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BLACKSTONE'S

CRIMINAL PRACTICE BULLETIN

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Welcome to the second edition of *Blackstone's Criminal Practice Bulletin.* The Bulletin is a quarterly newsletter designed to alert practitioners to key developments in criminal law and sentencing, and to place these changes in the context of the main work. This Bulletin covers developments between 1 September and 30 November.

We will publish further Bulletins in April and July 2006, and these will be available free of charge to registered users on the *Blackstone's Criminal Practice* website at <www.oup.co.uk/law/practitioner/cws/>. This website also offers monthly updates to the main work, set out on a chapter-by-chapter basis, as well as links to the full text of available judgments and to relevant legislation. By registering online you can be alerted to the posting of new material on the site and will receive news of all important changes by email.

CASE DIGEST—IN BRIEF

GENERAL PRINCIPLES—INCITEMENT AND MENS REA

Claydon [2005] EWCA Crim 2817

The criticism of *Curr* [1968] 2 QB 944 in *Blackstone's Criminal Practice* was endorsed by the Court of Appeal. This ruling did not, however, do anything to assist the prosecution in *Claydon*, who sought the conviction of C on charges of inciting a boy under the age of 14 to commit buggery. The problem with this charge was that it concerned alleged events that predated the abolition (on 20 September 1993) of the so-called 'irrebuttable presumption of incapacity' (i.e. the common-law rule by which a boy under that age was deemed physically incapable of committing any such act).

It was argued by the Crown that, although the boy could not (in law) have committed the act incited, it was nevertheless quite possible for the defendant to incite him. Having considered *Whitehouse* [1995] 1 Cr App R 420 and *Pickford* [1995] 1 Cr App R 420, the Court of Appeal felt obliged to reject that argument. As Laws J said in Pickford (at p. 424), 'it is a necessary element of the element of incitement that the person incited must be capable [as a matter of law] of committing the primary crime'. No such rule applies under the SOA 2003 or to things allegedly amounting to offences under the old law after 20 September 2003.

See *Blackstone's Criminal Practice*: A6.7

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OFFENCES—WILFULLY OBSTRUCTING A CONSTABLE

DPP v Glendinning [2005] EWHC 2333 (Admin)

The Administrative Court held (following *Bastable v Little* [1907] 1 KB 59) that no offence of wilful obstruction is committed where the defendant warns other motorists of a police speed trap ahead, unless it is established that those warned were either already speeding or were likely to do so at the location of the speed trap.

See *Blackstone's Criminal Practice*: B2.30

INDECENT PHOTOGRAPHS OF CHILDREN: ELEMENTS

Dooley [2005] EWCA Crim 3093

An offence under the Protection of Children Act 1978, s. 1(1)(c), may be established only if it is shown that at least one reason for the defendant's conduct (in this case his storage of the offending images in a shared directory on a networked computer) was to show or distribute them to others. Although the words 'with a view to' when used in that provision may mean something wider than, 'with intent to', it is not enough for the prosecution to prove merely that other persons were likely to obtain access to the images

See *Blackstone's Criminal Practice*: B3.271

OFFENCES—INTENTIONALLY CAUSING HARASSMENT, ALARM OR DISTRESS

Dehal v Crown Prosecution Service [2005] EWHC 2154 (Admin)

The defendant had entered a Sikh Temple and affixed a notice to a notice-board which, *inter alia*, described the president of the Temple as a hypocrite and a 'mad proud dog'. Quashing his conviction, which had previously been upheld by the Crown Court, Moses J examined the relationship between the offence under the POA 1996, s. 4A, and a person's right to exercise free speech guaranteed under the ECHR, art. 10. He emphasised (following *Hammond v DPP* [2004] EWHC 69 (Admin): see *Blackstone's Criminal Practice*, **B11.68**), that a conviction for such an offence could be justified only where the prosecution was brought in pursuance of a legitimate aim and was necessary to achieve that aim. The court below had failed in its stated case to identify any basis on which the prosecution could have satisfied those requirements.

See *Blackstone's Criminal Practice*: B11.58

OFFENCES—PUBLIC NUISANCE

Goldstein and Rimmington [2005] UKHL 63

The definition of the common-law offence of public nuisance has been clarified by the rulings of the House of Lords in these conjoined cases. Their lordships confirmed the continued existence of the offence and rejected arguments that it was inherently vague and incompatible with the ECHR, but advised that, in cases where specific statutory offences appear to have been committed, charges brought under the legislation in question will usually be more appropriate.

Johnson [1996] 2 Cr App R 434 was overruled. Lord Bingham said at [37] and [38]:

> I cannot . . . accept that *Norbury* [1978] Crim LR 435 and *Johnson (Anthony)* . . . were correctly decided . . . To permit a conviction of causing a public nuisance to rest on an injury caused to separate individuals rather than on an injury suffered by the community or a significant section of it as a whole was to contradict the rationale of the offence and pervert its nature, in Convention terms to change the essential constituent elements of the offence to the detriment of the accused. The offence was cut adrift from its intellectual moorings.
>
> . . . The crime of public nuisance does not extend to separate and individual telephone calls, however persistent and vexatious, and the extension of the crime to cover postal communications would be a further illegitimate extension.

The *mens rea* requirement as stated in *Shorrock* [1994] QB 279 was approved.

See *Blackstone's Criminal Practice*: B11.100 to B11.109

OFFENCES—FIREARMS POSSESSION

Uddin [2005] EWCA Crim 2653

The concept of 'possession' was examined in the context of firearms offences and the Court of Appeal held that, although there was evidence that the appellant had examined a gun with a view to purchasing it (by looking into a bag containing the gun), the fact that he never took possession of the bag made his conviction for unlawful possession unsustainable.

See *Blackstone's Criminal Practice*: B12.20

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OFFENCES—ESCAPE

Dhillon [2005] EWCA Crim 2996

The basic elements of the common-law offence of escape were further considered by the Court of Appeal in this case, which involved an illegal immigrant who had left a hospital while in police custody but who claimed that he was not aware that he was still in police custody when he emerged from x-ray. On the basis of the existing authorities (as cited in the main text), it was held that the prosecution in such cases must prove four things: (i) that the defendant was in custody; (ii) that the defendant knew that he was in custody (or at least was reckless as to whether he was or not); (iii) that the custody was lawful; and (iv) that the defendant intentionally escaped from that lawful custody.

See *Blackstone's Criminal Practice*: B14.54

ENTERING UNITED KINGDOM WITHOUT A PASSPORT, ETC.

Navabi [2005] EWCA Crim 2865

The Asylum and Immigration (Treatment of Claimants etc.) Act 2004, s. 2, must be read as imposing a full legal or persuasive burden of proof on any defendant who seeks to rely on a defence under s. 2(4).

