, an alternative offence requiring fault was available. In fact, the s.23 OAPA 1861 offence of administering a noxious thing so as to endanger life, initially charged but left on the file, was said by the Court of Appeal to be equally applicable on the facts. It seems plausible that the s.23 offence would have led to conviction if it had been used and if not, there should not have been a prosecution for manslaughter at all.

Part of the problem is that constructive manslaughter is an antique survival based on the logic of the felony-murder rule: causing death in the course of a dangerous felony was murder until s.1 of the Homicide Act 1957 came into force; causing death by a dangerous crime is still manslaughter. There is reason to doubt this kind of rule was ever in line with principle or authority,[14] but it certainly is not now. Nor is the rule more acceptable in principle when applied to manslaughter rather than murder, even with manslaughter's wider sentencing discretion. It is also open to greater abuse, since strict liability is now very common, while it was not common in felonies. It would grossly overcriminalise if the only real limit on liability for manslaughter was whether a jury thought the circumstances of the base offence presented a risk of some personal injury. It would also often make otiose specific statutory forms of homicide designed not to require fault but limited by narrower sentencing ranges, such as under the Road Traffic Act 1988.[15]

We have clear authority against negligence or strict liability base crimes being sufficient for constructive manslaughter and, on the other side, little authority in support. Any potential doubt in the law should see the offence read restrictively. We already "construct" liability for the death, but "constructing" from a foundation without fault is not to fill a gap, it is to abandon defining principles of criminal law. Unlike what was done in *Andrews* and *Meeking*, if there is an alternative offence featuring fault which could be used, it should be used, rather than prosecuting a strict liability base crime and alleging some free-standing culpable state of mind. If there is a relevant base crime requiring fault, that offence should be charged. The only possible argument for such liability is where the relevant strict liability offence has no fault-based analogue. But if the behaviour that constitutes the actus reus of the base offence is not thought sufficiently grave to require fault, there is a strong case that it should not, without fault, lead to homicide liability. It may be acceptable to sentence more heavily because of some factor not relevant to liability, but it is surely not acceptable to elevate the level of the offence because of something not set out in the definition of that offence. The course consistent with authority is surely not to convict of constructive manslaughter. Another, though less appropriate, option would be to permit the use of a strict liability offence as the base offence for constructive manslaughter, but only where it was committed with fault – that is, in a situation where a reasonable person would say there was a risk of death (as against a risk of some harm, albeit not serious harm, to someone).[16]

Manslaughter already has more than enough wrong with it, it does not need a new defect. Instead, we might also more usefully clarify other issues, such as the importance, let alone existence, of reckless manslaughter. Causation could be made the same across different forms of manslaughter, after *Kennedy*[17] and *Evans*.[18] Similarly, the effect D's knowledge or understanding can have on finding dangerousness could be made clear. D's awareness of his act's dangerousness is not required,[19] but what if D knows more than a reasonable bystander, and what of his grounds for an erroneous belief?[20] One way forward would be to re-examine the Law Commissions proposals[21]. The Law Com-

7 [2012] 1 WLR 3349, [14].
8 [1966] 1 QB 59, 70.
9 [1967] 2 QB 981, 988 cf. the slippage by Lord Hope in A-G's reference (No 3 of 1994) [1998] AC 245, 274, that D "did what he did intentionally".
10 Criminal Code, s.222(5)(a).
11 *Creighton* [1993] 3 SCR 3, [34] per Lamer CJ, [59] per La Forest and [73] per McLachlin J, referring to "absolute" offences, those without fault and without a due diligence or reasonable care defence.
12 [2002] EWCA Crim 3021; [2003] Crim LR 477.
13 Medicines Act 1968, ss.58(2)(b) and 67.
14 Law Commission, Consultation Paper 177, *A New Homicide Act for England and Wales* (2005), 1.50-1.51; RJ Buxton, "By Any Unlawful Act" (1966) 82 LQR 174, esp. 187-194.
15 E.g., RTA 1988, s.3ZB, but even there the Supreme Court has bent over backwards to insert fault, even if they did so (some would say inappropriately) via causation: *Hughes* [2013] 1 WLR 2461.
16 Promoted by some of the Supreme Court of Canada: *Creighton* [1993] 3 SCR 3, [34], see above, fn 10.
17 [2008] 1 AC 269.
18 [2009] 1 WLR 1999.
19 *DPP v Newbury* [1977] AC 500.
20 *Re Ball* [1989] Crim LR 730 cf. *Watson* (1985) 81 Cr.App.R 150, 157; *Jogee* [2016] UKSC 8, e.g., [96].
21 Law Commission, No 304, *Murder Manslaughter and Infanticide* (2006, HC 30). See too the Home Office proposal of 2001, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000) para. 2.11, where the base offence had to involve the intentional or reckless infliction of injury; see further [2000] 7 *Archbold News* 5.

