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Archbold Review

Cases in Brief

Gross negligence manslaughter—supply of drugs causing death—duty to seek medical attention—whether breach of duty caused death—test for causation

BROUGHTON [2020] EWCA Crim 1093; 18 August 2020

B was convicted of gross negligence manslaughter. The Crown case was that B, having given his girlfriend, M, controlled drugs and remained with her, owed a duty of care to secure medical assistance as her condition deteriorated to the point where there was an obvious risk of death. B's appeal was allowed, on the basis that the evidence as to whether his negligence caused M's death was insufficient for the case to have been allowed to go to the jury. On appeal, the Crown argued that the proper test in such cases was that the jury must be "sure that the defendant's negligence deprived the victim of a significant or substantial chance of survival that was otherwise available to the victim at the time of the defendant's negligence". This approach was inconsistent with the judgments in *Morby* (1882) 8 QBD 571. In that case, where the judges stated that the prosecution must show that the defendant's breach of duty caused death or that "affirmative proof is required," the context was a criminal prosecution and the criminal standard of proof. The court expressly rejected that it was sufficient to show that there was a significant chance that life would have been preserved. The principle established by *Morby* has not been abrogated in the intervening 140 years, and was approved in *Misra* [2004] EWCA Crim 2375, [2005] 1 Cr.App.R. 21, [70] and *Sellu* [2016] EWCA Crim 1716, [2017] 1 Cr.App.R. 24, [27]. Crown counsel had relied for the formulation of the contended-for test on a passage in *Sellu* which depended on the particular facts of that case, involving a series of alleged failures suggesting a progressively diminishing chance of survival, and grounds of appeal which related to the link between each failure and causation. *Sellu* was not authority for the proposition advanced by the Crown. The prosecution must prove to the criminal standard that the gross negligence was at least a substantial contributory cause of death. That meant that the prosecution must prove that the deceased would have lived in the sense that life would have been significantly prolonged. The court analysed the medical evidence and the timeline of M's deterioration as a result of ingesting the drugs supplied by B. *Misa* was not authority for the proposition that causation was always a matter for the jury whatever the underlying evidence. No issue should be left to a jury unless there was sufficient evidence upon which it could be satisfied so it was sure. This was one of those rare cases (as was *Morby*) where the expert evidence was all that the jury had to assist them in answering the question on causation. That expert evidence was not capable of establishing causation to the criminal standard. At (apparently) the critical time, that evidence was that M was deprived of a 90% chance of survival. That was not enough. Put another way, if an operation carried a personal 10% risk of mortality, both patient and clinicians would be able confidently to say that the chances of survival were very high or very good (to take two phrases used by the expert witness) but none could be sure. Applying the *Galbraith* [1981] 1 W.L.R 1039 test, taken at its highest, the evidence adduced by the prosecution was incapable of proving causation to the criminal standard of proof, and the submission of no case should have been allowed.

Jury—regular taking of verdict of acquittal—judge's discretion to allow verdict to be retaken—test for exercise

RN [2020] EWCA Crim 937; 7 July 2020

RN and her partner CM were both convicted of two counts of causing or allowing serious physical harm to a child contrary to the Domestic Violence Crime and Victims Act 2004 s.5. The route to verdict document was set out as follows in relation to each count, which related to separate

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serious injuries suffered by their baby: "Q1: Are we sure that RN caused [the relevant injury]? If Yes, then she is guilty of count [ ], and you would not need to consider Q2 if no, i.e. you are not sure she caused [the injury], then go to Q2. Q2: Are we sure that RN was aware (or ought to have been aware) that there was a significant risk that [the baby] would be caused serious physical harm by being assaulted by another (here [co-defendant]) …".

(1) At 3.12 pm, the jury without equivocation or dissent, convicted CM on count 2 and acquitted RN. At 3.35 pm the judge indicated to counsel that given more time the jury might be able to reach verdicts on count 1 that afternoon and the jury returned to court and were asked to continue considering their verdicts on count 1. No issue was then raised by jurors as to the correctness of the first verdicts. Approximately 40 minutes later, the judge indicated he had been informed that there was some dissatisfaction with the verdicts already delivered as the foreman thought he had "stumbled" over the answers as regards count 2, mention being made of him not being asked "the right questions" in respect of RN. At 4.25 pm, again without any equivocation or dissent, CM was convicted and RN acquitted on count 1, a new foreman giving the verdicts. Asked by the judge, the foreman confirmed that verdict on count 2 and RN was discharged. Shortly after, it was communicated that the foreman and other jurors had indicated there had been a mistake and that the verdict was incomplete. The foreman was isolated and, as requested, wrote a note, which said: "Count one, question two was not asked. Count two question two was not asked". The jury separated and went home. The following morning, the judge repeated the possible bases of conviction on the two counts. The jury again retired to deliberate on RN alone and 27 minutes later they returned to court and reversed their earlier verdicts, convicting her on both counts. Although it was credible to surmise, as had the judge, that the jury were waiting for a second question, reflecting the alternative basis of conviction on both counts (failure to protect the victim), that was inconsistent with the failure of the jury to express any concern at the time of both sets of verdicts. Thus, there was a lack of clarity as to the reservations described before 4.25. It was not a clear-cut instance of a jury promptly indicating a mistake in the delivery of verdicts, such that the matter was resolved in circumstances excluding the possibility of further deliberations and a change of mind. The foreman had been isolated, so his note may not have reflected all of their views. Furthermore, the jury were expressly asked by the judge to reconsider their verdicts, following which they deliberated for over 25 minutes before returning convictions. The court could not exclude the real possibility that the jury's final verdicts had been influenced by things they heard or discussed after the original acquittals. Although the verdict on count 2 stood unaltered for a longer period of time than that on count 1, the underlying considerations were identical for both counts.

