

# BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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Welcome to the second edition of the *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.

The Bulletin is available free of charge on the *Blackstone's Criminal Practice* website at [www.oup.co.uk/law/practitioner/cws/](http://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

### OFFENCES—RAPE: MENS REA

#### A-G's Ref (No. 79 of 2006); Whitta

[2006] EWCA Crim 2626

The Court of Appeal briefly examined a difficult *mens rea* issue relating to the concept of 'reasonable belief' in the complainant's consent. The accused in this case appears to have made a mistake as to the identity of a woman sleeping in a darkened room. He thought it was a young woman, S, whom he had met at a party and who he had good reason to believe was willing to have sex with him that night. It was however C, a 51-year-old woman who was sleeping off the effects of the 10 vodkas she had consumed that night. He got into bed with her and began to touch her, briefly penetrating her with his finger before realising his mistake, apologising and running from the room.

The Court of Appeal made some observations doubting the correctness of the ruling. Hooper LJ

said (at [15]) that 'a possible alternative way of dealing with this very rare set of circumstances would be to hold that the offence is committed if a reasonable (and therefore sober) person would have realised that the person being penetrated or sexually touched was not the person whom the defendant thought he was consensually penetrating or touching'.

See *Blackstone's Criminal Practice*, B3.9

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**OFFENCES—POSSESSION OF CANNABIS****R (Mondelly) v Commissioner of Police for the Metropolis**

[2006] EWHC 2370 (Admin)

In relation to cannabis, which is now a Class C drug, the general policy of the police is not to prosecute or caution offenders for possession of small amounts that appear to be for personal use only. This does not affect offences of production, supply or possession with intent to supply cannabis, and is not intended to preclude the prosecution etc. of persistent or blatant offenders in circumstances identified as sufficiently grave as to be deserving of firmer measures.

This policy does not have (and does not purport to have) the force of law, but here the decision of a Metropolitan Police officer to caution the claimant for mere possession was challenged in an application for judicial review, on the basis that it was inconsistent with published force policy, 'from which, in accordance with well established public law principles, police officers cannot depart without justification'.

Walker J (dissenting) would have allowed the application in this case. He said (at [66]):

The caution administered to Mr Mondelly clearly contravened the Commissioner's policy on policing simple possession of cannabis, and for no good reason. The injustice to Mr Mondelly is such that the court should intervene.

The majority of the Divisional Court took a different view. They did not accept that there was any such clear and settled policy not to arrest or prosecute for simple possession of cannabis. The absence of any such clear and settled policy was, in their view, fatal to the claimant's case. But there was another fundamental difficulty. As Moses LJ explained at [46] if the claimant was right:

then by the promulgation of Notice 3/2004, the Metropolitan Police Commissioner has rendered it unlawful for a police officer, . . . within the relevant metropolitan area, to arrest or caution anyone for simple possession of cannabis, absent the presence of one of the circumstances identified in the Standard Operating Procedures. This is a startling proposition, particularly when Parliament expressly conferred a power of summary arrest on police constables at the very moment it re-classified cannabis. Any suggestion that arrest or caution is unlawful must be viewed in the context of both the general power of arrest

conferred by S.24 of PACE and the explicit power conferred in relation to possession of cannabis conferred by the amendment in Section 3 of the 2003 Act.

See *Blackstone's Criminal Practice*, B20.2 and D1.151

**PROCEDURE—CHANGE OF PLEA: GUILTY TO NOT GUILTY****DPP v Revitt and Others**

[2006] EWHC 2266 (Admin)

The circumstances in which a defendant may be allowed to withdraw a plea of guilty were examined here. The defendants had ridden their motorcycles at speed along a public footpath, colliding with each other and terrifying an old lady who was walking her dog on the path. Although initially arrested for causing a public nuisance, they were later charged with offences of dangerous driving, driving without a valid licence, driving without insurance, and driving a vehicle without a valid test certificate. They were initially unrepresented, but were warned by the court legal adviser of the nature and seriousness of the charges (including the fact that a custodial sentence was likely), and were also told of their right to legal representation and advance disclosure. They nevertheless entered pleas of guilty.

Having done so, the defendants then seem to have reconsidered their position. They obtained legal representation and attempted to withdraw their pleas, contending (quite implausibly) that they had thought they were pleading guilty only to public nuisance. The magistrates refused to allow this, on the basis that the pleas had been informed and unequivocal, and the Divisional Court upheld that ruling, rejecting arguments that the practice followed in relation to guilty pleas is incompatible with the right to a fair trial under the ECHR, Article 6.