mission proposed (1) a category of second degree murder to cover killings intended to cause serious injury, or intended to cause injury or fear of injury but where D knew there was a serious risk of causing death and first degree murder where one of the partial defences applies, and (2) a sole "criminal act manslaughter" as a constructive manslaughter based on intentional injury or an awareness of a serious risk of injury. Some day we might even get around to admitting that constructive manslaughter should have gone the way of felony-murder and resist the dubious justification for new specialist constructive homicide offences.

Dispensing with the "safety net": is the intermediary really needed during cross-examination?

By Joyce Plotnikoff and Richard Woolfson[1]

Introduction

Some judges now ask, given the overall shortage of registered intermediaries, whether their presence during questioning is really necessary – especially if they attended the ground rules hearing and draft questions have been reviewed, simplified and are relatively few in number. One judge, while acknowledging that intermediaries are essential for cross-examination of some vulnerable witnesses, considers that the decision in respect of others involves a balancing exercise:

> We have to work within the facilities we are provided with, which involves compromise and the difficult decisions that some cases have to go ahead in less than ideal circumstances, and without an intermediary at all… I would urge intermediaries to look at the wider picture, just as a judge has to. Can they ask: "Is this a case where it is essential that I am present for both the ground rules hearing and section 28 cross-examination, or can my time be better used assisting this witness to the ground rules hearing, and then assisting another one in the same way, rather than that other getting no assistance at all?"

We invited ten experienced intermediaries to provide examples of the benefits of their presence for questioning at trial and in pre-recorded cross-examination and to consider the potential risks, having contributed to the ground rules hearing, of being dispensed with on the day of the witness's evidence. All quotes below are from intermediaries unless otherwise specified.

Ground rules hearings and advance review of questions

Ground rules hearings must be held in any case where "directions for appropriate treatment and questioning" of a witness or defendant are necessary.[2] The intermediary "must" be invited to make representations[3]; in other words, be given the opportunity to participate in the discussion and to explain report recommendations. Submission of written questions for review "in appropriate cases and in particular where the witness is of tender years or suffers from a disability or disorder" is a requirement[4] of the ground rules hearing for pre-trial cross-examination (s.28 of the Youth Justice and Criminal Evidence Act 1999), a special measure due to be rolled out nationally.[5] More generally, the practice of inviting defence advocates in vulnerable witness cases to "reduce their questions to writing in advance" for review has been described as "entirely reasonable" by Lady Justice Hallett.[6]

During the review, the judge can strike out repetitious or irrelevant questions or those that are comment; an intermediary, if appointed, assists the judge to ensure that the defence can put its case in a simple and straightforward way. Cross-examination is shortened. Section 28 pilot courts found advance review to be so integral to the fair testing of evidence that it is being widely adopted in non-s.28 cases with a vulnerable witness and intermediary. Written preparation of cross-examination questions for review is the central plank of the "Advocacy and the Vulnerable" training programme now being rolled out nationally by the Inns of Court College of Advocacy and the Law Society.[7]

Facilitating questioning

> What could possibly go wrong? But it went so wrong. I was a wasted resource.

An intermediary's primary responsibility as an independent officer of the court is to facilitate communication, assisting the judge, advocates and witness "to ensure that they all understand each other"[8] and "actively to intervene when miscommunication may or is likely to have occurred or to be occurring".[9]

Even the best planned ground rules hearing cannot anticipate exactly how questioning will unfold. Intermediaries have identified that witnesses have not understood "agreed" questions. Unplanned questions have been asked when advocates departed from those approved by the judge, or they have been asked out of the agreed order, with the final "challenge" asked first.