See *Blackstone's Criminal Practice*: B23.6

ROAD TRAFFIC OFFENCES—SPECIAL REASONS

Ashton v DPP [2005] All ER (D) 118 (Nov)

A car with a blue warning light, used by an ambulance driver to collect an ambulance in the early hours of the morning in response to an emergency call, is not itself an ambulance. The driver accordingly had offended against vehicle lighting regulations, and had no defence to charges of exceeding speed limits and passing a red light (which he had treated carefully as a give way signal).

On the issue of special reasons for not endorsing the driver's licence, the Divisional Court doubted (but did not interfere with) the magistrates' decision to treat the case as an emergency situation, because where it was the practice for employees of an ambulance company to remain at home (e.g. at night) until called out, that would be a routine or foreseeable situation, rather than an emergency. With respect, the possibility of an emergency call may be foreseeable, but when the call comes it may still be an emergency. If, as in this case, a sick child needs to be rushed to hospital in the early hours of the morning, does it become an emergency only when the driver reaches his ambulance?

See *Blackstone's Criminal Practice*: C8.8

PROCEDURE—LAWFUL ARREST

Fiak [2005] EWCA Crim 2381

An arrest does not become unlawful merely because the police officer initially tells the suspect, 'You are being detained in order for us to establish whether an offence has been committed. Now stay where you are' and only goes on to 'formally complete the arrest' a few minutes later when the facts have been established. Judge P said (at [14]):

> [The officer] sensibly elected to postpone the formal completion of the arrest until the facts were more fully investigated. In our judgment this was all part of a single process, not to be artificially compartmentalised, or fragmented into a series of individual processes. In these circumstances, her conduct was not rendered unlawful because she did not formally use the word 'arrest' until her brief investigation into the appellant's story was completed.

See *Blackstone's Criminal Practice*: D1.4

PROCEDURE—TIME LIMITS

Chief Constable of West Mercia Constabulary v Boorman [2005] All ER (D) 28 (Nov)

The Magistrates' Courts Act 1980, s. 127, does not have any bearing on the admissibility of evidence in proceedings under the CDA 1998, s. 1 (applications for ASBOs).

See *Blackstone's Criminal Practice*: D1.78

PROCEDURE—STATE IMMUNITY

R (Alamieyeseigha) v Crown Prosecution Service [2005] EWHC 2704 (Admin)

The head of a constituent state within the Federal Republic of Nigeria, which is not recognised as a sovereign state by Her Majesty's Government, enjoys no immunity from criminal proceedings in the United Kingdom, and a certificate issued to that effect by the Foreign Secretary under the State Immunity Act 1978, s. 21, is decisive on that issue.

See *Blackstone's Criminal Practice*: D1.79

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PROCEDURE—RESTRAINT ORDERS

R v S; D (UK) Limited v Revenue and Customs Prosecutions Office (application under s. 41 of the Proceeds of Crime Act 2002) [2005] EWCA Crim 2919

The Court of Appeal held that, where there was a good arguable case that money in one person's bank account represents all or part of a benefit obtained by another person (the alleged offender), that money is liable to restraint until a confiscation order is made. No enforceable right to the money on the part of the alleged offender need be established.

See *Blackstone's Criminal Practice*: D7.13

PROCEDURE—PRIVATE MEETING BETWEEN JUDGE AND COUNSEL

A-G's Ref (No. 80 of 2005), Wedlock-Ward 16 November 2005, CA

Goodyear [2005] EWCA Crim 888 was considered by the Court of Appeal in this case. Rose LJ warned that the purpose of that decision was not to encourage a return to the practice, disapproved by *Turner* [1970] 2 All ER 281, of counsel seeing the judge about sentence privately in his room. A hearing involving an indication of sentence should normally occur in open court (unless, e.g., a defendant is unaware that he is terminally ill); the principal feature of an appropriate indication of sentence is that an advance indication should be sought by the defence, and not promulgated by the judge; and if an indication in such a context is to be made, it is not appropriate for an indication to be given, with reference to the trial resulting in the much longer sentence compared to the one he offers if the defendant pleads guilty. Whatever personal views a judge may have, he may not disregard the Court of Appeal's judgments or guidance of the Sentencing Guidelines Council.

See *Blackstone's Criminal Practice*: D13.22

PROCEDURE—DEFENDANT'S COSTS ORDER

R v Oxfordshire Magistrates' Court [2005] All ER (D) 97 (Oct) (11 October 2005, Admin).

Defendants who accept a caution and are then acquitted when the prosecution offer no evidence do not thereby lose their rights to a costs order.

See *Blackstone's Criminal Practice*: D29.12

SENTENCING—BREACH OF COMMUNITY ORDER

West Yorkshire Probation Board v Boulter [2005] EWHC 2342 (Admin)

Any alleged breach of a community order is a criminal matter and requires proof to a criminal standard. Where in proceedings for an alleged breach of an order there is evidence that the person before the court has the same name, date of birth and address as the person who was previously convicted and made subject to the order, it is open to the court to draw the inference that he is the same person. This inference should be drawn unless there are other factors that would indicate the contrary.

See *Blackstone's Criminal Practice*: E11.3

SENTENCING—DISQUALIFICATION FROM DRIVING WHERE MOTOR VEHICLE USED FOR COMMITTING OR FACILITATING COMMISSION OF AN OFFENCE

Gisbourne [2005] EWCA Crim 2491

The Court of Appeal upheld a disqualification order imposed on an 'animal rights' campaigner who had used a hire car when conducting a series of acts of criminal damage and intimidation against employees of Huntingdon Life Sciences Ltd over a two-day period. Given that the disqualification order would expire before her release from a five-and-a-half-year prison sentence, it might have looked pointless, but the Court observed that, 'if a disqualification from driving is part of the appellant's record and appears upon her driving licence, that may well have, or be capable of having, an effect upon her ability to hire cars in the future.'

In contrast, an anti-social behaviour order for two years was made to take effect on the appellant's release from prison.

See *Blackstone's Criminal Practice*: E11.3

SENTENCING—SEX OFFENDERS' NOTIFICATION PERIOD

Slocombe [2005] EWCA Crim 2297

The length of the notification period in cases where a

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young offender is sentenced to a detention and training order is determined by reference to the SOA 2003, s. 131 and the use therein of the term 'serve'. It was held that a 12-month detention and training order was the equivalent of a sentence of only 6 months' imprisonment because the young offender in question would only be liable to 'serve' such a period before release under supervision.