(2) The court considered *Andrews* [1986] 82 Cr App R 148; *Millward* [1999] 1 Cr.App.R 61 and *Tantram* [2001] EWCA Crim 1364, [2001] Crim. L.R. 824. Although in these sort of circumstances, the judge had a discretion, if there had been a material opportunity for further discussion after the verdict in question had been delivered, thereby potentially leading to a change of mind, no amendment to the conviction or acquittal should be permitted. In this context – although it was not necessarily determinative – of clear importance would be whether the jury promptly indicated that the verdict needed correcting, and whether the court thereafter dealt with the issue straight away and before any significant further deliberations occurred, or might have occurred, thereby excluding the risk of a change of view on the part of one or more jurors.

[*Comment: Despite the hesitance expressed by the Court of Appeal, it seems clear that the jury were expecting to be asked the questions as set out in the route to verdict. This is perhaps understandable when there are only two questions, and each represents a clear alternative basis for conviction. It would be interesting to know if other instances of potential or actual confusion between the methodology of a route to verdict and the giving of the verdict arise in the Crown Court.*]

Investigation of crime—police use of automated facial recognition technology—whether compliant with European Convention on Human Rights Art 8—whether breaches Equality Act 2010 s.149 (public sector equality duty)

R (BRIDGES) v CHIEF CONSTABLE OF SOUTH WALES POLICE AND OTHERS [2020] EWCA Civ 1058; 8 August 2020

Overturning the Divisional Court ([2019] EWHC 2341 (Admin), [2020] 1 W.L.R. 672), the use of live automated facial recognition technology (AFR) by the South Wales Police in a number of public places in a trial supported by the Home Office breached European Convention on Human Rights Art.8 and the public sector equality duty (Equality Act 2010 s.149). The AFR technology created biometric data based on digitised measurements of facial features. The challenged use involved a CCTV camera on or near a police vehicle housing the relevant computer equipment which captured images in a variety of public places where large numbers of people were expected to be. From the images, the software identified faces and extracted unique facial features to create a unique biometric template. That was then compared with those contained in a database or "watchlist" of those sought by the police. Where the software produced a match, a police officer would be alerted, and other officers would investigate or make an arrest. As for data retention, facial images not matched were immediately deleted, as was the biometric template, regardless of whether a match was made. The facial images alerted against were either deleted following the deployment or within 24 hours. Match reports including personal information were retained for 31 days.

(1) It was agreed that Art.8(1) was engaged, but the Divisional Court had erred in concluding that the use of AFR passed the test of being "in accordance with the law" in Art.8(2), such as to not constitute a violation of the article. While there was a legal structure including primary legislation (the Data Protection Act 2018), secondary legislation (The Surveillance Camera Code of Practice made under Protection of Freedoms Act 2012 s.29) and locally promulgated policies by the police, this legal framework did not provide sufficient certainty as to either the "who question" – who was added to the watchlist – or the "where question" – the place in which the vehicle and CCTV cameras were stationed. In both cases, the legal framework allowed too broad a discretion to police officers to meet the standard of legality required by Art 8(2). (a) As to the

"who question", it was not suggested that the 2018 Act was sufficient on its own, and, although it appeared possible that the Code of Practice could deal with who should be on a police force watchlist, it did not. It was not for the court to say whether such policies should be set out in a national document rather than in local force documents, but it might be prudent for there to be at least consistency in the content of local policies and that might be the appropriate subject of an amendment to the Code. The terms of the local South Wales Police policy governing inclusion on the watchlist specified not only those wanted on suspicion of an offence or on a warrant, and vulnerable people, but also "other persons where intelligence is required." While the first three categories were objective, the final was not, and left too broad a discretion in individual officers. (b) As to the "where question", the local policies provided no clear normative requirements as to where deployment could take place, and such descriptive indications as were given were very broad and without apparent limits. (c) In the context of the legality requirement, the court emphasised that it was a crucial feature of the system as operated that images which did not produce a match were automatically and almost instantaneously deleted without human observation. The court hoped that that feature would not simply be set out in a policy document by way of description, as in the instant case, but that it would be made clear that it was required for there to be an adequate legal framework for the use of AFR.

(2) A ground of appeal attacking the adequacy of the data protection impact assessment required by s.64 of the 2018 Act was inevitably made out, as the assessment was written on the basis that there had been no violation of Art.8.

(3) The court considered the history of the public sector equality duty and the principles set out in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 60, [26] (and approved in *Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811, [73]). The court emphasised the importance of the duty's process requirements, and concluded that the reasons advanced by the Divisional Court for accepting that the duty had not been breached were inadequate. There was general evidence that some AFSs available on the market were capable of discriminating against black and minority ethnic people and women, as a result of inadequacies in the data sets used to train the systems. South Wales Police had breached the duty. They had not done all that they could reasonably have done to fulfil the duty by ensuring that the system in use did not discriminate. The court expressed the hope that, as AFR was a novel and controversial technology, all police forces that intended to use it in the future would wish to satisfy themselves that everything reasonable which could be done had been done in order to make sure that the software used did not have a racial or gender bias.

(4) Grounds of appeal based on Art.8(2) – proportionality and on whether the Divisional Court should have come to a conclusion on whether the Police had in place a document within the meaning of s.42 of the 2018 Act – were not successful.

[*Comment: The account of the history, nature and requirements of the public sector equality duty at, particularly, [173] to [182] may be of general interest.*]

Sexual offences—consent—Sexual Offences Act 2003 s.74—deception as to fertility—whether capable of vitiating consent

LAWRENCE [2020] EWCA Crim 971; 23 July 2020

A lie as to whether a man has had a vasectomy, when operative to secure consent to sexual intercourse, could not vitiate consent. *Assange v. Swedish Prosecution Authority* [2011] EWHC 2849 (Admin); *R (F) v DPP* [2013] EWHC 945 (Admin), [2014] QB 581; *R v B* [2006] EWCA Crim 2945, [2007] 1 W.L.R 1567, *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508, [2019] QB 1019 (Admin); *Dee* [1884] 14 LR Ir 468; *Clarence* [1882] 22 QBD 23; *Flattery* [1877] 2 QBD 410; *Elbekkay* [1995] Crim LR 163; *Linekar* [1995] QB 250 and *McNally* [2013] EWCA Crim 1051, [2014] QB 593 considered.