> At the Old Bailey in a recent re-trial, the defence QC failed to stick to the agreed questions. She had said that she might have to add one or two

1 Lexicon Limited.
2 Criminal Procedure Rule 3.9(7)(b); Criminal Practice Directions 3E.2; Toolkit 1 and checklist www.theadvocatesgateway.org.
3 Criminal Procedure Rule 3.9.(7)(a).
4 Introduction, Section 28 GRH Guidance Note issued for the pilots at Liverpool, Leeds and Kingston Crown Court by HHJs Aubrey QC, Cahill QC and Tapping (September 2014).
5 Ministry of Justice press release: https://www.gov.uk/government/news/greater-protection-for-rape-victims-and-children-at-risk-of-grooming (19 March 2017). The scope of this announcement was later qualified by the Lord Chief Justice: https://www.theguardian.com/politics/2017/mar/22/lord-chief-justice-castigates-liz-truss-for-failing-to-defend-judges (The Guardian, 22 March 2017). See also Hayden Henderson and Michael Lamb *The Section 28 Pilot Study: Effects on Case Progression* [2017] 2 *Archbold Review* 7.
6 *Lubemba, JP* [2014] EWCA Crim 2064, para.43.
7 https://www.icca.ac.uk/advocacy-the-vulnerable.
8 Lord Judge, *The Evidence of Child Victims: the Next Stage*, Bar Council Annual Law Reform Lecture, 21 November 2013.
9 *Cox* [2012] EWCA Crim 549.

depending on the witness's response. However, she went off script at the first question and used two tagged questions immediately. She had also agreed not to use "Do you remember?" at the beginning of every question, as she had tried to do in the first trial, but found it impossible to leave it out on several occasions.

The defence barrister agreed at the ground rules hearing that my suggestions for re-structuring the questions were acceptable. However, as soon as he started to cross-examine, he deviated from the agreed revised format. I had to intervene and during a break I asked the prosecution to speak to the judge, requesting another ground rules hearing to address this issue. If I had not been there, I doubt this would have happened.

Additional questions may be triggered where an answer is unanticipated, misunderstood or open to more than one interpretation (as when a child, asked whether Mr X "did it", responded: "Mummy said I must tell you that he did.")

On occasion, I've felt that an advocate did not correctly understand the witness's reply. I've had to say to the judge that "I don't think Mr X heard exactly what the child said."

Judges differ as to whether they permit deviation from the agreed list. The academic Laura Hoyano considers strict adherence to previously agreed questions to be problematic in terms of compliance with the right to challenge a witness (Article 6(3)(d) of the European Convention on Human Rights).[10] Some s.28 pilot judges suspend proceedings momentarily in order to decide what follow-up questions should be allowed: if the intermediary is present, these can be framed appropriately. Distinguishing s.28 cases, the Court of Appeal observes that:

"in the generality of cases the court should bear in mind the disadvantages to the defence in prescribing the form of questioning, not least because it may inhibit the development of cross-examination in response to a particular answer".[11]

In addition to monitoring comprehension, the intermediary also is alert to the impact of body language (e.g. if counsel shakes his head when asking questions), pace and tone:

Even with questions agreed beforehand, there is a tendency for counsel to ask them in a monotone. Quite often I have to repeat the question, change the emphasis or intonation of certain words and use pauses or gesture (e.g. to show "Was he in front of you or behind?") to help the witness understand.

The intermediary's presence is appropriate when the judge has agreed the use of communication aids. However, even where specific aids are not approved in advance, intermediaries may recommend them when communication becomes difficult. These have included letting witnesses write down responses or point to "yes/no/don't know" or other symbols and allowing the intermediary to read out the answers; writing down options posed in the question to help the witness process the information; and providing a doll for demonstration to a five year-old asked the unscheduled question "Where's a man's willy?".

Advocates who attend the ground rules hearing may be replaced on the eve of questioning. This has occurred even in pilot s.28 hearings, where the defence advocate who attends the ground rules hearing "must" conduct the pre-trial cross-examination.[12] In recognition that continuity may not be feasible when s.28 is rolled out, consideration is being given to downgrading the requirement for continuity to be merely "desirable". In such instances, intermediary engagement on the day of cross-examination with the replacement advocate is essential.

Intermediaries also advise about any questions to be asked by the prosecutor; issues for re-examination cannot be preplanned as they only become apparent at the end of cross-examination:

The prosecution barrister's questions were of a sensitive and complicated nature. He asked for my advice on how to word them.

