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Archbold Review

Cases in Brief

Hackney carriages—plying for hire—Uber

READING BOROUGH COUNCIL v ALI [2019] EWHC 200 (Admin); 2 February 2019

A was acquitted of plying for hire, not being licenced as a hackney carriage, contrary to the Town Police Clauses Act 1847 s.48, and the local authority prosecutor appealed by way of case stated. Where a private hire vehicle bookable through the Uber app was depicted on a map on the app, it was not "exhibited" in the sense required to constitute plying for hire in *Cogley v Sherwood* [1959] 2 QB 311 and *Rose v Welbeck Motors* [1962] 1 W.L.R 1010. Neither the vehicle nor the driver were specifically identifiable from the map on the app. The depiction did not involve any exhibition of that kind, but was for the assistance of the Uber customer using the app, who could see that there were vehicles in the vicinity of the type he or she wished to hire. The app was the modern technological equivalent of hiring a private hire vehicle by telephone. It was immaterial whether the driver was (on Uber's account) the principal and Uber his or her agent or not; nor at what point and between whom a contract had been made (cf *Uber BV v Aslam* [2018] EWCA Civ 2748): there was a pre-booking by the customer, which was recorded by Uber as private hire operator, before the specific vehicle which would perform the job was identified. There was no soliciting by the respondent without prior booking, as, the district judge found, the way the app operated meant that the driver only proceeded to the pick-up point after the customer had confirmed the booking and the driver had accepted the job. Whenever any contract was concluded, this was not plying for hire as the customer could not use the car without making a prior booking through the app.

Having a bladed article—folding cut-throat razor—whether folding pocket knife

R v D [2019] EWCA (Crim) 45; 15 January 2019

A folding cut-throat razor blade with no locking mechanism and a blade of less than two inches did not fall into the exception to the offence of having a bladed article in a public place contrary to the Criminal Justice Act 1988 s.139(1). The article was described by the court as having a small razor on an extended metal shaft, which could be kept open by pressing a thumb on a metal flange. A pocket knife was not an apt description of a cut-throat razor. The items had distinct characteristics, as reflected both in their descriptive names and in their functions. A razor was an article of sufficient sharpness to be used to shave. That would not be normally done by a pocket knife.

Prosecution appeals—notice of appeal and acquittal undertaking given by email—whether required to be given orally in open court; dangerous dogs—dangerously out of control—police dog exemption—scope

R v P [2019] EWCA Crim 17; 22 January 2019

(1) Having reserved judgment following a pre-trial hearing, the judge placed his draft ruling on the Digital Case System, embargoed until handing down. About two hours before the judge handed down the ruling in the absence of the parties, the prosecution emailed the judge an indication that they sought to appeal the ruling, requested that the email be considered as satisfying the provisions of the Criminal Justice Act 2003 s.58(4)(a)(i), and rehearsed the s.58(8) acquittal undertaking. Having heard joint submissions for the parties that this did satisfy the requirements, and submissions from an advocate to the court that s.58 required notice of intention to appeal and the acquittal undertaken to be given in open court, the court could detect no implied requirement that the obligations in s.58 were required to be performed orally in court. The statute was concerned with the steps that were to be undertaken, not how. There was no impediment to the prosecution informing the

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court by email, with effect from the handing down of a ruling, of its intention to appeal; nor requesting an adjournment by email, if that was what it sought. Indeed, a short adjournment pursuant to s.58(4) might well be agreed by a defendant without the need for attendance. Similarly, the court could be informed of the acquittal agreement by email. The judge remained in control of the proceedings and could convene any necessary further hearings. In so concluding, the court considered *Arnold* [2008] EWCA Crim 1034, [2008] 2 Cr.App.R 37; *T(N)* [2010] EWCA Crim 711, [2010] 2 Cr.App.R 12; *Quillan* [2015] EWCA Crim 538, [2015] 1 W.L.R 4673 and *The Knightland Foundation and Jacob Friedman* [2018] EWCA Crim 1860.

(2) Where a police constable was exercising a police dog in an open field (it being agreed that in so doing he was acting in execution of his duty, which required him to care for the dog), the dog did not come under the exemption from the concept of a dog being dangerously out of control in the Dangerous Dogs Act 10(3) where "the dog is being used for a lawful purpose by a constable". The dog was not "being used" so as to bring it within the exemption – the expression suggested the active engagement of the dog in a directed task or in support of the person concerned for an identifiable purpose [43]. The words "for a lawful purpose" reinforced this interpretation. One had to identify the purpose for which the dog is being used and then ask whether that purpose was lawful. In the context of a police constable, the use must be part of a policing activity. Whether a dog was being used for a policing activity by a constable was a question of fact.

Prosecution decisions—judicial review of Attorney-General's supervision of CPS approach; bias—approach on criminal appeals and judicial review

R (SLADE AND PEARMAN) [2018] EWHC 3573 (Admin); 20 December 2018

Following the collapse of a retrial of S and P for conspiracy to murder after Crown counsel concluded that certain evidence could no longer be relied upon, the trial judge ordered that the papers be sent to the Attorney-General to give consideration to the commencement of an investigation into what had occurred. As part of his consideration, the Attorney-General considered reports from leading counsel for the Crown and a detective chief inspector. S and P sought judicial review of the Attorney-General's decision to decline to ask for a separate review of the proceedings.

(1) It was well established that the circumstances in which the court would intervene in relation to prosecutorial decisions were very rare indeed, the principle of the separation of powers leading, as Sir John Thomas P put it in *L v DPP* [2013] EWHC 1752 (Admin), (2013) 177 J.P. 502 (at [7]) to the adoption of a "very strict self-denying ordinance", and see the authoritative statement of the principle in *R (Corner House Research) v SFO* [2008] UKHL 60, [2009] 1 AC 756, [30]–[31], per Lord Bingham of Cornhill. The superintendence of the CPS by the Attorney-General was one stage removed from prosecutorial decisions made on a case-by-case basis. If the latter were justiciable only in exceptional cases, this must be all the more so in a situation where the Attorney-General was deciding whether or not to undertake further inquiry in a case where a detailed investigation had already been carried out under the aegis of the DPP.