This case is considered in detail by Dr Jonathan Rogers on page 4 of this issue.

SENTENCING CASE

Credit; absconding

WILLIAMSON [2020] EWCA Crim 1085, 23 July 2020

The applicant sought leave to appeal against sentence. He had been sentenced to 16 years and 10 months' imprisonment following his guilty plea to the offence of conspiracy to rob, as well as a concurrent sentence of three months' imprisonment for an offence of failing to surrender to custody. The applicant submitted that his sentence was manifestly excessive because there was an unfair disparity between his sentence and the sentences imposed on two of his co-defendants, and that insufficient credit had been given for his guilty plea.

The applicant had received credit equivalent to that which he would have received had he pleaded on the first day of trial. He had pleaded guilty at his PTPH. Relevant history is that he had been served with a requisition to appear at Poole Magistrates' Court on 5 July 2019. He failed to appear and a warrant was issued. He was arrested on 31 October. On 2 November he appeared before the Magistrates' Court and was sent to the Crown Court. His PTPH took place on 28 November 2019.

The Court concluded that there was no unfair disparity between the applicant's sentence and that of his co-defendants. The sentencing judge had explained clearly why a lower provisional sentence was taken in relation to two of the applicant's co-defendants (see [24]-[26] of the judgment).

Regarding credit, the Court stated that whilst it was "technically correct" that the applicant entered his guilty plea at his own PTPH hearing, where normally 25 per cent credit would be allowed, that ignored the reality of this case. Section 144 of the 2003 Act and the Sentencing Council Guideline focuses on the stage at which the defendant indicates a guilty plea in the proceedings against them. In this case, proceedings began with the requisition served in July 2019. He failed to appear and went on the run. He was arrested at the end of October 2019. In these circumstances, there was no error of principle in confining his credit for plea to 10 per cent.

Only one reported case raised a similar issue: *Ward* [2013] EWCA Crim 2667. In that case, the Court of Appeal held that the sentencing judge could take the defendant's fail-

ures to comply with the criminal justice process into account in giving a lesser reduction for his guilty plea.
The proper approach to be taken will depend on the circumstances of the individual case. There will be some cases where it is appropriate to allow significant credit for plea in relation to the substantive offence, and to pass a consecutive sentence for a Bail Act offence. But in other cases, reducing the amount of credit given will be just and proportionate. If the absconding is reflected in a reduction in credit for plea there should be no additional penalty for any Bail Act offence.
The Court concluded that the ground of appeal in relation to credit was not arguable. The applicant had sought to evade justice altogether. There could be no complaint that his very belated and enforced engagement with the trial process resulted in only very limited credit for his plea. Leave to appeal was granted in relation to a mathematical error in the calculation of the credit to be afforded. This reduced the sentence by eight months. The sentence of sixteen years, ten months' imprisonment was quashed and substituted with a sentence of sixteen years, two months' imprisonment.

Case in Depth

R v Lawrance – the right outcome

By Jonathan Rogers[1]

Suppose that a man seeks unprotected sexual intercourse with a woman. He is asked first to confirm that he had had a vasectomy, as he had previously mentioned. He falsely confirms this, and thereby procures her agreement. The deception later becomes obvious when the woman becomes pregnant. According to the Court of Appeal in *Lawrance*[2], presided over by the Lord Chief Justice, he does not commit rape.
The decision is not to everybody's taste and has already attracted critical comment.[3] In my view, by contrast, the outcome the court reached in this case was the right one; although with due respect the Court's reasoning could have been improved on.
As we shall see, the Court drew a distinction between (a) deception about facts related to the sexual acts in question, although the acts in question were agreed to, and (b) the performance of acts not agreed to. In the Court's view, only the latter makes the activity non-consensual under s.74 of the Sexual Offences Act 2003 (SOA). In what follows I hope to show how the distinction should be drawn and why it matters.

What the Court said

The starting point is that the SOA does not provide explicit guidance to the right outcome. Only in s.76 SOA is the effect of deceptions even mentioned. In this section it is provided that deception negates consent in specified circumstances, and in subsection (2):

> (2) The circumstances are that—
>
> (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
>
> (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

In *Assange v Swedish Prosecution Authority*[4] the High Court had already decided that a deception as to whether a condom would be used did not affect the "nature" of the act of sexual intercourse under s.76(2)(a) SOA. In *Lawrance,* it was tacitly accepted that *Assange* could not be distinguished on this point and so the debate at trial and on appeal was whether the complainant had given consent for the purposes of s.74 SOA. As is well known, s.74 provides that

> ... a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

At trial, the prosecution relied on two previous cases where there had allegedly been previous discussion between the parties prior to intercourse. In *Assange,* the High Court had held that there would be no consent under s.74 where a man had unprotected sexual intercourse, knowing that his partner had insisted that he should wear a condom. Two years later, in *R (F) v DPP*[5] the High Court had held that it would be rape for a man to deliberately ejaculate into his wife, having understood that her agreement to intercourse was predicated on his at least attempting to withdraw beforehand. The Crown's argument in *Lawrance* was that the instant case was indistinguishable. At trial, the judge in *Lawrance* accepted this and (in the words of the Court of Appeal[6]) "concluded that the distinction which the appellant sought to draw between the consequences of the act of intercourse and the nature of the act itself was 'artificial'".[7]
With this the Court of Appeal itself disagreed. It rephrased the critical distinction in these terms

> The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it.[8]

On the facts of *Lawrance*, everything that he "physically performed" was as anticipated. To make it yet clearer, the Court confirmed that a man who has HIV but does not tell his sexual partner of it also does not commit rape,[9] no matter what the level of deception might have been.

1 Lecturer in Criminal Justice, University of Cambridge.
2 [2020] EWCA Crim 971.
3 See Natalie Wortley and Carole McCartney, [2020] 29 *Criminal Law Week* 7.
4 [2011] EWHC 2849 (Admin).
5 [2013] EWHC 945 (Admin).
6 Fn 2 above, at [14].
7 At [14].
8 Ibid at [37].
9 *R v B* [2006] EWCA Crim 2945.