Intermediary responsibilities are not confined to questioning: they help ensure comprehension of instructions and anything else said to the witness.

Addressing the witness's emotional state during questioning

The neuroscience of communication reveals how stress can significantly affect a person's ability to give their best evidence: to understand language, to communicate answers, to process and think logically to remember and to cooperate with court procedures. Problems are compounded when the person is expected to recount traumatic events. Where witnesses were unable to disclose offences for a long period, the process of cross-examination may re-trigger their silence. On the day, the intermediary may need to make fresh recommendations to deal with the witness's state of mind.

A man was so terrified of sitting on the chair facing the camera in the video link room that we had to sit together on the floor while he rocked. I repeated every question to him and he whispered his answers which I then repeated back to the court.

The child said she was nervous so she whispered her answers to me so I relayed them.

I've had instances where a question caused unanticipated distress to a witness. I was able to alert the court to this so that the question could then be modified.

Intermediaries work to establish rapport with the witness over one or more meetings. This level of rapport is unlikely with an usher or Witness Service volunteer whom the witness meets for the first time on the day of giving evidence:

A 16 year-old described herself as "terrified" about not understanding the questions at court. On the day, she managed well and I didn't need to intervene. She said afterwards that having me sit close by and knowing she could tell me if she didn't understand made "all the difference".

10 Laura Hoyano has drawn our attention to *MacLennan v HM Advocate* [2015] ScotHC HCJAC 128. The fact that the defence advocate was not restricted to pre-prepared written questions in cross-examination was one factor in stating that Art.6 ECHR had not been breached.

11 "This is particularly so if the ruling is made during the course of cross-examination": *SG* [2017] EWCA Crim 617. The trial judge ruled that the 18 year-old complainant became "vulnerable" during cross-examination and required submission of the remaining questions before questioning resumed the following day. The Court of Appeal expressed "misgivings as to the course adopted" but dismissed the appeal. [For a summary of the case, see p.3 above - Ed.]

12 Para.32, *Judicial Protocol on implementation of section 28 YJCEA 1999 Pre-recording of cross-examination and re-examination* (September 2014): "The defence advocate attending the ground rules hearing must be the same advocate who will be conducting the recorded cross-examination."

This relationship of trust gives many witnesses confidence to articulate their own concerns:

> On most occasions during evidence the witness will say something to me for me to relay to the court, e.g. they will ask where somebody is, how many more questions are there, that they don't understand or ask for a break.

> Some witnesses seek our permission to say that they don't understand, rather than stating this directly to the advocate (e.g. "I don't know who he is talking about…I can't remember that social worker…shall I say that?"). When comprehension monitoring symbols have been agreed by the court (e.g. "I don't know"), the witness may look towards the symbol when they are uncertain, and wait for a cue from the intermediary (e.g. "It's OK to use one of your cards if you need to") before they will state that they can't answer.

Further discussion of ground rules may be necessary during the witness's evidence:

> Even the best planned cross-examination can go wrong. For example, in one such case the witness froze completely. The judge asked me to come into court to discuss possible ways to adapt the situation and questioning in order to assist him to give evidence.

When problems emerge during a witness's evidence, intermediary recommendations have included moving the witness from the live link room into the courtroom behind a screen, and vice versa; and moving the advocate into the live link room to question the witness face to face. Where a six year-old refused to continue answering counsel's questions, remaining questions were further simplified with the intermediary's assistance then asked by the judge.
Intermediaries often find themselves involved in last minute discussions when witnesses are expected to look at documents or exhibits:

> We monitor constantly for issues that may negatively affect the witness so as to alert the judge. In the case of a nine year-old, nothing was mentioned by the defence at the ground rules hearing about visual evidence. During cross-examination, the child and I were told over the live link that counsel wanted to show a video of the house showing the different locations of alleged sexual assault and featuring someone with a duty of care for the child at the time of the alleged offences. The child was not prepared for this. I felt it would have seriously distressed her and would therefore have affected her willingness to cooperate and give evidence. During a break, I raised my concerns with prosecution counsel and asked him to address the matter with the judge.

> Just before the section 28 hearing, I was told that the witness was going to be shown photos. When I explained this, she made it very clear that she didn't want to look at them so I alerted the judge.

> A vulnerable woman in her 20s could only whisper "I can't remember" with increasing distress to everything she was asked. The judge asked me to read out to her (she couldn't read) a section of her written statement. This seemed to "unstick" her and she coped with the rest of the questioning.