See *Blackstone's Criminal Practice*, D11.86

**ATTENDANCE OF WITNESSES****R (TH) v Wood Green Crown Court**

[2006] EWHC 2683 (Admin)

The Divisional Court held that, by reason of the Supreme Court Act 1981, s. 29(3), no application

for judicial review may be entertained in respect of a Crown Court judge's decision to remand a witness in custody or on bail under the Criminal Procedure (Attendance of Witnesses) Act 1965, s. 4(3), when he has been arrested and brought before the court pursuant to a witness summons in proceedings on indictment. This need not leave such a witness without remedy against unjust treatment, because *habeas corpus* remains an available remedy as does a damages claim under the Human Rights Act 1998.

The power to remand in custody pursuant to s. 4(3) continues for as long as it is anticipated that the witness might be required to give evidence, and this may involve detention for days or weeks where there is a real possibility that either side might wish to recall the witness later in the trial.

See *Blackstone's Criminal Practice*, D13.42

## PROCEDURE—COMPROMISING APPEALS

### Owens and another

[2006] EWCA Crim 2206

In this case the Court of Appeal refused to give its approval to an arrangement proposed by the parties, the effect of which would have been to compromise an appeal by two brothers who were each appealing against convictions for conspiracy to evade excise duty on hydrocarbon oils in contravention of the Customs and Excise Management Act 1979, s. 170(2), and for conspiracy to conceal, disguise, convert or transfer the proceeds of criminal conduct, contrary to the Criminal Justice Act 1988, s. 93C(1). The terms of the agreement, if approved, would be that the Crown would not resist the appeals on one count, provided that all other applications and appeals against sentence were withdrawn.

In a postscript to a judgment dealing primarily with other issues arising from the appeal, Rix LJ emphasised that the court would not consent to such compromises: 'We informed the parties that such a compromise was in our experience unprecedented, and that we were unable to proceed on that basis. Of course, there are occasions, for instance where new evidence comes forward on appeal, where the Crown indicates that it is not minded to resist an appeal. Even in such circumstances, however, the

matter is fully opened to the court, so that the court can form its own view of the situation and resolve the matter for itself. In the present case, however, the suggested compromise had no logical or intellectual basis in the appeal, and simply represented a "deal". . . . It was unacceptable. It showed a fundamental misunderstanding of the function of the court in determining appeals.'

See *Blackstone's Criminal Practice*, D24.18

## EVIDENCE—HEARSAY ADMISSIBLE IN THE INTERESTS OF JUSTICE

### S

[2006] EWCA Crim 2272

The Criminal Justice Act 2003, s. 114(1)(d) was considered by the Court of Appeal in this case. The appellant, aged 16, was arrested on suspicion of a robbery, which had allegedly been committed by a gang of youths of which he was a member. On legal advice S gave a no comment interview. At trial, his defence was that he had not been involved in the robbery. He was cross-examined by the prosecution as to why he had not said this to the police, but he was not accused of subsequently inventing his defence.

His counsel sought to adduce evidence of a statement which the appellant had made to his solicitor prior to his police interview, but the trial judge declined to admit it under s. 114(1)(d), ruling that it would not be in the interests of justice to admit it. The judge did however direct the jury not to draw adverse inferences from the appellant's silence at interview.

Dismissing the appellant's appeal against his conviction for robbery, the Court of Appeal focused, as did the trial judge, on the fact that the excluded statement (which was not wholly exculpatory or consistent with the defence case) would have done little to assist the appellant and might in some ways have damaged his actual defence.

The case was distinguishable from *Oyesiku* (1971) 56 Cr App R 240 in which a statement made to a defence solicitor by a key witness was held to be admissible to rebut the suggestion that the defence case was a subsequent fabrication.

See *Blackstone's Criminal Practice*, F16.17

## SENTENCING

**Involuntary Manslaughter****A-G's Ref (No. 89 of 2006); Shaw**

[2006] EWCA Crim 2570

In cases involving work-place fatalities caused by deliberate breaches of safety regulations by an offender who is an employer, it is not appropriate to suspend a prison sentence merely for the purposes of preventing the collapse of the offender's business. Such a course would serve as no incentive to ensure that health and safety obligations were properly complied with; and it is imperative that such obligations are strictly observed:

**Wounding or Inflicting Grievous Bodily Harm****P (SJ)** [2006] EWCA Crim 2599

The defendant began an unprotected sexual relationship with a man, without informing him that she had been diagnosed as HIV positive. When he became infected she agreed to be tested, but led him to believe to his great distress that he had infected her. When the truth was discovered, she pleaded guilty to the malicious infliction of GBH and was sentenced to 32 months' imprisonment.