Why the Court's reasoning is problematic

Three difficulties can be noted with the decision. Some may use them to undermine the outcome. But in my view the outcome can be maintained if the reasoning is adjusted.

The first difficulty is that when the Court refers to deceptions about the "physical performance of the act" it means nothing other than to say that there was no "agreement by choice" to the "acts" that were done. We do not need to talk of deceptions in such cases. At most, they are evidence of that crucial non-agreement.

Second, it can be no easy matter to decide when a person has "agreed" to what the other "did". The Court itself does not explain what it meant by "physical performance of acts".

Third, the Court does not explain why the distinction they made between this case and *F* matters. Yet both men were aiming for the pleasures of unprotected intercourse leading to ejaculation, unconcerned about their partners' concerns about avoiding pregnancy. An explanation seems warranted as to why one man should be criminally liable but not the other.

I shall now address each of these difficulties in turn.

***Assange* and *F* as cases of lack of agreement**

Whenever there is a "deception" about the "physical performance" of the acts in question, we can more simply say that D did not "physically perform" the "acts" that had been agreed to. In the language of s.74 SOA there was no "agreement by choice" to the "relevant act(s)".

That being so, absence of agreement is what matters – though hearing evidence of a deception might persuade a court that the complainant had not agreed to what actually occurred.

In my view this is the best way to explain *Assange*. To do so need not even involve a reconstruction of the reasoning. The High Court only said that deceptions may be "relevant" or be "taken into account" when considering the presence of consent under s.74. It arguably more clearly rested its decision on the finding that there was no consent to sex without a condom, for it said

> It would plainly be open to a jury to hold that, if (the complainant) had made clear that she would only consent to sexual intercourse if Mr Assange used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent.[10]

On the facts of *F*, the husband allegedly said to the complainant, just before ejaculation, that he would ejaculate inside her "because you are my wife and I'll do it if I want".[11] So, far from "deceiving" her about his willingness to withdraw, he was all too frank about his disinterest in doing what she had agreed to. The High Court accordingly referred to *Assange* but said nothing about the law on deceptions; and it rested its finding on a lack of consent under s.74 SOA.

So understood, neither *Assange* nor *F* serve as good authority for deceptions making a difference where there *was* "agreement" to the acts done. Instead they were cases of straightforward non-agreement. Further, if *Assange* and *F* are the only cases where (according to *Lawrance*) deceptions matter under s.74 SOA (as opposed to s.76 SOA), then there seems to be no scope for deceptions to negate (otherwise valid) consent under s.74 at all.

10 Fn4 above at [86].
11 Fn5 above at [15].

The Court in *Lawrance* surely meant to restrict deceptions under s.74. It not only affirmed the case of *B*[12], but it also quoted at length from the High Court decision in *R (Monica) v DPP*[13] which had already discouraged a "common sense" approach to finding operative deceptions under s.74 SOA. It might not have appreciated that by restricting deceptions to "physical performances of acts", it was making deceptions altogether irrelevant in the context of s.74; but then again, it might well have done.

Incidentally, the analysis that the practice of a deception might simply help a court to conclude that the act done was not agreed to, in its ordinary understanding of "agreement", also applies to the other elements in s.74, viz. the "freedom" and "capacity" to agree. This should help to explain *Jheeta*[14].

Here, the defendant deceived the complainant into believing, variously, that she would be beaten up by others or fined by the police if she did not have sex with him. The deceptions in themselves did not defeat liability. But the Court of Appeal inferred that the complainant consequently felt coerced and thus lacked the necessary "freedom" to choose whether to agree. In doing so, it used the concept of "freedom" in its ordinary way (absence of coercion).

What does it mean to agree to the performance of an act?

We return to ascertaining agreement to the "physical performance" of the acts done.

In many cases, parties do not discuss in words exactly what they are agreeing to; and in such cases, there is a wide starting ambit of agreement and/or of reasonable belief in agreement. Often the best interpretation will be that each means to allow the other to explore their body in any way they wish, until such time as agreement might be withdrawn and the parameters become clearer.

But where there is verbal discussion, and certain acts are prohibited or required to be performed in a certain way, then the scope of agreement (and reasonable belief in agreement) narrows from the start. But precisely what can be expected from such discussions?

First, we must distinguish expressions of wishes from acts which are said to be forbidden. No one expects a man to be liable for rape if he fails to give full satisfaction: and exhortations to that effect should only be regarded as expressions of wishes, however they may be phrased. The same is true in relation to consequences (such as pregnancy) which the complainant may wish to avoid. This already explains why there was agreement by the complainant to the acts done in *Lawrance*.

Second, if it is forbidden to perform a specified act, or only agreed to if done in a particular way, the limitation only has effect as far as the other person has capacity to give effect to it while doing any permitted sexual acts. This was the case in *Assange* and in *F*; each man had capacity to perform intercourse whilst wearing a condom in the first case and in the second to at least attempt to withdraw before ejaculation; but neither did so.

This matters when we consider *McNally*.[15] McNally inserted her fingers into another's girl vagina. The complainant had

12 Fn9 above.
13 [2018] EWHC 3508 (Admin).
14 [2007] EWCA Crim 1699.
15 [2013] EWCA Crim 1051.

given McNally licence to explore her body in a general way which evidently included this. She was under the impression that McNally was a boy, and would not otherwise have agreed; but that does not affect the fact of her agreement to the digital penetration that was performed, because McNally, as a girl, had no capacity to perform this as a male person.

The Court in *Lawrance* appeared to regard its decision as consistent with the conviction in *McNally,*[16] but it is not clear that this is so. The Court in *Lawrance* did not explain how McNally's assumed deceptions related to the "physical performance of the acts". Nor had the Court in *McNally* relied on this being so. In fact, the Court in *McNally* spoke of the complainant's "freedom" being "removed by the appellant's deception."[17] But this makes a nonsense of the word "freedom", which should be about the measure of resistance to perceived coercion (whether physical or otherwise). There was no coercion of any kind in *McNally*.