Individual children, even those developing normally, and vulnerable adults cope emotionally with cross-examination in unpredictable ways. Sitting alongside the witness in the live link room (with both always on screen), the intermediary is best placed to pick up subtle body language and physiological indications of anxiety, dissociation, distress, fatigue, withdrawal or lack of attention. These are often not apparent over the live link to those in court. Intermediaries can indicate whether a short break of a couple of minutes (in which the jury remains in court) is sufficient, or if the witness needs a longer rest. During breaks they also provide activities tailored to the witness's needs and interests to reduce stress, contain potentially disruptive behaviour and enable the witness to reconnect with the questioner. Those in court are unlikely to be aware of the importance of such activities in enabling some witnesses to continue.
While it is primarily the usher's responsibility to bring technological problems to the court's attention, intermediaries also flag concerns affecting the witness's use of the live link. These have included poor sound quality, distractions caused by those in court looking through files or typing noisily and seeing the defendant on screen:

> When practising camera angles on the day of a frightened teenager's evidence, I realised that when the court camera swung around the courtroom, it gave a full view of the dock and public seating. The usher had never noticed this before.

At the close of the witness's evidence, the judge may direct the intermediary to assist in the taking of a victim's personal statement if this has not previously been done.

Waiting to give evidence
There can be benefits from the intermediary's presence before questioning starts, especially when vulnerable witnesses experience long delays. While pilot courts significantly shortened court waiting times in s.28 cases[13], maintaining tight schedules will be a challenge for national rollout. Even strict timetabling may go awry. While waiting, intermediaries help witnesses to remain as calm as possible:

> Often a fair bit of my work is done before we go into the live link room, managing anxiety levels and finding out what the signs are that I need to be alert to when questioning starts.

> In a section 28 hearing, I helped settle a nervous 13-year old whom the police had to bring to court as he was threatening to run away. The equipment didn't work. We finally all went home at 2pm, to return the following week. When he came back to court, he was even more anxious and ran out of the live link room at one stage. I managed to get him back in to finish his evidence by using stress-relieving techniques, including slowing and regulating his breathing.

While waiting, the intermediary may identify key information:

> Just before the witness gave evidence in a section 28 case, she told me that she didn't want one of the defendants to be referred to as "Dad" but by his first name. I passed this onto the judge.

Sometimes the presence of family members or a witness supporter can be counter-productive:

> I didn't want the child waiting with her parents and grandparents who were a bag of nerves. Anxiety was a big issue for this child who had not been sleeping.

13 On average, almost an hour less than children in the non-s.28 comparison group: Hayden Henderson and Michael Lamb *Pre-recording Children's testimony: Effects on Case Progression* [2017] 5 *Criminal Law Review* 345.

> I've had to jump in when a supporter said to the witness: "The barrister is out to trick you, so beware!" and when another told off a mentally ill witness, just about able to take her medication in the morning, for "not starting the day with a proper breakfast".

Intermediaries routinely facilitate introductions to the witness and ensure that explanations are understood. Conversation can be facilitated through play or topics that the intermediary knows will engage the witness:

> I sometimes have to minimise the "traffic" of professionals coming to introduce themselves to the witness, when it is clear that this is overwhelming.

> Some judges and advocates continue to use legal language at this stage when much simpler vocabulary is required.

Conclusion

Registered intermediaries for witnesses remain a scarce resource in the justice system, but not necessarily an expensive one.[14] More effective management of requests for intermediaries could result in better targeted allocation.[15] Time could also be freed up for their use in other cases if their trials were listed as fixtures, as intended,[16] with a schedule for their witness to give evidence, rather than asking them to block out a week or more in their diaries for trials in warned lists.

Criminal Procedure Rules and Practice Directions expect courts to take "every reasonable step" to facilitate the participation of witness or defendant, especially in intermediary cases.[17] Section 29 of the Youth Justice and Criminal Evidence Act 1999[18] creates a presumption that the intermediary who assessed the witness's communication will be present while (s)he gives evidence provided the intermediary recommends this as necessary. If the presumption is to be reversed, the intermediary should have the opportunity at the ground rules hearing to justify their presence during questioning. As with any special measure, the witness's preference is key: witnesses are asked whether they wish the intermediary to accompany them during cross-examination; they are advised that it is the judge's decision whether this will happen. When overriding the witness's wish for intermediary assistance, the judge should take account of the potential reaction to the intermediary's absence.