(2) Having seen the reports used by the Attorney-General in coming to his decision during a without notice public interest immunity hearing, Leveson LJ, who presided over the court considering the judicial review application, had recused himself from sitting in a directions hearing in relation to S's appeal against convictions factually related to the circumstances of the conspiracy to murder trial. He declined an application by S and P to similarly recuse himself in the current proceedings. The appeal required the court to consider the factual merits of the prosecution and its conduct, with the result that there could be a perception of unfairness, given that S had not seen the reports. However, the judicial review proceedings raised issues of process rather than substance, to which the undisclosed reports were irrelevant, such that a fair-minded and informed observer would not conclude there was a real possibility of bias on the *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 test.

Rape—consent—fraud—definition—case law; procuring sexual intercourse: Sexual Offences Act 1956 s.3—"procuring"—where sexual intercourse remote from deception; Judicial review—challenge to prosecution decisions—approach

R (Monica) v DPP [2018] EWHC 3508 (Admin); 14 December 2018

"Monica" was one of a number of women involved in radical protest groups with whom undercover police officers penetrating the groups had sexual relationships in the persona of their undercover identity. She sought judicial review of the decision of the DPP not to prosecute the officer in question for (inter alia) rape and procuring sexual intercourse (Sexual Offences Act 1956 s.3). The sexual relationship took place before the Sexual Offences Act 2003 came into force.

(1) The court considered *Flattery* [1877] 2 QBD 410; *Dee* [1884] LR 14 Ir 468; *Clarence* (1888) 22 QBD 23: *Papadimitropolous* [1958] 98 CLR 249*; Olugboja* [1982] QB 320: *Elbekkay* [1995] Crim LR 163, *Linekar* [1995] QB 250; *Richardson* [1999] QB 444; *Jheeta* [2007] EWCA Crim 1699, [2008] 1 W.L.R 2582; *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), *R(F) v DPP* [2013] EWHC 945 (Admin), [2014] QB 581 and *McNally* [2013] EWCA Crim 1051, [2014] QB 593 and academic writing including Jennifer Temkin, *Rape and the Legal Process* (2nd ed, 2002) and S Gardner, "Appreciating Olugboja", (1996) 16 LS 275.

(2) M argued primarily that *Olugboja* established that consent was a matter of fact for the jury, and therefore (by necessary implication) was not limited by fixed or rigid categorisations, as in the categories of deceit as to identity or nature and purpose of the act previously established by the common law, and that *Linekar* had erroneously departed from this approach and should not be followed. Alternatively, the "identity" category should be widened.

(3) The court declined to accept M's submissions on *Olugboja*. Although the court in that case stated that the issue of law was whether "it is necessary for the consent of the victim of sexual intercourse to be vitiated by force, the fear of force, or fraud; or whether it is sufficient to prove that in fact the victim did not consent", the facts had nothing to do with fraud, the issue relating to the absence of an overt threat of force/resistance. Similarly, *Elbekkay* amounted to a modest and incremental extension of the common law rule relating to the impersonation of a husband to an unmarried partner rather than, as dicta therein might suggest, a radically broader approach to consent. Had it been the case that there was a conflict between *Olugboja* and *Linekar*, there would have been difficulties with M's submission that the court should follow

the former. *Linekar* was not decided *per incuriam*, none of the *Young v Bristol Aeroplane* [1946] AC 163 exceptions applied, and the court was not the Court of Appeal. There was, rather, a consistent line of authority under common law and the Sexual Offences Act 1956 – including but not limited to *Flattery*, *Dee*, *Clarence* and *Linekar* – which supported the proposition stated by the CPS lawyer that only fraud as to the nature or purpose of the sexual act and fraud as to the identity of the perpetrator were capable of vitiating consent; and there was no authority to the contrary.

(4) The court proceeded on the basis, as the CPS lawyer who wrote the decision letter had, that, once the position under the Sexual Offences Act 1956 had been considered, it was appropriate to consider case law under the Sexual Offences Act 2003 on the basis that it might be relevant in a wider or indirect way (although it was at least arguable that this approach would be unduly favourable to M). This approach assumed that the 2003 Act did no more than restate and clarify the meaning of consent rather than alter or advance it. There was no decided case which held in terms that the 2003 Act had made no difference. The ratio of *Assange* was that the types of deception capable of negating consent under the general definition in the Sexual Offences Act 2003 s.74 were wider than the narrow deceptions considered in *Dee*, *Clarence* and *Linekar*, and which were reflected in the conclusive presumptions in s.76. There were two ways of explaining *Assange.* One was that s.74 changed the law; the other that the underlying common law understanding of the nature of consent had continued to develop. It was unnecessary for the court in M's case to say which was correct. The question, on this basis, was whether the development covered the officer's conduct. *Assange* allowed that a deception closely connected with "the nature or purpose of the act" which related to sexual intercourse itself, was capable of negating a complainant's free exercise of choice under s.74 of the 2003 Act. Whilst this might represent a relatively modest extension of the way in which the law examined consent, it did not support what would be the profound change in approach to consent contended for by M. The same modest extension approach applied to *R(F)* and *McNally*. The CPS lawyer had been entitled to conclude that prosecution of the officer would entail a significant leap forward in the understanding of consent from current legal principles.

(5) It was not strictly true that consent was a common law concept which the courts were free to develop. When the concept first appeared in a statute, Parliament was no doubt doing no more than reflecting the common law. But the interpretation of the concept of consent was now a matter of statutory interpretation. The relevant statutory definition of rape for the purposes of M's claim was that introduced in 1994 but the point also held good for the 2003 definition. The court had been shown no admissible aids to statutory construction which supported the expansive definition of consent M advanced. It would be wrong for such a fundamental change in the understanding of consent to be brought about by judges rather than Parliament.

(6) The CPS lawyer had also been entitled to exclude a prosecution for procuring sexual intercourse contrary to the Sexual Offences Act 1956 s.3, then in force. While the relevant deception involved in the officer's deployment was active and continuing, there was no identifiable act of procurement (see *Broadfoot* [1977] 64 Cr.App.R 71: "to procure means to produce by endeavour … 'procuring' is the bringing about of a course of conduct which the girl … would not have embarked upon spontaneously of their own volition"). The deception went to the circumstances which led the parties to encounter each other rather than the act of sexual intercourse. By the time a sexual relationship was on the cards, months later, the trigger was not procuring by the officer but mutual attraction. The officer did not create the circumstances which led to the encounter in the first place as he was responding to his orders. In any event, it was difficult to see how the procurement for the purposes of s.3 could be the bringing about of the initial encounter, at a stage when no sexual relationship was in contemplation. M could not point to a decided case in which a similar factual structure had amounted to the offence. The CPS lawyer was also entitled to conclude that it would be difficult to persuade a jury that the officer had the mens rea for the offence, a judgment of the kind in respect of which the court applied a strict self-denying ordinance.