The Court of Appeal heard representations from the Terrence Higgins Trust to the effect that deterrent sentences in cases such as this had adverse effects on the willingness of people who suspected that they were HIV positive to seek treatment or to undergo testing for the virus. However the Court concluded that the courts had a duty to deter those who knew that they were HIV positive from recklessly transmitting the virus. There were serious aggravating features in this case, including the defendant's willingness to let her partner assume the blame for her condition when the opposite was true. The sentence was upheld.

**Administering a Substance with Intent****Wright** [2006] EWCA Crim 2672

The Court of Appeal considered the proper approach to be taken in sentencing for offences contrary to the Sexual Offences Act 2003, s. 61

(administering a substance with intention of engaging in sexual activity). The offender, a nightclub doorman, tricked the complainant into drinking vodka laced with 'GBL', a derivative of 'GHB', which would cause amnesia and sleep inducement. She collapsed and appeared to have a fit, but he did not call an ambulance or otherwise assist her. She was taken to hospital, unconscious and with shallow breathing, depression of the central nervous system, and low blood pressure.

The court held that a sentence with a strong deterrent element was called for, particularly in view of the breach of trust involved and the offender's behaviour when the complainant fell ill. A sentence of five years' imprisonment was upheld.

**Causing Death by Dangerous Driving****Buckland** [2006] EWCA Crim 2516

*Cooksley* [2003] EWCA Crim 996 was considered in this case, in which a sentence of nine years' imprisonment (reduced from 10 years on the basis of a very late guilty plea) was upheld in respect of a prolonged case of deliberately dangerous driving that fell into the most serious category and was aggravated by drugs and by leading the police in a high-speed pursuit that became so hazardous that it had to be abandoned. The Court of Appeal recognised that it was not always appropriate to break down the individual characteristics of the driving in question, and that it was the overall character and effect of the driving that determined where in the spectrum the offence fell.

**General Mitigating Factors****A-G's Ref (No. 73 of 2006), R v M**

[2006] All ER (D) 106 (Oct)

The Court of Appeal recognised that a sentencing judge may on occasion, and in the right case, temper justice with mercy. In this case, an 81-year-old offender was spared a prison sentence in respect of a series of sexual offences against children. The offences involved touching their genitals over clothing. There was compelling mitigation: apart from

his age, the offender was in poor health, had chosen to stop his offending some years before, and had entered a guilty plea at the first opportunity. A community order had been imposed with the requirement of supervision and attendance at a sex offender programme, together with a sexual offences prevention order (prohibiting him from having unsupervised contact with a child under the age of 16).

In rejecting the Attorney-General's submission that this sentence was unduly lenient, the court observed that sentencing was an art rather than a science; that the trial judge was particularly well placed to assess the weight to be given to various competing considerations; and that leniency was not in itself a vice. The proposition that mercy should season justice was as soundly based in law as it was in literature.

### Detention and Training Orders

#### **R (A) v Governor of Huntercombe Young Offender Institution** [2006] EWHC 2544 (Admin)

The Court of Appeal had previously created a problem in this case by varying the claimant's original DTO from one of three years to one of 18 months, 'less 43 days spent on remand.' The last part of this order (which would, if followed, have resulted in his immediate release) was in fact unlawful, because s. 101(1) permits only orders of 4, 6, 8, 10, 12, 18 or

24 months; and although s. 101(8) (see E9.12) requires the period of any remand in custody to be taken into account in determining the term of the order, that period cannot be taken into account in determining the effect of the order.

When the Court of Appeal's error was discovered (when the claimant's parents arrived to collect him from detention), the court at once faxed a recommendation (but not an order) to the governor that he be released 'under all powers available to the Prison Service'. The Prison Service eventually decided that they had no power to do so, and that the Secretary of State had no power to order release under s. 102 at any time other than exactly one month or two months before the usual release point, in accordance with s. 102(4)(b).

Stanley Burnton J upheld this strict interpretation of s. 102(4)(b), and rejected arguments that the inconvenience caused to the claimant's parents amounted to 'exceptional circumstances' such as might justify early release on compassionate grounds under s. 102(3). As to the mistake by the Court of Appeal, whether such a mistake amounts to an exceptional circumstance will depend on the precise facts. In his lordship's view, such a mistake will not ordinarily amount to an exceptional circumstance, because of the increasing risk of such errors under today's bewilderingly complex sentencing rules.