See *Blackstone's Criminal Practice*: E25.3

EVIDENCE—HEARSAY EXCLUSION

Al-Khawaja[2005] EWCA Crim 2697

The Court of Appeal returned to the issue raised by the ECHR, art. 6(1) and (3)(d), in cases where a key prosecution witness is dead or otherwise unavailable and the prosecution propose to use a statement made by that witness as hearsay. The case arose under the CJA 1988, s. 23, but the human rights issues are essentially the same as those that may arise under the CJA 2003.

Having considered *Sellick* [2005] EWCA Crim 651 and *Doorson v Netherlands* (1996) 22 EHRR 330, the Court concluded that nothing in art. 6 required the exclusion of the deceased complainant's evidence in the circumstances of that case, but the Court certified the following question of law of general public importance for possible consideration by the House of Lords:

> Was it a breach of the defendant's right to a fair trial provided by art 6(1) and (3)(d) of the European Convention on Human Rights that the statement of the essential witness on one count was admitted in evidence, she having died?

See *Blackstone's Criminal Practice*: F16.15

EVIDENCE—CONFESSION

Coll [2005] All ER (D) 82 (Nov)

This case provides an illustration of the possible use, against an accused, of a confession made in his presence by a co-accused. In the course of a recorded telephone call to the emergency services following a fatal stabbing the appellant's co-accused said something that suggested that she and the appellant were jointly responsible for the offence. The appellant appears to have said nothing. On the facts of the case, it seems far from clear that it was safe to draw any inferences from the appellant's failure to deny what the co-accused said, because it was not even clear that the appellant had either heard or understood what was said. This, however, was held to be a matter for the jury to decide, and the trial judge had directed them correctly.

See *Blackstone's Criminal Practice*: F17.34

SENTENCING

Attempt

Ford [2005] EWCA Crim 1358

The Court of Appeal gave specific guidance as to sentencing for offences of attempted murder, which takes account of the greatly increased tariffs now imposed in many cases of murder itself, and recognises that in grave cases of attempt significantly increased sentences may now be required, so as to ensure that those convicted serve approximately half the period of imprisonment that would have been imposed on conviction for the full offence. In less serious cases of attempted murder, however, increased sentencing levels may not be required, and this includes cases where any killing would have resulted in a conviction for voluntary manslaughter rather than murder.

See *Blackstone's Criminal Practice*: A6.33

Provocation

Lindsay [2005] EWCA Crim 2980

An eight-year sentence of imprisonment imposed on a defendant was upheld. He had picked up a sword in self-defence when attacked in his home by three masked intruders armed with loaded handguns, and killed one of them by slashing him repeatedly with that sword. The prosecution case was that, although he had initially acted in self defence, he had then lost his self-control and demonstrated a clear intent to kill the armed intruder. This apparently harsh sentence was clearly influenced by the fact that the defendant was himself a low-level cannabis dealer who kept the sword in readiness for such events, and will hopefully not be seen as setting a precedent for sentencing ordinary householders who 'go too far' when defending themselves against armed intruders.

See *Blackstone's Criminal Practice*: B1.31

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Provocation

Sentencing Guidelines

The Sentencing Guidelines Council (see <http://www.sentencing-guidelines.gov.uk>) has issued a 'final guideline' in respect of defendants who are convicted of (or plead guilty to) manslaughter by reason of provocation and are sentenced after 28 November 2005.

See *Blackstone's Criminal Practice*: B1.31

Meeting a Child following Sexual Grooming

T [2005] EWCA Crim 2681

The Court of Appeal upheld a longer than commensurate sentence of eight years' imprisonment with an extended licence period of two years, imposed following a guilty plea. The appellant, aged 43, had purported to befriend a girl, aged nine. He had done very little with her before she became suspicious and reported his approaches, but he had a number of previous convictions (including one for rape) and was described as a 'relentless, predatory paedophile'.

See *Blackstone's Criminal Practice*: B3.84

Sexual Activity with a Child Family Member

Thomas [2005] EWCA Crim 2343

Guidance as to sentencing in cases involving consensual sex with older children who are family members (in this case a girl aged 17 who had previously been fostered with the defendant, but was living in semi-independent accommodation at the time of the offences) was provided here. A sentence of four years' imprisonment was quashed and replaced with two-and-a-half years, having regard (*inter alia*) to the appellant's guilty plea, and to the ages of the parties, the nature and length of the sexual activity and the number of occasions on which it had occurred.

See *Blackstone's Criminal Practice*: B3.109

Trafficking for Sexual Exploitation

Maka 16 November 2005, CA

The offender pleaded guilty to two counts of trafficking within the UK for sexual exploitation contrary to the SOA 2003, s. 58(1), and was also convicted on two other such counts, together with one of trafficking into the UK for sexual exploitation contrary to s. 57(1). The offences all involved a 15-year-old Lithuanian girl, who was tricked into travelling from Lithuania by the promise of well-paid work, and then repeatedly sold by the offender into rape and prostitution. Consecutive sentences totalling 18 years' imprisonment were upheld. The total sentence was described as 'appropriately severe' because deterrence to others in Lithuania or other parts of Europe, as well as those in the UK who took part in such activities, was a highly material consideration.

See *Blackstone's Criminal Practice*: B3.206

Robbery

Sentencing Guidelines

The Sentencing Guidelines Council (see <http://www.sentencing-guidelines.gov.uk>) has issued new draft guidelines concerning robbery. This draft does not yet have direct legal force, but it may well be seen as persuasive.

See *Blackstone's Criminal Practice*: B4.50

Obtaining Property by Deception: Sentencing

Seward [2005] EWCA Crim 1941

These convictions for deception offences involved 'identity theft'—an increasingly frequent type of offence. The appellant, who had a drug problem, was sentenced to imprisonment for eight offences of dishonesty, including two of obtaining property of a total value of £10,000 by deception and four of using a false instrument. It was argued that the appellant's rehabilitation might instead have benefited from a drug treatment and testing order, for which he had been assessed as suitable, but the Court concluded that the prison sentence imposed, whilst severe, was not unjustified and should be upheld. Henriques J said (at [14]):

> Identity fraud is a particularly pernicious and prevalent form of dishonesty calling for, in our judgment, deterrent sentences. There was here an actual loss of £10,000, none of which was recovered even though stolen that day, and a potential loss of £15,000. It is the appellant's case that he was only the front man, acting on the instruction of others, he taking the risk by reason of the prevalence of CCTV cameras. It was inevitable that he and not others would be brought to justice. His position has been likened to the mule in drug importation cases.