(7) In respect of judicial review of prosecution decisions, the court distilled the following propositions from the authorities (*L v DPP* [2013] EWHC 1752 (Admin); *R (Corner House Research) v SFO* [2008] UKHL 60, [2009] 1 AC 756 and cases cited therein; and *R(F) v DPP* [2013] EWHC 945 (Admin), [2014] QB 581), and the principles underlying them: (a) particularly where a CPS review decision was exceptionally detailed, thorough, and in accordance with CPS policy, it could not be considered perverse; (b) a significant margin of discretion was given to prosecutors; (c) decision letters should be read in a broad and common sense way, without being subjected to excessive or overly punctilious textual analysis; and (d) it was not incumbent on decision makers to refer specifically to all the available evidence. An overall evaluation of the strength of a case fell to be made on the evidence as a whole, applying prosecutorial experience and expert judgment.

SENTENCING CASE

Protest; custodial threshold

ROBERTS [2018] EWCA Crim 2739, 6 December 2018

The appellants had been convicted of public nuisance contrary to the common law. They had been part of a group protesting against hydraulic fracturing ("fracking") near Blackpool. The appellants had seated themselves on top of the cabs of lorries for between two and a half and three and a half days, blocking one carriageway of a road and causing substantial disruption. Two of the appellants were sentenced to 16 months' imprisonment, and one to 15 months' imprisonment.

The appeals were heard as a matter of urgency on 17 October. The Court allowed the appeals, concluding that the sentence which should have been imposed was a community order with a significant requirement for unpaid work. However, as by the time of the hearing the appellants had been in custody for three weeks, the appropriate sentence was a conditional discharge for two years.

The appellants' core submission was that those convicted of offences in the course of protesting should not receive a custodial sentence in the absence of violence against the person. The Court did not accept this submission, stating that there is a wide range of offences that may be commit-

ted in the course of peaceful protest; within such offending very different levels of harm may be suffered. Sentencing by reference to harm and culpability, and with the three aims of sentencing in mind (punishment, deterrence and rehabilitation) remains appropriate. The motivation of an offender can increase or diminish culpability. It is not part of a court's function to adjudicate on the merits of controversial issues but committing crimes, at least non-violent crimes, in the course of peaceful protest does not generally impute high levels of culpability. Both the common law and Strasbourg jurisprudence place the underlying circumstances of peaceful protest at the heart of the sentencing exercise. There are no bright lines between custodial and non-custodial sentences, but particular caution attaches to immediate custodial sentences.

Having regard to the appellants' good character and the underlying motivation for their criminal behaviour, notwithstanding the widespread disruption for which they were responsible, the custody threshold was not crossed. A community sentence, with a punitive element, would have met the justice of the cases. A community sentence is a serious penalty. A person with strongly held beliefs would be free to manifest them when subject to such an order. There are many ways in which peaceful protest can be achieved without breaking the law.

Features

The Criminal Bar Association Study and Section 41: Dousing or Stoking the Flames?

By Matt James Thomason[1]

The debate concerning s.41 of the Youth Justice and Criminal Evidence Act 1999 has been heating up ever since the Court of Appeal's controversial decision in *Evans*.[2] In response to legislative proposals to further limit the use of sexual history evidence from Harriet Harman MP and Liz Saville Roberts MP, the Criminal Bar Association (CBA) commissioned Laura Hoyano[3] to empirically investigate the day-to-day operation of s.41. The resulting report, *The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: views from the barristers' row* (the "CBA study") was published at the end of 2018.[4]

Following an outline of the relevant law, the report begins with a scathing critique of the most prominent empirical studies on s.41:[5] the 2006 Home Office Report,[6] Dame Vera Baird QC's Northumbria Study,[7] LimeCulture's ISVA Study,[8] and the Ministry of Justice's Study of CPS case files.[9]

Much of the methodological critique is well-founded,[10] and it is unlikely that the credibility of any of these four studies survives Hoyano's forensic cross-examination.

The Sample

Hoyano, in conjunction with three barristers on the CBA s.41 Working Party, produced a survey that was circulated to members of the CBA. Respondents were asked to give specific examples of cases where issues concerning s.41 arose, and their own opinion concerning the section. There were 166 respondents who had conducted a sex case in the last 24 months,[11] the majority of whom both regularly prosecute and defend. A total of 377 cases were discussed by respondents, with an estimated 565 complainants between them.[12] These cases encompassed 105 Crown Court centres across England and Wales,[13] and unlike most recent research on s.41 included sex offences other than rape, historic allegation cases, and cases involving male complainants (131/565 cases).[14] In terms of age ranges, 407/565 complainants were adults, with 55 aged between 16-17, 50 aged between 13-15, and 53 aged under 13.[15]

However, as acknowledged,[16] membership of the CBA does not encompass the entire criminal bar and so non-CBA mem-

1 PhD Researcher, School of Law, University of Nottingham. Many thanks to Professor J.R. Spencer, for comments on an earlier draft.

2 *Evans* [2016] EWCA Crim 452, [2016] 4 W.L.R 169.

3 Senior Research Fellow at Wadham College, University of Oxford, and tenant at Red Lion Chambers.

4 https://www.criminalbar.com/wp-content/uploads/2018/12/REPORT-FOR-CBA-WEBSITE-FINAL-ERRATA-with-Executive-Summary.pdf For Laura Hoyano's own summary of the study see "Cross-examination of Sexual Assault Complainants on Previous Sexual Behaviour: Views from the Barristers' Row" [2019] *Criminal Law Review* 77. I would like to thank the author, and editor of the *Criminal Law Review*, for providing an advance draft of this.

5 CBA study paras 9-42.

6 Liz Kelly, Jennifer Temkin and Sue Griffiths, "Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials," Home Office report, 20 June 2006.

7 Ruth Durham, Rachel Lawson, Anita Lord and Vera Baird DBE QC, "Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16" (Vera Baird, Police & Crime Commissioner, 2017.)

8 LimeCulture Community Interest Company, "Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors (ISVAs)", September 2017.

9 Ministry of Justice and Attorney General, "Limiting the Use of Complainants' Sexual History In Sex Cases: Section 41 of the Youth Justice and Criminal Evidence Act 1999: the Law on the Admissibility of Sexual History Evidence in Practice" Cm 9547, December 2017.