## CASE DIGEST—IN DETAIL

### Brady

[2006] EWCA Crim 2413

A novel issue concerning the essential elements of the offence of inflicting grievous bodily harm under the Offences Against the Person Act 1861, s. 20, was considered but not entirely resolved by the Court of Appeal. The accused had consumed a significant quantity of alcohol at a nightclub. As he sat down on a low railing on the first floor gallery above the dance floor, he lost his balance and fell, landing on a girl below, causing crippling injuries to her back.

Clearly he was to blame for her injuries, but the issue was whether he could be said to have inflicted

them 'maliciously'. Maliciousness requires either an intention to cause some injury or recklessness as to whether some such injury might be caused. This ordinarily means recklessness of the subjective or *Cunningham* variety, as defined by the House of Lords in *G* [2003] UKHL 50. But in this case, the voluntary intoxication might have invited a direction to the jury based on the *Majewski* rule; i.e. a direction that they could consider the accused to have acted maliciously if they were satisfied that he would have recognised the risk had he not been drunk (see to that effect the Judicial Studies Board's Specimen Direction No. 52B).

Had the accused deliberately jumped onto the people below, his drunken inability to appreciate the risk of injury would undoubtedly have brought him within the *Majewski* rule. But here he had fallen accidentally. His only deliberate act was to sit on the rail, and this potentially distinguished his case from previous authorities. In giving leave to appeal, the single judge had questioned whether or not the accused could properly have been convicted:

absent proof of an actus reus appropriate to a section 20 offence that is, absent proof of *deliberate*, non-accidental conduct on the part of the accused that inflicted grievous bodily harm upon the victim

The Court of Appeal were critical of counsel for failing fully to explore the authorities on maliciousness, and the court hesitated to pronounce on the issue. Hallett LJ said (at [24] to [25]):

Given the way in which the appeal was argued before us, we confess we have not found the question an easy one to answer. As we attempted to review the law ourselves, we understood the concern of the single judge. . . .

Given the possible ramifications of a judgment on this point, we are reluctant to come to a concluded view in the absence of fuller argument. If it assists, however, we are prepared to give our *preliminary* view, namely that, subject to the question of *mens rea*, it may have been open to the jury in this case to convict the appellant on the basis of his own account. We say that for this reason: arguably, there was here evidence of 'deliberate non-accidental conduct on the part of the accused that inflicted grievous bodily harm' in that the appellant deliberately perched, precariously as it turned out, on a low railing, above a crowded dance floor and having consumed considerable quantities of alcohol and drugs. This deliberate act, on any view, led almost immediately and directly to the fall over the railing and to the infliction of grievous bodily harm. It was a substantial cause of the infliction of those injuries. We would not be inclined to accept, therefore, [counsel's] submission that, because it was the unintentional fall rather than the deliberate act which, in fact, caused [the victim's] injuries, this broke the chain of causation. The one led inevitably to the other.

In the event, the court considered that the appeal could be allowed on the basis of defects in the trial judge's directions to the jury. On the directions given, one could not rule out the possibility that the jury had convicted the appellant merely because his stupidity had led to the victim's injuries. The conviction therefore was unsafe.

See *Blackstone's Criminal Practice*, B2.37

### Hadley and others

[2006] EWCA Crim 2544

The Court of Appeal considered both when prosecution non-disclosure will result in a conviction being unsafe and in what circumstances and according to what criteria a retrial will be ordered.

This was a drugs case. The prosecution failed to disclose relevant material because it failed to view relevant videos and instead relied on summaries. As a result there was a failure to disclose material video recordings relating to surveillance of the appellant's business premises. The Court accepted that it must, in deciding whether the conviction was unsafe, determine first whether the material should have been disclosed and then whether the failure to disclose it renders the conviction unsafe. It does not necessarily follow that because the first question is answered in the affirmative the second must also be so answered. The court will not regard a conviction as unsafe if the non-disclosure can be said to be insignificant in relation to any real issue in the case (*Alibha* [2004] EWCA Crim 681 followed). Individual items of evidence must be seen in the context of other evidence in the case.

The Court accepted that an appellant need not show that disclosure would have affected the outcome of the proceedings. It is enough for him to show that it was capable of affecting the jury's mind, not that it must have done so. Given the importance of disclosure in ensuring a fair trial, a court is likely to be slow to accept that the safety of a conviction is unaffected where a substantial volume of disclosable material has been withheld from the defence.