Quality of advocacy for the vulnerable is in a state of flux. The best is superb, and the general standard is improving, but the gap between best and poor practice has never been wider. Advocates in whom judges have confidence are sometimes replaced at the last minute by others less skilled. Rollout of the "Advocacy and the Vulnerable" training programme under the auspices of the Inns of Court College of Advocacy and the Law Society is only just getting underway. (While intermediaries contributed to development of the materials, they have, unaccountably, not been invited to contribute to training delivery.) The programme has been met with some degree of resistance by lawyers.[19] The Judicial College has been in the vanguard of vulnerable witness training, but judicial control of inappropriate questioning remains inconsistent, with at least some judges over-confident of their own abilities to identify and simplify complex questions. For example, a judge who excluded an intermediary from the review of questions approved the following:

> If I said that Kelly told you that if you said Sam did something to you, she would get some money. Do you agree? (a 24-word double hypothetical leading question, to be posed to a five year-old witness).

Shaun Smith QC, a governor of the Inns of Court College of Advocacy, a lead facilitator in the Bar's vulnerable witness training programme and a Judicial College tutor, recognises the welcome improvements in how vulnerable people are dealt with by both judges and advocates, but cautions that nonetheless, the road ahead remains a long one:

> In that respect, the presence of intermediaries – "the watchmen/women" of this invaluable process – remains essential, not only to assist in the appropriate questioning of the vulnerable, but to ensure that the environment in which they give their evidence continues to be as stress free as possible.

In summary, the intermediary's presence can achieve a range of benefits before and during questioning. There are significant risks in dispensing with them after the ground rules hearing. On occasion, some intermediaries do a disservice to the scheme by failing to intervene during inappropriate questioning (although control remains the responsibility of the judge) or to bring problems experienced by the witness to the attention of the court. Judges or advocates dissatisfied with a registered intermediary's performance (or similarly, who wish to commend their contribution) should contact the scheme's Quality Assurance Board.[20] However, intermediary silence during questioning does not, by itself, indicate that their presence was unnecessary. Communication is a dynamic process, reliant on many factors, not merely wording. At its most extreme, intermediaries may help salvage evidence if communication breaks down but their presence also routinely contributes to "best" evidence in subtle ways that may not be apparent to the court. Their skills in safeguarding effective communication are unmatched by other courtroom participants.

Intermediaries share judicial concerns that their time should be used to benefit the greatest number of witnesses. However, it is unrealistic to invite intermediaries to "bow out" after the ground rules hearing when the circumstances in which vulnerable witnesses give evidence are so often unpredictable; in any case, releasing intermediaries at short notice does not inevitably mean they can be re-deployed elsewhere. A more productive strategy would be to free up days "held" unproductively in intermediaries' diaries by scheduling intermediary trials and vulnerable witness testimony with greater certainty. This approach would not penalise vulnerable witnesses, which is the potential outcome of disengaging the intermediary after the ground rules hearing but before cross-examination.

14 The Ministry of Justice pay scale for a registered witness intermediary is £38.36 per hour and £16.90 travelling time. Much confusion and "pushback" has been caused by higher unregulated fees charged by some nonregistered intermediaries for defendants.

15 "In light of the scarcity of intermediaries, the appropriateness of assessment must be decided with care to ensure their availability for those witnesses and defendants who are most in need. The decision should be made on an individual basis, in the context of the circumstances of the particular case" (Criminal Practice Direction 3F.5).

16 "It is preferable that [intermediary] trials are fixed rather than placed in warned lists" (Criminal Practice Direction 3F.28). An increasing number of intermediary trials appear to be floated.

17 Criminal Procedure Rules 3.9(3)(b) and 3.9(6); Criminal Practice Direction 3D.2).

18 The intermediary's function is to communicate: to the witness, any questions put to the witness; to persons asking such questions, the witness's answers; and to explain such questions or answers so far as necessary to enable them to be understood by the witness or the questioner.

19 Lynda Gibbs, programme director of the Inns of Court College of Advocacy, speaking at the Intermediaries for Justice Annual Conference, 5 May 2017.

20 Feedback can be sent via registered.interme@justice.gsi.gov.uk.

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