See *Blackstone's Criminal Practice*: B5.25

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Class A Drug Offences

Davies and other appeals [2005] EWCA Crim 2437

The sentencing guidance previously given in *Afonso* [2005] 1 Cr App R (S) 560, in [2004] EWCA Crim 2342 was 'explained' in this case by the Court of Appeal. *Davies and other appeals* [2005] EWCA Crim 2437, Rose LJ said:

> What was not expressly said in Afonso and what we now make clear is that the sentence level which was indicated of the order of two to two-and-a-half years' imprisonment was intended for those with no criminal record. Those with significant criminal records, even without prior drugs convictions, do not have the mitigating factor of good character which is, of course, material to the sentencing process. They are therefore likely to receive a somewhat higher sentence . . .

Sentences of three-and-a-half years (as in *Afonso* itself) were accordingly held to be appropriate in two cases before the court involving non-retail supply by defendants with significant criminal records.

The court further reiterated that *Afonso* was never intended to affect the level of sentences applicable to cases involving retail drug supply, and that if what is supplied is represented to be a Class A drug and is intended to be purchased as a Class A drug, but is not in fact a Class A drug (e.g. it is paracetamol), that will, generally speaking, make very little, if any, difference to the level of sentence that is appropriate.

See *Blackstone's Criminal Practice*: B20.106

Motor Manslaughter

Brown [2005] EWCA Crim 2868

A sentence of ten years' detention in a young offender institution was upheld in respect of an offender, aged 20, who deliberately drove his car into a head-on collision with another vehicle whilst intent on committing suicide. The court observed that he must have known he would kill or injure at least one other person and the case was therefore exceedingly grave even if other aggravating features were not present.

See *Blackstone's Criminal Practice*: C3.6

CASE DIGEST—IN DETAIL

B & Q plc [2005] EWCA Crim 2297, (2005) The Times, 3 November 2005

Inconsistent verdicts—Health and safety

The Court of Appeal is notoriously reluctant to accept that two apparently inconsistent verdicts returned by the same jury are indeed logically inconsistent, but its ruling in *B & Q plc* is perhaps easier to defend than some others. A fatal accident occurred in one of the defendant company's stores when a poorly driven forklift truck reversed into a customer and an employee, killing the former and injuring the latter. The defendant company was charged (*inter alia*) with two offences relating to that accident, namely (1) with failing in its duty to ensure so far as was reasonably practicable the health, safety and welfare at work of an employee (contrary to the Health and Safety at Work etc. Act 1974, s. 2(1)) and (2) with failing to conduct its activities in such a way as to ensure, so far as was reasonably practicable, that persons not in its employment would not be exposed to risks to their health and safety (contrary to s. 3(1)). The jury was directed to consider each count separately, and acquitted the defendant on the count relating to its employee but convicted it on the count relating to the safety of the customer.

As the Court pointed out, there was a possible basis for the different verdicts in this case, namely that the employee who was injured had been instructed on safety measures, had been issued with a brightly coloured safety vest and was himself a trained forklift driver and might have been expected to take greater care for his own safety, whereas little seems to have been done to safeguard the customer.

The case also provides a useful analysis of much of the case law on inconsistent or allegedly inconsistent verdicts, including a number of cases (such as W(M) 30 March 1999) that remain unreported.

See *Blackstone's Criminal Practice*: D24.24

Renda [2005] EWCA Crim 2826, (2005) The Times, 16 November 2005

Character evidence—Collusion—False impression—Attack on another

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The Court of Appeal (in a judgment given by Sir Igor Judge P) made the following general observations as to the new regime introduced by the CJA 2003:

> Several of the decisions or rulings questioned in these appeals represent either judgments by the trial judge in the specific factual context of the individual case, or the exercise of a judicial discretion. The circumstances in which this Court would interfere with the exercise of a judicial discretion are limited. The principles need no repetition. However we emphasise that the same general approach will be adopted when the Court is being invited to interfere with what in reality is a fact specific judgment. As we explain in one of these decisions, the trial judge's 'feel' for the case is usually the critical ingredient of the decision at first instance which this Court lacks. Context therefore is vital. The creation and subsequent citation from a vast body of so-called 'authority', in reality representing no more than observations on a fact specific decision of the judge in the Crown Court, is unnecessary and may well be counterproductive. This legislation has now been in force for nearly a year. The principles have been considered by this Court on a number of occasions. The responsibility for their application is not for this Court but for trial judges.
>
> Finally, even if it is positively established that there has been an incorrect ruling or misdirection by the trial judge, it should be remembered that this Court is required to analyse its impact (if any) on the safety of any subsequent conviction. It does not follow from any proved error that the conviction will be quashed.

Turning to the meaning of bad character, it was stated that this might in some cases include evidence of irrational or even dangerous behaviour to which no blame or culpability attaches. Although an absolute discharge following an earlier finding of unfitness to plead does not constitute a criminal conviction, it does not necessarily indicate that the person found unfit to plead was blameless as far as the alleged offence was concerned: an act of violence that gave rise to the proceedings in question may still be considered reprehensible behaviour and thus evidence of bad character.

Judge P emphasised at [27] that the CJA 2003, s. 107, should not be misused. Unless the case falls squarely within s. 107(5), the Court of Appeal is the appropriate court in which the correctness of the judge's original decision to admit bad character evidence should be questioned. Even where the case does fall within s. 107(5), this does not meanthat it would be unsafe to continue with the trial. It may in some cases be possible to neutralise any potential prejudice by demonstrating the fact (if such be the case) that the evidence in question is false. Greater difficulty may in fact be caused by evidence, which although clearly contaminated is not demonstrably false, so that a jury may be tempted to rely upon it.

On the issue of false impressions, Judge P drew attention to the significant difference between the defendant who makes a specific and positive decision to correct a false impression for which he is responsible, or to disassociate himself with false impressions conveyed by the assertions of others, and the defendant who in the process of cross-examination is obliged to concede that he has been misleading the jury. A concession extracted in cross-examination that the defendant was not telling the truth in part of his examination-in-chief will not normally amount to a withdrawal or disassociation from the original assertion for the purposes of s. 105(3): Judge P at [21].

One of the appellants (Ball) asserted on a charge of rape that the complainant had behaved or was disposed to behave in a reprehensible way ('She's a bag really, you know what I mean, a slag . . .'). Accordingly the judge ruled that an attack had been made on her character for the purposes of the CJA 2003, s. 101(1)(g), as explained and expanded in s. 106, and in particular s. 106(1)(c). Evidence was given 'of an imputation about the other person made by the defendant—(i) on being questioned under caution, before charge . . .' The judge considered whether to exclude the evidence under s. 101(1)(3) on the basis that its admission would have an adverse effect on the fairness of the proceedings, but concluded that cross-examination as to the appellant's bad character should be permitted, and the Court of Appeal held that there was no arguable basis for interfering with his decision.