Should the facts of *McNally* arise again, I believe that judges should consider themselves at liberty to regard *Lawrance* as conflicting with *McNally*. They should then prefer *Lawrance*.

Why the distinction from *Assange* and *F* matters

The final difficulty with *Lawrance* is that the Court does not explain why it is not "artificial" to label as a rapist the man who deliberately ejaculates against his partner's wishes, whilst not so treating the man who simply deceives his partner about his fertility. But I believe that there is an explanation.

Let us try to capture the essential wrongness of non-consensual sexual activity. The most plausible account, it seems to me, is that the offender uses the victim as an object for his own, or for another's, sexual gratification and in so doing gains greater sexual gratification than the other was prepared to afford him. It should be possible to explain every case where consent is absent under the definition in s.74 SOA in this way.

This is, surely, not a very controversial account. But, crucially, it supports the distinction between the facts of *Lawrance* and those of *F* and *Assange*. Women who insist on a condom likely realize that the men expect to obtain less satisfaction from sex with a condom, but decide to limit the satisfaction that the men may take from their encounter, on account of their wish to avoid pregnancy. In such cases, the man can be said to gaining more gratification than his partner was prepared to afford him when he removes the condom, or (as in *F*) deliberately ejaculates inside her vagina; and his liability for rape is in each case defensible.

By contrast, the deceived complainant in *Lawrance* was already prepared to afford all the sexual gratification that the other wanted. The same is true of the complainant in *McNally*, and this reinforces the argument that agreement, and consent, was present under s.74 SOA on the facts of *McNally*. Such complainants were not used for unpermitted sexual gratification, and rape or other non-consensual offences should not apply.

Conclusions

We should now abandon any notion of deceptions vitiating a consent which otherwise arises within s.74 SOA. Deceptions might assist in showing that one of the elements in s.74 is missing in any case, but we must still apply our ordinary understanding of those terms "agreement", "freedom" and "capacity" under s.74 SOA. Whether courts will now be more willing to widen the scope of the deceptions provided for under s.76 SOA remains to be seen.

This is not to say that the law could not be improved. It is easy to imagine dissatisfaction with some deceivers, including Lawrance, escaping all liability, and many solutions may sound plausible. But for now, we must apply the SOA, and the statute surely does reserve the special treatment of deceptions to the narrow sphere of s.76.

Still, we can live with the statute. When we think in terms of offenders gaining sexual gratification, or levels of gratification, from victims who were not willing to afford them, we can justify even the resulting distinction between *F* on the one hand, and *Lawrance* on the other. Let us follow *Lawrance* until such time as the law is revised by the legislature.

16 Fn15 above at [36].
17 Fn15 above at [26.]

Feature

Logic and experience

By Neil Hickman[1]

Summary

This article considers the problems presented by historic allegations of abuse. It is recognised that the general introduction of a limitation period in respect of criminal charges would be regarded as unacceptable, and would, in any event, be an inflexible measure. However, it is suggested that in cases which appear to depend solely on whether the complainant is to be believed, the criminal courts should be far more ready than is currently the case to stay stale cases as being incapable of being fairly tried, and in an appropriate case even to direct an acquittal.

1. Introduction

"The life of the law has not been logic; it has been experience" observed Holmes J.[2] Having taken my leave of the Bench some 32 years after I first sat part-time as a Deputy County Court Registrar, I would like to consider one area where I certainly struggle to discern logic. It concerns the fraught subject of alleged historical abuse.

Proof of such an allegation may depend solely on the recollection of the complainant, and on whether that recollection is reliable.

This issue has been at the centre of two high profile recent

1 Neil Hickman is a retired District Judge.

2 O. W. Holmes Jr., *The Common Law*, (Boston: Little, Brown & Co., 1881), p 1.

cases; that of Carl Beech, who made a series of increasingly lurid allegations of historic abuse against a number of eminent public figures before being convicted as a serial liar and fantasist and jailed,[3] and that of Cardinal George Pell, who was convicted on two charges of historic abuse and whose conviction was quashed by the High Court of Australia.[4]

2. The approach of the civil and family courts to evidence of old recollection.

In the civil and family courts, where I sat, professional judges seek to determine issues on a balance of probability. And those professional judges are distrustful of recollections going back many years. Thus Leggatt LJ, as he then was,[5] in *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd* said

> An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called "flashbulb" memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description "flashbulb" memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
>
> …the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections… Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.[6]

The family court has taken a similar view. Thus Peter Jackson J (as he then was) in *Lancashire CC v C, M & F (Children: Fact-finding)*[7] said

> As memory fades, a desire to iron out wrinkles may not be unnatural – a process that might inelegantly be described as "story-creep" may occur without any necessary inference of bad faith.

One may not need "a century of psychological research into the nature of memory". George Eliot observed as long ago as 1861[8] that

> …memory, when duly impregnated with ascertained facts, is sometimes surprisingly fertile…

In *Catholic Child Welfare Society (Diocese of Middlesbrough) v CD*[9] the Civil Division of the Court of Appeal overturned a first-instance decision to disapply the Limitation Act 1980[10] in an abuse case. A report from the eminent forensic psychiatrist Professor Maden is quoted in which we read

> There are serious problems for the expert arising from the fact that the material events took place over [20] years ago. Memory is not reliable over such long periods of time. Recall is an active mental process in which memories tend to become distorted with time to fit the individual's beliefs, needs and values. Both the content and the meaning of recollections often change with time. Events can and do acquire a significance years later that they did not have at the time.[11]

Matters which influenced Lewison LJ (with whom the criminal law specialist Rafferty LJ concurred) included[12] that the complaint was uncorroborated, contradicted previous statements, and was at variance with contemporaneous documents; and that

> the defendants were exposed to the real possibility of significant prejudice in their ability to defend the claim so long after the event, and without the ability to call relevant witnesses.