10 Hoyano's criticisms of the Northumbria Study and ISVA Study, that court observers may not have appreciated different evidential rules such as s.100 of the Criminal Justice Act 2003, would not have seen pre-trial s.41 applications, and gave little weight to the fair trial rights of the defendant, could equally apply to other trial observation research on s.41 which was not evaluated in the CBA study: Olivia Smith, "Rape trials in England and Wales: Observing Justice and Rethinking Rape Myths", Basingstroke: Palgrave MacMillan, 2018, Ch.4; Jennifer Temkin, Jacqueline M Gray and Jastine Barrett, "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2016) 13(2) *Feminist Criminology* p. 205.

11 13 respondents were removed from the study for failing this requirement for inclusion.

12 The number of complainants is slightly uncertain due to some respondents being imprecise. There are a confirmed 540 complainants in the study, and Hoyano estimates there were at least an extra 25 complainants to make a total of 565 for the purposes of analysis: CBA study, paras 68-69.

13 Though it is noted that Wales is significantly underrepresented: CBA study, para.117.

14 CBA study para.74.

15 CBA study paras 75-77.

16 CBA study para.117.

bers' views are likely not to be well represented in the study. Although the survey method is useful in terms of getting a high number of respondents, the detail in responses is generally lower than it would have been had the barristers been interviewed, as this would have assisted clearing up any vague answers, and allowed for follow-up questions. Moreover, there is no way to determine whether barristers were responding to the survey from memory, or using their case files, which may affect the accuracy of some responses.[17]

Findings

Despite some methodological limitations, the CBA study is the most wide-ranging investigation into the operation of s.41 since the 2006 Home Office Study, and its findings deserve to be read in full. Here, three key findings, which shed new light on this area, will be briefly discussed.

Procedure

Just over one third (50/144)[18] of s.41 applications were made outside of the time limits prescribed in the Criminal Procedure Rules (CrimPRs).[19] Reasons given for this included: late disclosure, that the issue arose late in the trial, and that counsel received late instructions from their client.[20] Furthermore, respondents claimed that despite many of these applications being served outside of the prescribed time limits, they were still served on opposing counsel within plenty of time prior to trial, and it was thought that little prejudice was caused by this. Due to the common disclosure issues, the CBA study identifies a new practice whereby counsel sometimes draft vague applications in order to comply with the time limits, orally filling in the detail of the application once the relevant material has been disclosed.[21]
It is common for commentators to assume that non-compliance with the CrimPRs by defence counsel is intentional or malicious, with no regard to the practical realities of current trial procedure.[22] However, it is clear from the CBA study that this is not the case and, moreover, the second and third of the reasons for late applications mentioned above are not the fault of counsel. Calls to further tighten the time limits (as in fact recently happened)[23] or to enforce harsh penalties for non-compliance are misguided unless the primary reason for late applications, a problem currently plaguing the entire criminal justice system, is addressed: late and/or incomplete prosecution disclosure.

Agreement

One finding of the CBA study that is sure to generate some controversy is that the prosecution are often agreeing previous sexual history evidence. This can take many forms: counsel can agree a form of questioning between them that avoids the complainant's sexual history altogether, or the prosecution can agree to mention the complainant and defendant's prior sexual relationship as part of the factual background in their opening speech or as an agreed fact so that the complainant does not have to be questioned directly about this.[24] These appear to be positive developments, as they have the laudable aims of protecting complainants from unnecessary distress when giving evidence, while providing the fact-finder with the relevant context for the case.
Other forms of agreement may, however, cause concern for some. The report claims that some prosecutors are agreeing to lead evidence so that the defence are able to activate the rebuttal gateway (s.41(5)), and that it is often stated in the making of an application that the prosecution either agrees to the application or does not object. Hoyano appears to attempt to pre-empt criticism of this practice by citing statutes[25] and parts of the CrimPRs[26] which lay down obligations on parties to co-operate and encourage the most efficient use of court time. It remains the fact, however, that the absence of an explicit "agreement" gateway for sexual history evidence in s.41 stands in stark contrast to defendant or non-defendant bad character evidence (under s.101(1)(a) and s.100(c) of the Criminal Justice Act 2003), and to hearsay evidence (under s.114(1)(c) CJA 2003). It is striking that this aspect of s.41 is being somewhat circumvented, or perhaps superseded, by the ever-increasing case management pressures affecting the entire court process. If this can be perceived as a frustration of the intention of Parliament, it is one which appears to be largely caused by chronic underfunding, combined with the increasingly pushed managerial ethos, throughout the criminal justice system, which in many respects may also be traced back to Parliament.

Sexual History Evidence Without an Application

Respondents were asked whether they had experience of a court permitting questioning concerning previous sexual history where there was no, or a failed, s.41 application. In 23/223 cases, some questioning was permitted; however, the answers to this question are difficult to interpret as some of the questioning highlighted by respondents did not seem to actually require a s.41 application.[27] It seems relatively clear that in at least eight cases, sexual history evidence was adduced in the absence of a s.41 application.[28] Though Hoyano makes the point that in these cases it seems that the evidence would have *prima facie* satisfied a gateway anyway,[29] one cannot know whether such evidence would have also satisfied the "unsafe conclusion" test in s.41(2)(b) without more information.
Although non-compliance with the rules of evidence is always a cause for concern, it might have undermined the credibility of the study had there been no examples of this at all. The fluid nature of trials, and the uncontrollable nature of witnesses, make 100% compliance with all evidentiary rules in every case an almost impossible task.[30] However, as s.41 is one of the main evidentiary rules in sex cases, and so should perhaps be at the forefront of counsel's minds, it is reassuring to know that in some of these cases Hoyano reports that judges censured counsel for not making an application.[31]

17 This is also acknowledged in the study: CBA study, para.44.
18 CBA study, para.93.
19 Under the then CrimPR (2015) Rule 22.2(b), s.41 applications needed to be submitted within 28 days of prosecution disclosure. This was amended after the data collection period of the study to 14 days under the new CrimPR Rule 22.4(b).
20 CBA study, paras 94-99.
21 CBA study, para.100.
22 See Clare McGlynn, Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81(5) *The Journal of Criminal Law* 367, 390-391; Ruth Durham et al (2017), fn.7 above, 38-39; Liz Kelly et al (2006), fn.6 above, 23-24, 76-77.
23 See fn.19 above.
24 CBA study, paras 103-105.
25 Sections 31(6), (7), (9) of the Criminal Procedure Investigation Act 1996; s.9(4) of the Criminal Justice Act 1987.
26 Crim PR Rules 3.3(2)(a), 3.3(2)(c)(ii), 3.3(2)(e), 3.14(1).
27 CBA study paras 108-111.
28 CBA study para.112.
29 CBA study para.112.
30 If unconvinced, the reader is advised to take a trip to a local Crown Court and try and count how many times a witness gives evidence on a minor issue which is *technically* inadmissible hearsay, and no objection is made by either counsel nor the judge.
31 CBA study paras 114-115.