See *Blackstone's Criminal Practice*: F12.1, F12.2, F12.21, F12.31 and F12.33

Weir [2005] EWCA Crim 2866

Bad character—Witness credibility

Evidence of bad character is now admissible (if at all) only where the CJA 2003, part 11 so provides (although where so admissible such character may be established through evidence of reputation under common-law rules preserved by s. 99(2)). In this case, however, it was recognised (*obiter*) that:

> No doubt there are cases where previous conduct of a defendant is of probative value and therefore relevant to a matter in issue between him and the prosecution or him and a co-defendant, yet the 'bad character' provisions of the [CJA 2003] relating to the defendant's 'misconduct' do not apply. In such cases, section 99(1) of the Act whereby the common law rules governing the admissibility of evidence of 'bad character' in criminal proceedings are abolished does not exclude the relevant material because it does not amount to 'evidence of bad character'.

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Suggestions in *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26 (which was not a criminal case) by Lord Phillips, which appeared to suggest (*obiter*) that the CJA 2003 'codified' the old common-law rules governing evidence of bad character, were politely described as 'capable of being misunderstood'. The 2003 Act, said Kennedy LJ, has completely reversed the old general rule governing evidence of bad character. Evidence of bad character is now admissible if it satisfies certain criteria, and s 101 does not require evidence of propensity to have any 'enhanced probative value'. Instead,

> If the evidence of a defendant's bad character is relevant to an important issue between the prosecution and the defence (s 101(1)(d)), then, unless there is an application to exclude the evidence, it is admissible. Leave is not required. So the pre-existing one stage test which balanced probative value against prejudicial effect is obsolete.

Weir also concerned character evidence relating to a witness. While it suggests that such evidence is more likely to be admitted than before the 2003 Act applied, it was nevertheless held in Weir that matters relating only to the credibility of a witness may be admissible under s. 100, if they have substantial probative value in respect of such credibility and if the credibility of the impugned witness is of substantial importance in the context of the case as a whole. To exclude evidence of credibility, said the Court, would leave a significant lacuna in the legislation with the potential for unfairness, and it is clear from the explanatory notes to the Act (at [362]) that Parliament did not intend issue of witness credibility to be excluded from the operation of that section.

See *Blackstone's Criminal Practice*: F12.2, F12,12 and F14.7

LEGISLATION

The Criminal Defence Service (Funding) (Amendment) Order 2005 (SI 2005 No. 2621)

The principal amendments made by this Order to the principal Order of 2001 concern a new payment scheme for guilty pleas and cracked trials.

The Costs in Criminal Cases (General) (Amendment) Regulations 2005 (SI 2005 No. 2622)

These Regulations amend part 3 of the Costs in Criminal Cases (General) Regulations 1986 (SI 1986 No. 1335), which relates to orders for a defendant's costs to be paid out of central funds.

The Criminal Defence Service (General) (No. 2) (Amendment) Regulations 2005 (SI 2005 No. 2784)

These Regulations amend the Criminal Defence Service (General) (No. 2) Regulations 2001 (SI 2001 No. 1437) so as to include specified proceedings as criminal proceedings for the purposes of the Criminal Defence Service. The specified proceedings include certain intervention orders under the CDA 1998, ss. 1G and 1H; certain parenting orders under the ASBA 2003, ss. 20, 22, 26 and 28; and the PCC(S)A 2000, part 1A of sch. 1; notification orders, sexual offences prevention orders and risk of sexual harm orders (and interim orders in each case) and foreign travel orders under the SOA 2003, ss. 97, 100, 101, 104, 108, 109, 110, 114, 118, 119, 123, 125, 126 and 127; and restraining orders on acquittal under the PHA 1997, s. 5A.

The Regulations also provide for an increase in the financial eligibility limits for advice and assistance specified in reg. 5 from £192 to £194 (income eligibility limit for advocacy assistance—reg. 5(3)) and from £91 to £92 (income eligibility limit for advice and assistance—reg. 5(5)). See *Blackstone's Criminal Practice* D29.5.

Criminal Defence Service (Recovery of Defence Costs Orders) (Amendment) Regulations 2005 (SI 2005 No. 2783)

These Regulations amend the Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001 (SI 2001 No. 856), reg. 9 in order to increase the level of income a funded defendant must have before his income is taken into account for the

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purpose of calculating his financial resources from £25,000 to £25,250. See *Blackstone's Criminal Practice*: **D29.8**.

Criminal Justice Act 2003 (Mandatory Life Sentences: Appeals in Transitional Cases) Order 2005 (SI 2005 No. 2798)

This Order makes provision similar to the provision in the Criminal Appeal Act 1968 for the purpose of the new transitional appeal introduced by the CJA 2003, sch. 22, para. 14(1). The basic provisions that the Order closely follows are set out in **D25** of the main work. Paragraph 14(1) of the Order provides a right of appeal to the Court of Appeal and the House of Lords, if appropriate, to prisoners who have either had their minimum term of a mandatory life sentence reviewed or determined by the High Court under the transitional provisions in sch. 22 see *Blackstone's Criminal Practice*: **E4**.

Domestic Violence, Crime and Victims Act 2004 (Commencement No. 4) Order 2005 (SI 2005 No. 2848)

This Order brings into force, on 20 October 2005, the following provisions of the Act:

- ss. 32 to 34 (the victims' code);
- s. 47and sch. 7 (investigation by Parliamentary Commissioner in relation to victims' rights);
- s. 54(1), (2)(a) and (b), (3)(a) and (b) and (4) to (8) (disclosure of information in relation to victims' rights).

Misuse of Drugs and the Misuse of Drugs (Supply to Addicts) (Amendment) Regulations 2005 (SI 2005 No. 2864)

Regulations 2 to 13 of these Regulations amend the Misuse of Drugs Regulations 2001 (see **B20.22**), principally in relation to extended formulary nurse prescribers (EFNPs) and the keeping of records in computerised form. Regulation 13 revokes the 2001 Regulations, sch. 5, para. 2, removing any preparation of cocaine containing not more than 0.1% of cocaine from the exception that applies to the prohibition on importation, exportation and possession. Regulation 14 makes a consequential amendment to the Misuse of Drugs (Supply to Addicts) Regulations 1997 (SI 1997 No. 1001).

The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2005 (SI 2005 No. 2892)

By virtue of this Order, the following 15 organisations are added at the end of the Terrorism Act 2000, sch. 2, and thus are classified as proscribed organisations: Al Ittihad Al Islamia; Ansar Al Islam; Ansar Al Sunna; Groupe Islamique Combattant Marocain; Harakat-ul-Jihad-ul-Islami; Harakat-ul-Jihad-ul-Islami (Bangladesh); Harakat-ul-Mujahideen/Alami; Hezb-e Islami Gulbuddin; Islamic Jihad Union; Jamaat ul-Furquan; Jundallah; Khuddam ul-Islam; Lashkar-e Jhangvi; Libyan Islamic Fighting Group; Sipah-e Sahaba Pakistan for the previous list of organisations. See *Blackstone's Criminal Practice*: **B10.7**.