3. The approach of the criminal courts

In the criminal courts, of course, proof is supposed to be "beyond reasonable doubt", or in the currently fashionable terms, "so that you are sure". And sometimes a jury will inevitably get it wrong; but the acceptance of that fact by Elias J (as he then was) in *R (Roberts) v Secretary of State for the Home Department*[13] is conspicuous by its rarity. He refers to "anyone who has suffered the grave misfortune to be wrongly committed of such terrible crimes, *and there will inevitably be such people*."[14] [Emphasis added]

Judges, of course, also get it wrong. As Sedley LJ famously observed in *Secretary of State for the Home Department v AF*

> As Mark Twain said, the difference between reality and fiction is that fiction has to be credible… [Y]ou cannot be sure of anything until all the evidence has been heard, and… even then you may be wrong.[15]

3 The sentencing remarks of Goss J (26 July 2019) may be found at: https://www.judiciary.uk/wp-content/uploads/2019/07/BEECH-Sentencing-Remarks-26.7.19-003.pdf
4 *Pell v R* [2020] HCA 12, on appeal from [2019] VSCA 186.
5 He became a Justice of the Supreme Court on 21 April 2020.
6 [2013] EWHC 3560 (Comm) at [15]–[18], 22.
7 [2014] EWFC 3 at [9].
8 *Silas Marner*, Ch.8.
9 [2018] EWCA Civ 2342.
10 Under s.32 of that Act.
11 [2018] EWCA Civ 2342 at [26].
12 See [2018] EWCA Civ 2342 at [78], [79].
13 [2004] EWHC 679 (Admin).
14 [2004] EWHC 679 at [41].
15 [2008] EWCA Civ 1148, [2009] 2 W.L.R 423 at [113].

However, it is possible that it is easier for a professional judge to accept that, in the wise words of Sir Mark Hedley

> [T]o say that I do not know is a statement neither of judicial nor forensic failure; it is merely a recognition of the limits of the available evidence.[16]

Generally, though, the idea that a jury can try a stale case fairly and that a jury's decision to convict must at all costs be respected appears deeply embedded. Thus in *CPS v F* [2011] EWCA Crim 1844, Lord Judge CJ, quoting his predecessor, said that [in *Attorney General's Reference (No 1 of 1990)*][17]

> …Lord Lane CJ stressed that
>
> The trial process itself is equipped to deal with the bulk of complaints which have in recent … cases founded application for a stay.

It may respectfully be suggested that Lord Lane was not so much stressing a point as repeating an article of faith.
Some historic abuse cases are extreme indeed – in *Cooper*,[18] where the convictions were quashed, the allegations were some 30 years old; in *Conn*,[19] where they were upheld, the lapse of time was between 31 and 40 years; and in *GB*,[20] D pleaded guilty to offences of incest committed 53 years previously when he was a teenager.
It is acknowledged that the task of the defence is difficult. Lord Woolf CJ eloquently identified the courts' dilemma in *B*[21]

> We must do justice to the prosecution, whose task it is to see that the guilty are brought to justice. We must also do justice to the victim. In this case we are particularly conscious of the position of the victim. If she is right, she was treated in a most disgraceful way by someone whom she should have been entitled to trust: her stepfather. For years, for understandable reasons, … she felt unable to make public what had happened. She is entitled to justice as well. But we also have to do justice to the appellant. At the heart of our criminal justice system is the principle that while it is important that justice is done to the prosecution and justice is done to the victim, in the final analysis the fact remains that it is even more important that an injustice is not done to a defendant. It is central to the way we administer justice in this country that although it may mean that some guilty people go unpunished, it is more important that the innocent are not wrongly convicted.
>
> In this case it has to be recognised that because of the delay that occurred, in our judgment the appellant was put in an impossible position to defend himself. He was not, as [counsel] says with force, able to conduct any proper cross-examination of the complainant. There was no material he could put to the complainant to suggest that she had said that something had happened on one occasion which could be established to be incorrect. There was no material in the form of notes that were given to the doctors which showed that she had changed her account. All that the appellant could do was to say that he had not committed the acts alleged against him. [Counsel] says that to say to a jury, when faced with allegations of the sort that were made here, "I have not done it" is virtually no defence at all.

And, while recognising that this might in a sense result in injustice to the complainant, the Court of Appeal quashed the conviction.
A number of early cases saw the courts ready to stay prosecutions arising from very old allegations. Thus in *R v Telford JJ, ex parte Badhan*[22] a prosecution for a sexual offence alleged to have been committed some 15 years previously was stayed, Mann LJ observing briskly that

> Where the period of delay is long, it can be legitimate for the court to infer prejudice without proof of specific prejudice.

That decision was followed in *JAK*[23] where a prosecution for rape and indecent assaults alleged to have been committed some twenty years previously was stayed.
By 2011, however, the Court of Appeal had comprehensively retreated from that position, and in *CPS v F*[24] a five-judge court presided over by Lord Judge CJ declared that the only authorities which should henceforth be considered when a stay of proceedings was sought on grounds of delay were *Galbraith*,[25] *Attorney General's Reference (No 1 of 1990)*[26], *Stephen Paul S*[27] and *CPS v F* itself. It was stated that even where delay was unjustifiable, a permanent stay should be the exception rather than the rule, and that where there was no fault on the part of complainant or prosecution, the grant of a stay would be very rare. No stay should be granted in the absence of serious prejudice to the defence so that no fair trial could be held – and it was implicit that the readiness to infer serious prejudice which was shown in *Badhan* would be shown no longer.
Thus Moses LJ in *Neill*[28]:

> As anybody defending in these cases knows, it is extremely difficult to find purchase in the evidence successfully to cross-examine when a series of undated, unspecific allegations are made by a young girl who is perhaps inevitably vague in the complaints that she makes.