Conclusions and Proposals

The headline message from the study is clear: contrary to recent academic and public outcry, s.41 is (mostly) operating as intended. Applications are *not* the norm in sex cases, and when applications *are* made they are usually made properly in accordance with the statutory regime. Applications are *not* nodded through, and are usually subject to scrutiny from both opposition counsel and the trial judge. If sexual history evidence can be admitted without unnecessary distress to the complainant, such as through the prosecution's opening speech or an agreed fact, then this is often the selected option.

In terms of concrete proposals for reform, the report has little radical to say. It is suggested that s.41 could be redrafted so that it: a) is easier to use and understand, and b) codifies the "ECHR gloss" from *R v A (No 2)*.[32] Rather than reform, the report places a much greater emphasis on the harm which misrepresentative reporting of rape cases in the media, and by politicians, can cause.[33] It is suggested by Hoyano that this misrepresentation is compounded by the complexity of s.41 itself, and so the suggested simplification reforms could help in this regard.

Implications for the Debate

For those who were already arguing that s.41 should be left alone,[34] or that reform should primarily be focused at simplification and codifying *R v A (No 2)* in some way,[35] the report will be very welcome in providing empirical support for (at least some of) their arguments. For those arguing for more drastic reforms, such as further tightening of s.41[36] or a complete bar[37] on admitting previous sexual history evidence, it is unclear whether this report will do much to dissuade them. Soon after the publication of the report, Harriet Harman MP tweeted

> New *@TheCriminalBar* survey confirms problems in sex trials. Govt Courts Bill & victims' strategy must protect rape victims from intrusive sex life Qs. Victims shouldn't be in the dock[38]

citing statistics from the report that 144/565 complainants were subject to s.41 applications, and that 105 of these were allowed either in full or in part. While Dame Vera Baird QC's response, given in an interview in *The Times*, was that rape trials should not be "inquisitions into the complainant's sex life".[39]

Ultimately, if one's conception of relevance is narrow, or if one advocates a high admissibility threshold to further protect complainants, or if one has the consequentialist goal of increasing trial conviction rates in sex cases, then anything other than a very low number of applications (or none) will be unacceptable. These issues concern theoretical debates about the competing values in the criminal justice system, and empirical work can only do so much in informing them. Moreover, if some view criminal barristers as part of the problem, in that they are being complicit in unnecessarily distressing complainants and therefore deterring complaints, then it may be that research into those same barristers' opinions, and self-reported practices, will cut little ice.

Likely to be less controversial, though, are the reports' findings on general compliance with, and use of, the current law.[40] Although some may approach defence counsel's self-reporting of compliance with some scepticism, it is much more difficult to dismiss prosecutor reports of defence compliance, for the same reason as is noted in the report: one would expect prosecutors to be the first to complain about the defence adducing evidence without making s.41 applications when required.[41]

Although itself not perfect, the methodological failings, or age, of previous empirical studies mean that the CBA study contains the best information we currently have on the practical operation of s.41, and provides a firm snapshot of current practice which will inform debates about the future of sexual history evidence.

32 See similar calls for simplifying s.41 in: Matt James Thomason, "Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence" (2018) 22(4) *International Journal of Evidence and Proof* 342; Findlay Stark, "Bringing the Background to the Fore in Sexual History Evidence" (2017) 8 *Archbold Review* 4.
33 CBA report paras 139-141.
34 Nick Dent and Sandra Paul, "In Defence of Section 41" [2017] *Criminal Law Review* 613.
35 Matt James Thomason (2018), fn.32 above; Findlay Stark (2017), fn.32 above.
36 Clare McGlynn (2017), fn.22 above, 387-390; Clare McGlynn, "Challenging The Law on Sexual History Evidence: A Response to Dent and Paul" [2018] *Criminal Law Review* 216.
37 At least, for 3rd party sexual history evidence: Harriet Harman QC MP "New Cross-Party Coalition Launches Challenge to Attorney General and MoJ on Use of Rape Complainants' Previous Sexual History in Court", 29 January 2018.
38 Harriet Harman MP (@HarrietHarman), 29 November 2018, 6.19am, Twitter.
39 Dame Vera Baird QC, reported in *The Times*, 3 December 2018. https://www.thetimes.co.uk/article/3d481880-f4e4-11e8-8c84-29b2667b0b46 Accessed 9 January 2019.
40 Though, as is noted above, questions may be asked as to whether counsel agreements to adduce sexual history evidence comply with s.41.
41 CBA study para.128.

Mens rea and statutory construction

By Paul Jarvis[1]

It is a well-known principle of our law that when Parliament creates a criminal offence, mens rea is presumed to be required in order for the prosecution to prove that a person has committed that offence[2]. For any court required to determine whether a statutory offence requires mens rea, "[o]ne must begin, therefore, with this strong presumption firmly at centre stage."[3] Over the years the legislature has created many statutory sexual offences where either (i) Parliament made it an element of the offence that the victim has to be a child below a certain age[4] or (ii) Parliament provided that special rules apply to the offence where the victim is a child below a certain age.