Licensing Act 2003 (Consequential Amendments) Order 2005 (SI 2005 No. 3048)

Among the amendments made by this Order are amendments to the Criminal Justice and Police Act 2001, s. 1 and to the Penalties for Disorderly Behaviour (Amount of Penalty) Order 2002 (SI 2002 No. 1837). These have the effect of making offences under the Licensing Act 2003, ss. 141, 146(1) and (3), 149(3) and (4) and 151 into offences that may attract a fixed penalty of £80 and those offences under ss. 149(1) and 150 of that Act into offences that may attract a fixed penalty of £50. It also removes from the fixed penalty regime the offences under the now repealed Licensing Act 1964.

Criminal Justice and Court Services Act 2000 (Commencement No. 15) Order 2005 (SI 2005 No. 3054)

This Order brings s. 57 of the Act (testing of persons in police detention) fully into force on 1 December 2005.

Criminal Justice Act 2003 (Commencement No. 3) Order 2005 (SI 2005 No. 3055)

This Order brings s. 5 of the Act (drug testing for under-eighteens) into force on 1 December 2005.

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Drugs Act 2005 (Commencement No. 3) Order 2005 (SI 2005 No. 3053)

This Order brings the following provisions of the Act into force:

- On 1 December 2005: ss. 7 (testing for presence of Class A drugs), 9 (initial assessment following testing for presence of Class A drugs), 12 (attendance at initial assessment), 18 (orders under part 3 and guidance) and 19 (interpretation) and, to the extent not already in force, s. 23 (amendments and repeals) and schs. 1 (amendments) and 2 (repeals).
- On 1 December, insofar as they relate to initial assessments required under s. 9: ss. 11 (requirements under ss. 9 and 10: supplemental), 15 (disclosure of information about assessments), 16 (samples submitted for further analysis) and 17 (relationship with Bail Act 1976 etc.).
- On 1 January 2006: ss. 1 (aggravated supply of controlled drug: see **B20.26**, 3 (drug offence searches: England and Wales: see **D1.38**), 5 (x-rays and ultrasound scans: see **D1.38**) and 8 (extended detention of suspected drug offenders).

Licensing Act 2003 (Commencement No. 7 and Transitional Provisions) Order 2005 (SI 2005 No. 3056)

This Order brings into force, on 24 November 2005, the whole of the Act bar sch. 6, paras. 98 and 99(c) and the repeal of the Sporting Events (Control of Alcohol etc.) Act 1985, ss. 2(1A) and 5A. See **B11.191** to **B11.200** of the main work for coverage of the offence-creating sections.

The Serious Organised Crime and Police Act 2005 (Commencement No. 3) Order 2005 (SI 2005 No. 3136)

This Order brings into force on 1 January 2006, *inter alia*, s. 98(1) (civil recovery freezing orders) and sch. 6, paras. 2, 3, 5, 7 to 19 and 21 to 23.

The Misuse of Drugs Act 1971 (Amendment) Order 2005 (SI 2005 No. 3178)

This Order amends the sch. 2, part 3 of the 1971 Act so as to insert the drug ketamine in the list of Class C drugs (see **B20.5**).

Domestic Violence, Crime and Victims Act 2004 (Commencement No. 5) Order 2005 (SI 2005 No. 3196)

This Order brings into force, on 5 December 2005, ss. 2 and 3 and sch. 10, paras. 34, 35 and 40 to 42 and a relevant repeal in sch. 11. All these provisions relate to family proceedings and the Family Law Act 1996.

COMMENT AND ANALYSIS

Problems with Conflicting Expert Evidence

In *Puaca* [2005] EWCA Crim 3001, the prosecution case was that the appellant had murdered the deceased by pressing her face into the bedclothes and suffocating her. The only positive evidence of murder came from the prosecution's expert witness, H, who opined that death had been caused by asphyxia due to upper airway obstruction, and that evidence of tearing and haemorrhaging within the muscles of her shoulders must have resulted from her desperate attempts to free herself, and yet there were no other visible injuries (bruises etc.) of the kind one might have expected if she had been pinned down and suffocated in that way.

The appellant's case was that he found the deceased dead in her bed and that the cause of her death was a drug overdose, possibly coupled with a fit. Two expert witnesses supported this defence at trial. They did not claim that H's suffocation theory was impossible (and given that the burden of proof was on the prosecution they did not need to) but they insisted that there was no pathological evidence to support that theory. The post-mortem toxicological evidence showed that prior to her death the deceased had ingested alcohol, amitriptyline, dothiepin, dilhydrocodeine, codeine and probably diazepam, but H's post-mortem findings had failed to take this into account.

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On appeal, five more pathologists gave evidence for the appellant and strongly challenged a number of matters on which H had relied in order to reach his conclusion. Fault was also found with the way in which much of H's evidence had been presented. His frequent references to evidence of asphyxia, for example, could easily have been taken to mean evidence of suffocation by obstruction of the upper airways, whereas asphyxia may have other causes, including drug overdoses. Accordingly, it was clear that the conviction was unsafe and it was quashed.

Puaca is the latest in a line of cases in which issues have been raised as to the safety of homicide convictions based on disputed expert evidence. Disquiet triggered by the much-publicised cases of *Clark (Sally)* [2003] EWCA Crim 1020 and *Cannings* [2004] EWCA Crim 1, [2004] 1 All ER 725 led to the reopening of many cases involving parents who had been convicted of killing their infant children (see in particular *Harris and others* [2005] EWCA Crim 1980) and in some (but not all) of these cases convictions were eventually quashed as unsafe.

Puaca did not involve an infant death, but many of the issues involved were similar. As in the infant death cases, there was no confession, no eyewitness evidence of the alleged crime and no real evidence of motive. As in those cases, there was expert evidence as to post-mortem findings from which prosecution experts concluded that the deceased had been unlawfully killed. As in those cases, expert witnesses called by the defence had disputed the post-mortem findings or the conclusions that could properly be drawn from them; and as in those cases a jury confronted with this technical and conflicting evidence somehow concluded that the case was clearly one of murder.

One other feature was shared with some of the infant death cases: the defendant declined to testify. This was something from which the jury was permitted to draw an inference under the CJPO1994, s. 35, but only if there was already a case for the defendant to answer, which arguably there was not.