In that case, counsel was in fact able to cross-examine to some considerable effect, but the defendant was convicted after a summing-up which the CA condemned as long, rambling and emotive and as "what can only be described as putting forcefully the case for the Crown".[29] Yet the convictions were upheld, as they were in *Howeson*,[30] a case tried by the same judge with a summing up which, in Hickinbottom LJ's studiedly diplomatic language, "… [a]s in *Neill*, … fell short of the optimal."[31]
Perversely, it appears that a defendant may even be better placed if the trial process fails than if the case is tried impeccably. Thus in *SC*[32] convictions in relation to allegations going back some 40 years were quashed. The agreed bad character evidence regarding the defendant was described as breathtaking. The defendant had pleaded guilty to other charges of incest and indecent assault. The Judge's charge to the jury was "full, fair and balanced".[33]

16 *AA & 25 Ors (Children)* [2019] EWFC 64 at [65].
17 [1992] 1 QB 630.
18 [2019] EWCA Crim 43.
19 [2018] EWCA Crim 1752.
20 [2015] EWCA Crim 1501.
21 Sub nom. *B, R v* [2003] EWCA Crim 319.
22 [1991] 2 QB 78.
23 [1992] Crim LR 31.
24 [2011] EWCA Crim 1844.
25 [1981] 1 W.L.R 1039.
26 [1992] 1 QB 630.
27 [2006] EWCA Crim 756.
28 [2013] EWCA Crim 2617 at [11].
29 [2013] EWCA Crim 2617 at [14].
30 [2018] EWCA Crim 2503.
31 [2018] EWCA Crim 2503 at [35].
32 [2018] NICA 39.
33 [2018] NICA 39 at [16].

But, unbeknown to the prosecution, the complainant had been raped (not by this defendant) when she was 16. And, said Treacy LJ in the Court of Appeal:

> … we cannot possibly know what she may have said when questioned about these matters or measure its impact on a reasonable and properly directed jury.[34]

This comment would make sense if it could be assumed that lay juries are gifted with a perceptive understanding of the psychology of rape victims. But what basis is there for so thinking?

A case may depend entirely on a jury feeling able to assess the complainant as being a witness of truth, an exercise which Professor Maden in the *Middlesbrough*[35] case suggested verged on the impossible.

In *CPS v F*, Lord Judge quoted with approval from *E(T)*[36]

> as long as juries were vested with responsibility for deciding the verdict, we must have confidence that they will make allowances for the difficulties faced by a defendant who can only say "I didn't do it"…

This, however, does not begin to address the problem identified in *Gestmin*, that even with an honest witness, old recollections may simply not be reliable.

When the *Pell* case was before the Supreme Court of Victoria[37], Weinberg JA, the most experienced criminal lawyer on the court and a former Director of Public Prosecutions, forensically dissected the jury's finding of guilt (in respect of assaults said to have occurred over 20 years previously) in a monumental dissenting judgment. He drew attention to the fact that some twenty witnesses, all of them accepted as being honest people, had given evidence that suggested the complainant's account to be physically or logistically impossible. And, he observed

> In the present case, the prosecution relied entirely upon the evidence of the complainant to establish guilt, and nothing more. There was no supporting evidence of any kind from any other witness. Indeed, there was no supporting evidence of any kind at all. These convictions were based upon the jury's assessment of the complainant as a witness, and nothing more.[38]

The majority, however, concluded

> [S]enior counsel for the Crown opened his oral submissions by asserting that A was "a very compelling witness. He was clearly not a liar. He was not a fantasist. He was a witness of truth".
>
> In our view, that submission should be upheld. The jury were entitled to reject the falsity contention…
>
> Throughout his evidence, A came across as someone who was telling the truth…[39]

In other words, simply that the complainant's allegations were "credible and true". Does that form of words sound familiar? It should do, for I have quoted the language used[40] by the Police early in Operation Midland to describe Carl Beech.

When the *Pell* case reached the High Court of Australia,[41] a unanimous seven-judge court observed that

> As the Court of Appeal majority encapsulated it, the prosecution case was that the evidence of the witnesses apart from [the complainant] left open a realistic *possibility* that the offending that he described had occurred (Emphasis in the original).

That, however, meant that the Court was asking itself the wrong question, and effectively reversing the burden of proof. Only if the Court (or the original jury) was satisfied that the offending behaviour *had in fact* occurred could it be right for the Cardinal to be convicted. And the High Court said firmly that

> The unchallenged evidence of the applicant's invariable practice of greeting congregants after Sunday solemn Mass, and the unchallenged evidence of the requirement under Catholic church practice that the applicant always be accompanied when in the Cathedral, … was evidence which ought to have caused the jury, acting rationally, to entertain a doubt as to the applicant's guilt.

Even accepting that the majority of complaints about historic abuse are well-founded, the problem for a court dealing with a specific case is not "are complainants in general to be believed?" It is "is the recollection of *this* complainant to be believed as it concerns *this* defendant?" And there are two reasons why it may not be right for it to be believed. One is that "Events can come to be recalled as memories which did not happen at all." The other is of course that sometimes witnesses lie.

In *Bryant*[42], after the defendant had been convicted by a jury – and had his sentenced increased as "unduly lenient" – fortuitously the complainant made demonstrably false claims in seeking compensation through the civil courts. His medical records then emerged in which

> over a period from 2000 to 2010 the complainant in this case had to seek medical attention from his GP in relation to what can only be described as his being a chronic liar.

At which point his conviction was then quashed.

4. A limitation period for criminal charges?

Any suggestion of a general limitation period in respect of criminal charges would stand no chance of acceptance in the present climate of opinion in this country, even though it is a feature of many legal systems, notably in several states of the US.

A limitation period would, in any event, be an inflexible remedy. It has to be recognised that in some cases, defendants admit the truth of very old allegations – as, for example, in *Cooper*[43] where the defendant

> … sent letters to the complainant, her sister and their mother in which he apologised for his behaviour describing it as wicked, horrible and inexcusable. He claimed that he had been feeling guilty for a long time.[44]

In many cases there proves to be independent corroboration

34 [2018] NICA 39 at [44].
35 See Note 9.
36 [2004] 2 Cr.App.R 36.
37 *Pell v R* [2019] VSCA 186.
38 [2019] VSCA 186 at [925].
39 [2019] VSCA 186 at [90]—[91], [95].
40 As quoted, for example, in the report by Martin Evans in *The Daily Telegraph*, (18 December 2014), retrieved 23 October 2019.
41 *Pell v The Queen* [2020] HCA 12.
42 *The Daily Telegraph*, 20 July 2016; *Day v Bryant (declaratory relief - costs - QOCS)* [2018] EWHC 158 (QB).
43 [2017] EWCA Crim 393, [2017] 2 Cr App R (S) 18, from [53] onwards.
44 [2017] EWCA Crim 393, [2017] 2 Cr App R (S) 18, at [55].