As to the latter, one example was s.14 of the Sexual Offences Act 1956, which provided that it is an offence for a person to make an indecent assault on a woman.[5] The courts interpreted the word "assault" to mean that the physical contact between the defendant and the victim must have occurred without her consent.[6]

Moreover

> [a]s there are no words in the section to indicate that Parliament intended to exclude mens rea as an element in the offence, it follows that the prosecution had to prove that the appellant intended to commit it[7]

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2 *Smith, Hogan and Ormerod's Criminal Law*, 15th ed. (OUP, 2018) at §5.2. See also *Sweet v Parsley* [1970] AC 132, 148–149, Lord Nichols in *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 460 and Lord Kerr in *Brown* [2013] UKSC 43; [2013] 4 All ER 860, at [26].
3 *Brown* at [29].
4 Rape of a child under 13, contrary to s.5 of the Sexual Offences Act 2003, for example.
5 Section 14(1).
6 "Conduct which would otherwise constitute an assault is not an assault if done with the free and lawful consent of the other person. The actus reus is the doing of the indecent act without the consent of the other. The prosecution must prove the absence of consent" per Lord Hobhouse in *K* [2002] 1 AC 462 at [37].
7 *Kimber* [1983] 1 W.L.R 1118 at [1121].

and the prosecution was required to prove both that the physical contact itself had taken place intentionally or recklessly *and* that at the time of that contact the defendant had not honestly believed in the victim's consent to the contact. As to the word "indecent", in *Court*[8] Lord Ackner held that an assault was indecent if it was of a type that was capable of being indecent in the minds of right-thinking people, and that in order to commit an indecent assault, the accused person had to believe that the assault he committed was capable of being indecent in the minds of right-thinking people.[9]

Section 14(2) modified the position as regards to the "assault" element of the offence by providing that where the victim is a girl under 16, she

> cannot in law give any consent which would prevent an act being an assault for the purposes of this section.[10]

In *K*[11] a unanimous House of Lords held that where the victim was said by the prosecution to be under the age of 16, and thus incapable of consenting to the physical contact, the prosecution nevertheless had to prove that the defendant did not genuinely believe she was 16 or over and if the prosecution could not prove that state of mind on the defendant's part then he was entitled to be acquitted. The reasonableness, or otherwise, of his belief was irrelevant.

Over the course of several decades, then, an offence that began its existence without any mens rea requirements set out specifically in the statute that created it came to acquire a wealth of them. These decisions also highlighted that the presumption of mens rea has to be applied to each aspect of the conduct element of the offence. In the case of s.14 of the 1956, that meant the courts had to presume that as regards the physical contact between the defendant and the victim, the consent of the victim to that contact, the age of the victim at the time of that contact (where it was said she was under the age of 16) and the indecent nature of the contact, there was a corresponding mens rea component to the offence unless it was clear from the statutory language that no such component existed or that conclusion was driven by a process of necessary implication. So far as s.14 was concerned, that presumption was never displaced with respect to any conduct element of the offence.

With this in mind, it is worth considering the court's approach to those offences where the age of the child is a conduct element of the offence itself. One obvious example is rape of a child under 13, contrary to s.5 of the Sexual Offences Act 2003.[12] That offence is committed whenever a person intentionally penetrates the vagina, anus or mouth of another person with his penis, and the other person is under 13. The maximum sentence is life imprisonment. There can be no doubt then that this offence is "truly criminal". The offence itself provides for a mens rea requirement of intention so far as the act of penetration is concerned, although where the prosecution can prove that penetration took place it will be an unusual case for a jury to have doubts about whether that penetration was intentional. Significantly, so far as the second conduct element is concerned – the age of the child – the 2003 Act is silent as to mens rea and so the presumption applies.[13]

In *G*[14], however, the House of Lords disapplied the presumption. Lord Hoffmann observed that

> [t]he policy of the legislation is to protect children. If you have sex with someone who is on any view a child or young person, you take your chance on exactly how old they are. To that extent, the offence is one of strict liability and it is no defence that the accused believed the other person to be over 13.[15]

To similar effect, in *Brown*[16], on an appeal from Northern Ireland, the UK Supreme Court had to consider whether the presumption of mens rea was disapplied in a case where the defendant had pleaded guilty to an offence of having had unlawful carnal knowledge of a girl under the age of 14.[17] Delivering the unanimous judgment of the Court, Lord Kerr held that "[p]recisely the same policy considerations underpin section 4 of the 1885 – 1923 Acts"[18] as underpinned s.5 of the 2003 Act, namely that

> [y]oung girls must be protected and, as part of that protection, it should not be a defence that the person accused believed the girl to be above the prescribed age…If you have sexual intercourse with someone who is clearly a child or young person, you do so at your peril.[19]

G stands as authority for the proposition that under Pt.1 of the Sexual Offences Act 2003, where the offence-creating provision stipulates that the child must be under the age of 13 when the prohibited conduct takes place, the prosecution will not be required to prove that the defendant did not reasonably believe the child was aged 13 or over. That will be the position in any case, regardless of how old the defendant himself is. In *G* the defendant was 15 and the victim was 12, but it would not have mattered if he had been only 12 himself. His belief in the age of the victim was held to have been irrelevant and so the fact the prosecution accepted the defendant genuinely believed the victim to have been 15 did not impact on his liability for the offence.

Regardless of whether the House of Lords reached the correct conclusion in *G*, the answer to the stated question was at least emphatic and provided no room for doubt in future cases. The same cannot be said of more recent developments in the law regarding the offence of making indecent photographs of children contained in s.1(1) of the Protection of Children Act 1978.

In its current form, s.1(1)(a) of 1978 Act provides that

> it is an offence to take or permit to be taken or to make any indecent photograph or pseudo-photograph of a child.[20]

Section 7 of the 1978 Act contains no definition of *making* and so over the intervening twenty years since "to make"

8 [1989] 1 AC 28.
9 [45E].
10 Section 14(2).
11 [2002] 1 AC 462. See J Horder, "How Culpability Can, and Cannot, Be Denied in Under-Age Sex Crimes" [2001] Crim LR 15 and PR Glazebrook, "How Old Did You Think She Was? (2001) 60 CLJ 26.
12 See J.R. Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] Crim LR 347.
13 Some jurisdictions have spelt it out in the statutes themselves that mens rea does not apply with respect to the age of the child. In New Zealand, for example, s.132 of the Crimes Act 1961 created the offence of having a "sexual connection" with a child under 12 and by virtue of s.132(4) "It is not a defence to a charge under this section that the person charged believed the child was of or over the age of 12 years". Similarly, ss.18–26 of The Sexual Offences (Scotland) Act 2009 created a number of sexual offences that can only be committed against children below the age of 13 and s.27 provides in respect of each of those offences that "It is not a defence … that A believed that B had attained the age of 13 years".
14 [2008] UKHL 37; [2009] 1 AC 9.
15 At [3].
16 [2013] UKSC 43.
17 Contrary to s.4 of the Criminal Law Amendments Acts (Northern Ireland) 1885 – 1923. The position in Northern Ireland is now governed by The Sexual Offences (Northern Ireland) Order 2008, which replicated many of the offences contained in the Sexual Offences Act 2003, including that of rape of a child under 13, as to which see s.12 of the 2008 Order.
18 At [39].
19 Above.
20 A child is defined in s.7(6) of the 1978 Act as any person under the age of 18 but that has only been the law since s.45(2) of the Sexual Offences Act 2003 came into force on 1 May 2004. Between the date the 1978 Act came into force and 1 May 2004, a child was any person under the age of 16.

became an element of the offence[21], the courts have considered its meaning, most notably in the context of cases where a defendant has viewed or downloaded indecent photographs of children online. In *Bowden*[22], the Court of Appeal referred to the dictionary definition of "to make" ("to cause to exist; to produce by action; to bring about") and held that this was wide enough to encompass the downloading of such images from the internet. The decision in *Bowden* was endorsed in *Atkins v DPP*[23] and extended in later cases to include situations where the images are stored by operation of the computer (such as an internet cache) rather than by deliberate action on the part of the user.