Appeals in the infant death cases have often succeeded where (as in *Clark and Puaca*) fresh evidence has been admitted on appeal to undermine the original conclusions of the prosecution's experts, or where (as in *Clark and Puaca*) it is clear that serious errors were made in the conduct of post-mortems or in the presentation of the evidence to the jury. Appeals have also succeeded in cases where the jury was asked to resolve, without the benefit of any hard factual evidence, a conflict of opinion between reputable experts. In *Cannings*, the Court of Appeal concluded (at [178]):

> Where a full investigation into two or more sudden unexplained infant deaths in the same family is followed by a serious disagreement between reputable experts about the cause of death, and a body of such expert opinion concludes that natural causes, whether explained or unexplained, cannot be excluded as a reasonable . . . possibility, [a] prosecution . . . for murder should not be started, or continued, unless there is additional cogent evidence, extraneous to the expert evidence . . . which tends to support the conclusion that the infant, or where there is more than one death [sic], one of the infants, was deliberately harmed. In cases like the present, if the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed.

But in *Kai-Whitewind* [2005] EWCA Crim 1092, *Harris* [2005] EWCA Crim 1980 and *Puaca* the Court of Appeal has construed that dictum very narrowly, and has rejected any suggestion that, that wherever there is a conflict of opinion between reputable experts, the expert evidence called by the Crown is automatically neutralised. That may be true, they concede, in cases such as *Cannings* where the conflicting theories are not based on any hard evidence, but where there is such evidence, juries, it seems, must be allowed to choose between the conflicting expert opinions as to its causes or as to the conclusions that may be drawn from it. In *Kai-Whitewind,* Judge LJ said (at [85]):

> In *Cannings* there was essentially no evidence beyond the inferences based on coincidence which the experts for the Crown were prepared to draw. Other reputable experts in the same specialist field took a different view about the inferences, if any, which could or should be drawn. Hence the need for additional cogent evidence. With additional evidence, the jury would have been in a position to evaluate the respective arguments and counter-arguments: without it, in cases like *Cannings*, they would not.
>
> In the context of disputed expert evidence, on analysis, what was required in this case was no different to that which obtains, for example, when pathologists disagree about the cause of death in a case of alleged strangulation. An argument whether the hyoid bone was fractured before death (supporting the conclusion of strangulation) or whether it occurred post mortem, perhaps during the course of the autopsy itself (which would discount strangulation), is commonplace. . . . And even if the experts disagree about whether it was indeed fractured, that is a question for the jury. . . . Evidence of this kind must be dealt with in accordance with the usual principle that it is for the jury to decide between the experts, by reference to all the available evidence, and that it is open to the jury to accept or reject the evidence of the experts on either side.

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In *Harris*, Gage LJ said (at [70]):

> On general issues of this nature, where there is a genuine difference between two reputable medical opinions, in our judgment, the Court of Criminal Appeal will not usually be the appropriate forum for these issues to be resolved. . . . That is not to say that such differences cannot be resolved at trial. At trial, when such issues arise, it will be for the jury . . . to resolve them as issues of fact on all the available evidence in the case (see *Kai-Whitewind*).

Juries may therefore continue to convict defendants of murder in such cases even where a battery of eminent expert witnesses (which in *Kai-Whitewind* included a professor of forensic pathology and consultant pathologist to the Home Office) opine that on the evidence such a conclusion would be wrong or at best unjustified. It is not essential for the prosecution to produce other evidence, such as a confession or an eye-witness account, which is wholly independent of their expert witnesses or of the conclusions drawn by those witnesses. The jurors may have no expertise or qualifications that might enable them properly to interpret the post-mortem findings, or to distinguish between conflicting expert views concerning those findings, but that does not seem to matter. Ought it to matter?

It would be dangerous to insist that expert evidence presented for the defence must necessarily be taken to neutralise any expert evidence given for the prosecution. Some expert testimony may indeed be hard to reconcile with the facts and it may then be right for juries to reject it. But, with respect, it is difficult to see how in *Kai-Whitewind* the jury (or the Court of Appeal) could safely have concluded that the opinions of so many defence experts could be discounted as demonstrably wrong. If those experts were not demonstrably wrong, the conviction was unsafe. Puaca may not be a particularly troublesome case, but *Kai-Whitewind* surely is.

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Sentencing Dangerous Offenders: 'Significant Risk of Serious Harm'

The provisions on custodial sentences for dangerous offenders under the CJA 2003 came into effect on 4 April 2005 and apply in respect of offences committed on or after that date (see **E.5**). The criteria for the use of these sentences is that the offender has committed a 'specified offence' and that the court is satisfied that there is a significant risk of serious harm to members of the public occasioned by the commission of further specified offences by the offender. Once the criteria are met, the court is required to impose one of the sentences provided for public protection. A specified offence is one that is listed in sch. 15 to the Act and includes many violent or sexual offences. Where a specified offence is punishable with at least ten years' imprisonment, it is also a 'serious offence'. Different provisions apply depending on whether or not the specified offence is a serious offence. If an offender has in the past been convicted of a specified offence there is a rebuttable presumption that the 'significant risk of serious harm' threshold has been passed. The provisions replace the powers to impose 'longer than normal' sentences under the CJA 1991 and the PCC(S)A 2000. There had been much concern, reflected in the judicial training on the CJA 2003, that the new provisions had been drawn too widely and would require the courts to impose disproportionately long sentences in a large number of cases. The Court of Appeal has addressed these concerns in the important case of *Lang and Others* [2005] EWCA Crim 2864.

Giving the judgment of the Court, and dealing with 13 separate appellants, Rose LJ said that the requirement that a risk be 'significant' means more than a possibility—it must be 'noteworthy, of considerable amount or importance'. A wide variety of information will need to be considered before such an assessment is made. The court will rely upon the pre-sentence report (prepared in accordance with the *Guide for Sentences of Public Protection* issued by the National Probation Service in June 2005) and the details of the offender's previous offending, where relevant. A medical report would be appropriate in some cases. The CJA 2003 defines 'serious harm' as 'death or serious personal injury, whether physical or psychological', a phrase familiar to courts from the earlier legislation, and on which there exists some guidance (*Creasey* (1994) 15 Cr App R (S) 671; *A-G's Ref (No. 47 of 1998)* [1999] 1 Cr App R (S) 464). The fact that the further offence that is foreseen is a 'serious offence' does not automatically mean that commission of such an offence would result in 'serious harm', and if the offence foreseen is not a 'serious offence', it will be rare that there is a 'significant risk of serious harm'. The Court of Appeal confirmed that risk to 'members of the public' was a general term, and was not to be construed as excluding any particular group, such as prison officers or staff at mental hospitals. It seems safe to assume that, in appropriate circumstances, such a risk can be made out where the risk is specific to a small group of individuals, or just to one potential victim (applying the

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pre-Act authorities of *Hashi* (1995) 16 Cr App R (S) 121 and *S* (1994) 15 Cr App R (S) 765).