In deciding whether to order a retrial, the Court will have regard to the gravity of the offence. Likely delay in bringing the matter to a fresh hearing while regrettable would not, in a case where there are unlikely to be difficulties in putting the evidence before a fresh jury, persuade the Court that it would be unjust to order a retrial. The Court will not refuse a retrial simply because the prosecution may be able to improve its case: the purpose of the trial process is to reach a correct decision, not one that is the result of procedural or tactical shortcomings on either side. The Court's focus is on whether there was failure to disclose, not why. It follows that arguments essentially based on abuse of process are unlikely to

prevail. Here, looking at the question whether it would be in the wider interests of justice for there to be a retrial, the Court notes that this is not a case where the prosecution's conduct dictated that no prosecution should have been brought (*Mullen* [1992] 2 Cr App R 143 distinguished). Lessons, the court concluded, had been learned and the interests of justice would not be served by refusing to order a re-trial simply to make a point.

See *Blackstone's Criminal Practice*, D8.10 and D24.54

### Dunlop

[2006] EWCA Crim 1354

The retrial provisions of the Criminal Justice Act 2003 were examined by the Court of Appeal for the first time. The court's ruling (which was made in June 2006 but not then fully reported) enabled the respondent to be re-indicted for a 1989 murder of which he had previously been acquitted. On 11 September he pleaded guilty to that murder in the face of overwhelming new evidence.

The murder in question was a qualifying offence for the purposes of the new law, and it was clear that there was new and compelling evidence against the respondent. This evidence primarily took the form of the respondent's repeated confession to the murder, which had been made in the knowledge that it exposed him to prosecution for perjury at the original murder trial, but at a time when the double jeopardy rule still precluded any retrial for the murder itself. He had in fact already been charged with and convicted of perjury as a result of those confessions.

As the respondent conceded, the Crown's application for a retrial involved no conflict with European human rights law. Article 4(2) of Protocol 7 of the ECHR expressly permits an appellate court to reopen a case in accordance with the provisions of domestic law 'if there is evidence of new or newly discovered facts'. The respondent did however raise certain other objections in an attempt to forestall the proposed retrial. He argued that an order for a retrial would not be in the interests of justice because:

- (i) It would not be fair for the respondent to be prejudiced by his confessions and his plea of guilty to perjury when these were made as a result of representations, or alternatively in

reliance on a belief, that he could not and would not be tried again for murder;

- (ii) A fair trial would be unlikely because of prejudicial publicity from acquittal to the present day and because there would be unavoidable reference to the previous trials; and
- (iii) The periods of delay prior to the application were so great as to render a retrial contrary to the interests of justice.

The Court dealt with the second and third points first. Using accepted techniques of jury management, said Lord Phillips CJ, it should be possible to select a jury that was not prejudiced by recollection of such publicity. As to the delay, there was little difference between the delay occasionally found in cases involving historic sex offenders, who may have been lulled into a sense of false security by the absence of any charge over 17 or more years, and the delay in trying a defendant who had been lulled into a sense of false security by the existence of a rule against double jeopardy. Turning then to the respondent's first and principal argument, Lord Phillips said (at [42] and [45]):

In reliance on the belief that he was immune from retrial, Dunlop has provided new evidence which is not merely compelling, but overwhelming. There has been no suggestion that he is in a position to attempt to rebut this evidence. In these circumstances we suggested to [counsel] that the issue was not so much whether it was fair that [Dunlop] should be exposed to the jeopardy of another trial, but whether it was fair, having particular regard to the fact that he had set out to 'put the record straight' and pay the considerable penalty for perjury, that he should be exposed to further punishment for murder, the punishment in question being a mandatory life sentence. . . .

We have concluded that the public would rightly be outraged were the exception to the double jeopardy rule not to be applied in the present case simply on the basis that Dunlop would not have made the confessions that he did had he appreciated that they might lead to his retrial. We can see no injustice in allowing a retrial in this case.

See *Blackstone's Criminal Practice*, D11.59

### S

[2006] EWCA Crim 2389

In *Robinson* (1994) 98 Cr App R 370 the Court of Appeal ruled that a party cannot call a witness of fact and then, without more, call a psychologist or other expert witness to give reasons why the jury should

regard that witness as reliable. If the credibility of the witness is (or is soon to be) attacked on the basis of his mental abnormality etc., it is permissible under *Robinson* to rebut this attack with expert evidence, but such evidence must even then be restricted to answering the particular challenge, and must not become oath-helping.