Importantly, s.1(1)(a) is silent as to the mens rea of the offence and so the starting-point is that the presumption applies. However, in a case concerned with the taking of an indecent photograph by the user of a camera, the Court of Appeal has held that the taking of the photograph has to be an intentional act but the prosecution did not have to prove that the taker of the photograph knew or had no reasonable belief that the person depicted in it was a child.[24] By contrast, where the indecent photograph is made by the act of downloading the image from the internet or opening an email attachment, not only must the making of the photograph be intentional but the accused must know that the photograph he has made "is, or is likely to be, an indecent photograph of a child".[25]

In *W(P)*[26] the Court of Appeal confirmed that there is a distinction to be drawn between cases where the defendant used a camera to make a photograph and cases where he downloaded a photograph from the internet

> Given particular considerations relating to a phone or computer user's awareness as to what he is downloading, it is understandable that a different approach has been adopted for that situation. That should not affect the position where the making of an indecent image takes place through the more direct action of photographing or filming. In those circumstances, the offence is made out by the deliberate act of photographing or filming without more.[27]

This line of cases demonstrates that when the courts ask themselves whether to disapply the presumption in respect of a particular conduct element of a statutory offence the answer does not have to be "yes" or "no". The answer could just as easily be "it depends"; and if that is the right answer under s.1(1)(a) of the Protection of Children Act 1978, why could it not also be the right answer under s.5 of the Sexual Offences Act 2003, the rape of a child under 13 offence?

The House of Lords in *G* appears to have proceeded on the basis that the question whether to disapply the presumption of mens rea for the s.5 offence permitted of only a "yes" or "no" answer; but had it appreciated the possibility that "it depends" was also a perfectly satisfactory answer then it *might* have held that mens rea as to the age of the victim is not required when the s.5 offence is committed in one particular way but would be required if it was committed in a different way, depending, perhaps, on the age of the defendant himself. In this way, the House of Lords in G *could* have held that a reasonable belief in the age of the victim is available to a young child defendant (say someone aged under 16) but not available to an older child defendant, and in that way provide greater protection against the threat of prosecution for juvenile defendants than the exercise of prosecutorial discretion, which is at present the only safeguard a defendant like *G* could hope to rely on.

If the English courts conclude that the presumption of mens rea is not disapplied then the prosecution will have to prove to the criminal standard either that the defendant had a particular state of mind (that the image he downloaded was, or was likely to be, an indecent photograph of a child, for example) or that he did *not* have a particular state of mind (that he did not reasonably believe the victim was consenting, for example). In contrast, where the presumption is disapplied, not only will there be no mens requirement for the prosecution to prove, but nor will the defendant be able to raise his state of mind as a defence to prove on the balance of probabilities.[28] As far as the defendant is concerned, it is full mens rea or bust.

In contrast, the position in Hong Kong is more nuanced. In a series of cases culminating in *HKSAR v Choi Wai Lun,*[29] the Court of Final Appeal[30] departed from the approach in England and Wales and concluded that where a statute was silent as to mens rea in relation to a particular conduct element it might be possible for the court to chart a middle course between full mens rea and no mens rea and recognise the existence of a defence of belief or reasonable belief on the part of the defendant. In that case, the Court held that the presumption of mens rea was disapplied but nevertheless the accused had a defence if he could prove on the balance of probabilities that he honestly and reasonably believed that the girl in question was aged 16 or more.

If the English courts were to follow Hong Kong's lead then cases such as *K* (presumption not disapplied; prosecution has to prove mens rea to the criminal standard as regards the victim's age) and *G* (presumption disapplied; a reasonable and honest belief on the part of the defendant as to the age of the victim is irrelevant) would fall to be reconsidered. In the case of *K*, the existence of an intermediate basis of liability might have swayed the court in favour of disapplying the presumption but then recognizing the existence of a defence as was the position in *HKSAR v Choi Wai Lun*. In the case of *G*, the existence of an intermediate basis of liability would not have

21 The words "or to make" and "or pseudo-photograph" were added from 3 February 1995 by s.84(2) of the Criminal Justice and Public Order Act 1994.
22 [2001] QB 88.
23 [2000] 1 W.L.R 1427.
24 *DM* [2011] EWCA Crim 2752. See also *Land* [1998] 1 Cr.App.R 301 and the observations of Judge LJ at p.305A about the purpose behind provisions such as this and the need to protect children from exploitation.
25 Per the Court of Appeal in *Harrison* [2008] 1 Cr.App.R 29 (at para.8) and *Smith (Graham)* [2003] 1 Cr.App.R 13.
26 [2016] EWCA Crim 745; [2017] 4 W.L.R 79.
27 At [31].

28 In *Sweet v Parsley*, Lord Reid (at p.150) observed that "there are many kinds of case where putting on the prosecutor the full burden of proving mens rea creates great difficulties and may lead to many unjust acquittals". One alternative in his view would be to place "the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention". Of course, his Lordship's comments were directed towards the situation where the presumption is not disapplied and the court then has to determine what form the mens rea takes. He was not expressly considering the possibility of a defendant bearing a legal burden in the event the presumption was disapplied. In its Consultation Paper No.195 on *Criminal Liability in Regulatory Contexts*, the Law Commission, at para.615, referred to the case of *B (A Minor) v DPP* (see fn.2) and remarked that having declined to disapply the presumption of mens rea, the court did not go on to ask itself "what kind of fault requirement would best strike the right balance between the interests of accused persons and those of the prosecution and of the child victims". According to the Law Commission, the court did not consider itself free to decide, for example, that a defendant charged under s.1(1) of the Indecency with Children Act 1960 could only escape conviction if he had taken reasonable steps – exercised due diligence – in all the circumstances to discover the age of the victim rather than it simply being for the prosecution to prove that the defendant did not genuinely believe the victim was under the age of 14. For the Law Commission, this was "an important limitation or flaw in the court's approach".
29 [2018] HKCFA 18. The case concerned s.122(1) of the Crimes Ordinance, which provides that a person who indecently assaults another is guilty of an offence. Like s.14(2) of the Sexual Offences Act 1956, s.122(2) of the Ordinance further provides that a person under the age of 16 cannot in law give any consent which would prevent an act being an assault for the purposes of s.122(1). The question for the court was whether a person commits the s.122(1) offence if he engages in sexual conduct which is in fact consensual with a girl who is actually aged 13 when he honestly and reasonably believed her to be aged 16 or above.
30 The highest court in Hong Kong.