available even where the allegations are very old. The defendant may have a series of previous convictions which are admissible under ss.101 and 103 of the Criminal Justice Act 2003.[45] There may be other genuinely independent complainants.[46]

5. Conclusion: an alternative approach

However, it may reasonably be suggested that, in cases which appear to depend solely on whether the complainant's evidence is reliable (a less emotive and more relevant expression than "is to be believed"), the criminal courts should be far more ready than is currently the case to stay stale cases as being incapable of being fairly tried, or even to withdraw such cases from the jury. In a series of decisions starting with *Turnbull,*[47] the courts have sought to protect defendants from weak identification evidence. If a case against a mentally handicapped defendant depends wholly upon confessions which are unconvincing to a point where a jury could not properly convict on them, it should be withdrawn from the jury.[48] If a case depends wholly *or partially* upon hearsay "so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe" the judge is given express power by statute[49] to direct an acquittal. Indeed, there is House of Lords authority[50] for the proposition that

> if a judge is satisfied that there is no evidence before a jury which could justify them in convicting the accused and that it would be perverse for them to do so, it is the judge's duty to direct them to acquit.

In asking whether a jury's verdict of guilty would be unreasonable in the *Wednesbury* sense,[51] as the High Court of Australia had the courage to do, the judiciary no more usurps the function of the jury than the Administrative Court usurps the functions of the executive by subjecting perverse administrative decisions to judicial review.

The current approach appears to entail the view that while a professional judge cannot safely find a case proved to the civil standard, a lay jury – possibly "assisted" by a summing up like those in *Howeson* and *Neill* – can safely find the same case proved to the criminal standard on the same evidence. That, reverting to Holmes J, lacks logic. And for someone like David Bryant, the experience it brings in its wake is the experience of injustice.

45 As to which, of course, see *Hanson* [2005] EWCA Crim 824.
46 Though this may bring its own difficulties – see, for example, *Alan V* [2003] EWCA Crim 3641, *Adams* [2019] EWCA Crim 1363; and the existence of another complainant, who had since died after retracting his complaint may have influenced the decision to prosecute in *Pell*.
47 [1977] QB 224.
48 *R v McKenzie*, *The Independent*, 24 July 1992.
49 Criminal Justice Act 2003, s. 125.
50 *Wang* [2005] UKHL 9 per Lord Salmon.
51 I.e. a decision that no reasonable person acting reasonably could have made – *Associated Provincial Picture Houses Ltd v Wednesbury* Corporation [1948] 1 KB 223.

White Paper: *A Smarter Approach to Sentencing* (Sept 2020)

A brief comment by Professor Nicola Padfield, Fitzwilliam College, Cambridge[1]

My summary analysis might divide the proposals under three headings:

(i) Deeply punitive (and expensive, often inappropriate and unduly complex)

Longer tariffs for many discretionary life sentences (two-thirds determinate equivalent, not half); increasing the time sex offenders serving the weirdly-named "SOPC" (sentence for offenders of particular concern) must spend in prison; abolishing automatic halfway release for most[2] sex and violent offenders who get four-seven years (already changed for over seven-year sentences simply by Statutory Instrument[3]; a new power to prevent automatic early release for offenders who become a terrorist risk during a non-terrorist sentence; whole life orders extended, including for those aged between 18 and 20 (perhaps unlawful as well as morally wrong? See *R (Smith) v Secretary of State for the Home Department*[4] and various ECtHR cases); increased starting points for murders committed by persons under 18 years of age; tougher rules on minimum terms for repeat burglars and possessing a knife etc; much more "tagging" including "House Detention Orders" (!) and "location monitoring".

(ii) Some probably positive (not new ideas, and all require significant funding and plenty of "piloting")

Community sentence treatment requirements; some unpaid work hours served in a work-related educational or training capacity; criminal records reform, reducing the amount of time some young people are required to disclose criminal records to prospective employers; better quality pre-sentence reports (PSRs); "encouraging" more deferred sentencing; reducing use of remand for young offenders; "problem-solving courts".

(iii) Some could be positive or negative

Reducing options for out-of-court disposal to two: community resolutions and conditional cautions; "empowering" probation: beware the dangers of unaccountable powers!

The Government recognises the need for huge improvement, but is there any evidence that the important things will happen? As the Prison Reform Trust concludes, "There's nothing smart about rehashing punitive rhetoric and hoping for a different outcome".[5]

Many more concerns are raised by the latest Ministry of Justice consultation on *Strengthening the Independent Scrutiny Bodies through Legislation*[6] and the Home Office's *Consultation on Serious Violence Reduction Orders.*[7] If there is money to spend, let's prioritise (i) cutting the backlog of cases awaiting trial,[8] (ii) hugely improving prisons (not just the estate but regimes as well), and (iii) improving support for ex-offenders post-release.

1 With thanks to Tom Hawker-Dawson for wise comments; all errors and opinions are my own.
2 See the impact assessment, and its Annex A, as well as the White Paper itself – these are particularly complex proposals, particularly difficult to understand.
3 *Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020.*
4 [2005] UKHL 51.
5 http://www.prisonreformtrust.org.uk/PressPolicy/News/Sentencing.
6 https://www.gov.uk/government/consultations/strengthening-the-independent-scrutiny-bodies-through-legislation.
Is this really about strengthening or about stream-lining? What is needed is Government action on the mountain of existing damning reports. For yet another, see https://committees.parliament.uk/publications/2486/documents/24751/default/.
7 https://www.gov.uk/government/consultations/serious-violence-reduction-orders: which will surely weigh disproportionately on young black men?
8 Well done Judge Raynor https://www.lawgazette.co.uk/law/mojs-judicial-critic-complains-of-improper-and-undue-pressure/5105606.article. Why aren't more judges speaking out?

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