As far as the rebuttable presumption is concerned, the Court indicated that an exercise of judgment on the part of the sentencer was always required. Although the court must start from the presumption, there is discretion, and the judge is expected to reach a reasonable conclusion in the light of the available information. It was the expressed intention of Parliament to protect the public from serious harm. It follows that it was not the intention to require the imposition of indeterminate sentences for relatively minor offences. The Court of Appeal emphasises, therefore, that both the test of 'significant' risk and the test of 'serious' harm are more demanding than has been assumed by many sentencers. The presumption did not apply to offenders aged under 18 or to adults with no relevant previous convictions.

When sentencing young offenders, the Court of Appeal stated that it was important to bear in mind that they may change and develop within a shorter time than an adult. This, together with the level of maturity of the youth, may be highly relevant when assessing both future conduct and whether that may give rise to significant risk of serious harm in the future. For youths, the statutory regime allows greater discretion over the choice of sentence even when the relevant criteria have been satisfied. The court may impose an extended sentence on a youth even where a 'serious offence' has been committed, whereas for an adult offender the court may only impose a life sentence or imprisonment for public protection. The Court of Appeal expressed the view that where the offender is very young, an indeterminate sentence may be inappropriate even where a serious offence has been committed and there is a significant risk of serious harm from further offences (see also D [2005] EWCA Crim 2292). It should be noted that there are particular issues of difficulty relating to the determination of mode of trial for youths where the dangerous offender provisions are invoked. It is understood that the Divisional Court will be addressing this matter in the near future.

Finally, the sentencer should be careful to give reasons for all conclusions, particularly for the finding of whether or not there is a significant risk. Reasons should include reference to the information that has been taken into account. If the sentencer is minded to come to a different conclusion from the report(s) presented, it would be wise to alert counsel so that representations can be made on the issue. Rose LJ expressed sympathy for those sentencers who had been unsuccessful in finding their way through the 'labyrinthine provisions' of the Act, and made it clear that any criticism voiced by the Court was directed at the authorities which had produced the legislation rather than the judges who had tried to apply it.

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Anti-social Behaviour

Arguably the refinements of practice and procedure relating to anti-social behaviour represent the fastest growing area of case law at present. Recent cases have dealt with the following points.

Nature of the Offending Behaviour

In *R (on the application of Mills) v Birmingham Magistrates' Court* [2005] EWHC 2732 (Admin) it was held that some acts of theft may involve 'anti-social behaviour' within the meaning of the CDA 1998, s. 1(1) (or s. 1C(2)) but that furtive acts of shoplifting could not be shown to have had any such effect.

Sentencing for Breaches of ASBO

Guidance as to sentencing for breach of an ASBO has been provided by the Court of Appeal in *L* [2005] EWCA Crim 2487. The Court emphasised the need for proportionality between the breach and the sentence: a severe sentence of imprisonment or custody may be appropriate in some cases, but not where the defendant has breached an order merely by (e.g.) entering an area or using a transport system from which he has been barred.

Where the defendant has not merely infringed the terms of the order, but has done so by committing an offence in breach of the order, the Court dissented from the view (as previously expressed in *Morrison* [2005] EWCA Crim 2237) that it is wrong in principle to impose a heavier sentence for breach of the ASBO than for the offence in question. Leveson J said:

> We are conscious that in Morrison this Court held that if the breach of an ASBO is no more than the commission of an offence for which the maximum penalty is prescribed by statute, it is normally wrong in principle to pass a sentence for a breach calculated by reference to the maximum for breach of an ASBO. With respect, that appears to ignore the impact of antisocial behaviour on the wider public which was the purpose of the legislation in the first place; it also means that antisocial behaviour short of a criminal offence could be more heavily punished than antisocial behaviour that coinci-

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dentally was also a criminal offence. We thus prefer the contrary approach of this Court in *Tripp* [2005] EWCA Crim 2253 which itself reflects *Braxton* [2004] EWCA Crim 1374, [2005] Cr App R (S) 36.

ASBOS following Conviction in Criminal Proceedings

As to the imposition of ASBOS following conviction, see *Boness and other appeals* [2005] EWCA Crim 2395.

(1) An ASBO must be precise and capable of being understood by the offender. The court should ask itself, before making an order, whether the terms of the order were clear so that the defendant would know precisely what it was that he was prohibited from doing.

(2) Following a finding that the defendant had acted in an anti-social manner (whether or not the act constituted a criminal offence), the test for making an order that prohibited the offender from doing something is one of necessity. Each separate order prohibiting a person from doing a specified thing must be necessary to protect persons from further anti-social acts. Accordingly, any order must be tailor-made for the individual defendant, not designed on a word processor for use in every case.

(3) Given the requirement that the order must be necessary to protect persons from further anti-social acts by the defendant, the purpose of an ASBO is not to punish. The use of an ASBO to punish a defendant is unlawful. A court should not allow itself to be diverted by a defendant's representative's seeking the imposition of an ASBO at the sentencing stage in the hope that the court might make such an order as an alternative to prison or other sanction. It might be better for the court to decide the appropriate sentence and then move on to consider whether an ASBO should be made or not after sentence has been passed, albeit at the same hearing

(4) It follows that the court should not impose an order which prohibits a defendant from committing a specified criminal offence, if the sentence which could be passed following conviction for the offence should in itself be a sufficient deterrent.

(5) A court should in any case be reluctant to impose an order which prohibits a defendant from committing a specified criminal offence. If a court wishes to make an order prohibiting a group of youngsters from racing cars or motor bikes on an estate or driving at excessive speed (anti-social behaviour for those living on the estate), then the order should not (normally) prohibit driving whilst disqualified. It should prohibit, for example, the offender whilst on the estate from taking part in, or encouraging, racing or driving at excessive speed. It might also prevent the group from congregating with named others in a particular area of the estate. Such an order gives those responsible for enforcing order on the estate the opportunity to take action to prevent the anti-social conduct, it is to be hoped, before it takes place.

(6) The terms of the order must be proportionate and commensurate with the risk to be guarded against. That is particularly important where an order might interfere with a defendant's right under the European Convention on Human Rights as protected under the Human Rights Act 1998.

An ASBO imposed under the CDA 1998, s. 1C, does not become invalid merely because the form setting out the terms of the order and the conviction giving rise to it fails to specify the behaviour that was found to have been 'likely to cause harassment or distress to any person': see *English* [2005] EWCA Crim 2690.

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PUBLISHING NEWS

Corruption and Misuse of Public Office

Colin Nicholls QC, Barrister, 3 Raymond Buildings;
Tim Daniel, Partner, Kendall Freeman Solicitors; and
John Hatchard, Professor, Open University

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