moved the Court on the issue of whether to disapply the presumption, but having decided to dislodge it the Court would have been faced with the possibility of ensuring the appropriate balance – between the presumption of innocence and upholding the purpose of the legislation – by placing a legal burden on the accused to prove his lack of mens rea on the balance of probabilities. With these considerations firmly in mind, now may just be the time for the English courts to reconsider their own approach to the common law presumption of mens rea, especially in the realm of sexual offending where the choices facing them are so stark and the consequences for those who find that their reasonably and honestly held beliefs are irrelevant are so severe.

Prosecuting Medical Professionals for Manslaughter

In February 2011, Jack Adcock, aged six, died of sepsis in Leicester Royal Infirmary, where Dr Bawa-Garba, the junior paediatrician in charge of the ward, had failed to diagnose and treat his condition as promptly as she should. For this she was prosecuted for manslaughter by gross negligence and in 2015 convicted: a conviction upheld on appeal.[1]

In June 2017 a Medical Practitioners Tribunal,[2] considering her fitness to practice, ordered her suspension from practice for 12 months. Against this ruling the General Medical Council appealed, arguing that this lenient outcome failed to respect the jury's guilty verdict, and in January 2018 the Divisional Court, accepting this argument, ordered her to be struck off the Medical Register. In August 2018 the Court of Appeal quashed the Divisional Court's decision and reinstated the Tribunal's original ruling.[3]

If welcome to Jack Adcock's parents, Dr Bawa-Garba's prosecution and conviction caused consternation in the medical profession. She was a doctor whose record was otherwise exemplary. As the trial judge said when imposing a suspended sentence, her error was not the result of laziness or selfishness, but a simple failure to recognise the gravity of this case and give it the priority required. This happened, furthermore, in a ward that was crowded and under-staffed and the staff under great pressure, worsened by an IT failure. She herself had been on duty for some 12 or 13 hours without a break.[4] Many thought, and said, that Dr Bawa-Garba had been made the scapegoat for staff shortages and other systemic failings in the NHS.

Responding to pressure from a worried medical profession, the Minister of Health commissioned a review of medical manslaughter prosecutions led by Sir Norman Williams, President of the Royal College of Surgeons, whose report appeared in June 2018.[5]

Noting widespread concern about gross negligence manslaughter investigations and prosecutions involving medical conduct not bad enough to merit them, the review recommended "revised guidance" for investigators and prosecutors, designed to ensure that due account is taken of "systemic issues and human factors" before health professionals are prosecuted.

But the underlying problem here, surely, is not the lack of guidance but the nature of the current law itself. As everybody knows (or should know), negligence is "gross" if it satisfies the *Bateman* test,[6] which – to paraphrase – means the jury considers it bad enough to deserve punishment. But even as later qualified in *Rose,*[7] which says the jury must be directed to make this finding only if the behaviour was "truly exceptionally bad", this leaves the key issue entirely to the jury. In consequence it is impossible to predict in advance of verdict whether, on any given set of facts, "gross" negligence is present. If, as in the *Bawa-Garba* case, the jury thinks a simple error of professional judgement satisfies the test, the result is a conviction: appeal proof, if the jury was properly directed.

Though widely criticised as circular and uncertain,[8] the *Bateman* test (and its derivatives) seem to be reluctantly accepted as the only possibility there is. If we want the fault element for gross negligence manslaughter to be something worse than simple negligence, but something less bad than recklessness as to death or bodily harm, there is really no other way of doing it.

But this is not so. In their book *Errors, Medicine and the Law*[9] Alan Merry and Alexander McCall-Smith say that a clear distinction could be made between "slips" – medical mishaps that result from simple human error, and "violations" – those resulting from a conscious decision by the medical professional to disobey an accepted rule of proper practice. As an illustration they contrast the facts of *Adomako*, where an unconscious patient died because the defendant anaesthetist failed to notice that the patient's endotracheal breathing tube had become disconnected, and the hypothetical case of a patient who dies in the same way when the anaesthetist, contrary to a basic rule of practice, leaves him in the theatre unattended. In parallel with the Williams study, the General Medical Council has commissioned its own independent review of medical manslaughter prosecutions, which is still ongoing at the time of writing; and the British Medical Association's response to this review contains a similar suggestion.

Unlike the *Bateman-Adomako* test, a test based on this distinction would have solid content and thus be capable of producing results that are consistent and predictable. And it should ensure that conscientious doctors are no longer prosecuted for honest errors of professional judgement made when working under stress.

Manslaughter prosecutions in cases like Dr Bawa-Gaba's may assuage the anger of the grieving relatives, but they do nothing to improve patient safety. What is needed to do this are dispassionate investigations designed to discover what went wrong, and why, in which everyone speaks frankly and those concerned can learn from their mistakes. And a criminal investigation, designed to Name the Guilty Man and lock him up, is more likely to achieve the opposite result.

JRS

1 [2016] EWCA Crim 1841.
2 These are specialist tribunals which, in 2012, took over responsibility from the General Medical Council for adjudicating on issues of fitness to practice.
3 *Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879.
4 It is interesting to consider that drivers of Public Service Vehicles, unlike doctors, are not permitted to work for longer than 4.5 hours without taking a 45-minute break: a legal requirement imposed for reasons of public safety as well as consideration for the health of drivers.
5 *Gross Negligence Manslaughter in Healthcare – The Report of a Rapid Policy Review;* June 2018.
6 "… in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment".
7 [2017] EWCA Crim 1168; [2017] 3 W.L.R 1461.
8 See for example *Smith, Hogan and Ormerod's Criminal Law*, 15th ed (2018), 594.
9 Cambridge University Press, 2001; 2nd ed, 2017.

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