This principle was considered in *S*, where the testimony of the complainant, an autistic girl, aged 13, was supported by the evidence of a distinguished expert witness, who opined that such a child would not easily have been able to invent the story she had told, and would have struggled to stick to a false story of that kind, even if she had been able to invent it.

Upholding the admission of this expert evidence, the Court of Appeal ruled that *Robinson* could readily be distinguished because the expert evidence in that case had related directly to one particular

witness. In *S* the expert evidence was of general application. It related to a neurological condition and a feature widely experienced by those who suffer from it. It remained for the jury to decide whether the complainant was to be believed as to the particular allegation she had made. Indeed, the expert had not been permitted to comment directly on the veracity of the complainant's actual evidence.

In many respects, the admission of expert evidence in cases such as *S* makes good sense, but the attempt to distinguish *Robinson* is more problematic. The expert's evidence in *S* may have been of general application, but the jury in each case was concerned only with the credibility of one particular complainant; and in *S* the expert told them that the complainant was almost incapable of fabricating her allegations. That comes very close to saying, 'Her evidence is likely to be true'. If so, where does that leave the *Robinson* principle?

See *Blackstone's Criminal Practice*, F7.24 and F10.6

## LEGISLATION

### Fraud Act 2006

The Fraud Bill received Royal Assent on 8 November, but none of the Act's material provisions are yet in force.

See *Blackstone's Criminal Practice*, B5.1 and B5.92

### Police and Justice Act 2006

As its title suggests, this Act covers both policing matters and traditional criminal justice issues. It received Royal Assent on 8 November but only a small number of its provisions are in force (see s. 53 for commencement). Measures in the Act include the following.

- It creates a standard set of powers available to all Community Support Officers (CSOs) (s. 7).
- It amends the PACE 1984 in relation to bail (s. 10).
- It provides police officers with a new power to enable them to stop and search any person or vehicle in any area of an airport, where they have reasonable grounds to suspect that criminal activ-

ity has taken place or is about to take place (s. 12).

- It extends the conditional caution scheme to provide for punitive conditions to be attached, in addition to the reparative and rehabilitative conditions already allowed, and introduces a power of arrest for breach of a conditional caution (ss. 17 and 18).
- It amends the Anti-Social Behaviour Act 2003 to extend the range of agencies that can enter into parenting contracts and apply for parenting orders (ss. 23 and 24).
- It amends the Computer Misuse Act 1990, *inter alia* so as to clarify the position on denial of service attacks and to increase penalties (ss. 35 to 38).
- It extends powers of forfeiture under the Protection of Children Act 1978 (ss. 39 and 40).
- It amends the Extradition Act 2003 and includes complex powers which would, if implemented, remove the USA from the list of countries designated for the purposes of Part 2 of that Act (ss. 42 and 43).
- It provides for accused persons to 'attend' hearings and give evidence via a live link (ss. 45 to 48).

### Road Safety Act 2006

This Act received Royal Assent on 8 November but, with minor exceptions, is not in force. It includes the following provisions.

- The Act introduces a new offence of causing death by careless or inconsiderate driving and of causing death by driving while unlicensed, disqualified or uninsured. These offences will carry a carry a maximum sentence of five years' and two years' imprisonment respectively. The maximum fine for careless and inconsiderate driving is increased from £2,500 to £5,000.
- A new definition of careless and inconsiderate driving is provided.
- It creates the offence of being the registered keeper of an uninsured vehicle. This will carry a fixed penalty fine of £100 plus the power for the enforcement authorities to clamp and, in appropriate cases, dispose of such vehicles.
- Penalties for the existing offences of using a handheld mobile phone while driving and for failing to have proper control of a vehicle are increased (to three penalty points and a £60 fixed penalty fine).
- The range of penalty points for speeding is extended.
- The Act enables the future use of alcohol ignition interlocks—requiring certain drivers to drive only cars fitted with such locks.
- Police and VOSA enforcement officers are empowered to require offenders who cannot supply a satisfactory UK address to pay an immediate deposit in lieu of a fixed penalty or pending a court hearing.

### Safeguarding Vulnerable Groups Act 2006

This Act received Royal Assent on 8 November 2006 and makes provision in connection with the protection of children and vulnerable adults. It provides that certain activities be regulated activities and that persons who are mentioned on the relevant list maintained by the Independent Barring Board be prohibited from taking part in or seeking to take part in those activities. Breach of the prohibition is an offence. The Act provides for a range of either-way and summary offences including offences carrying a maximum penalty of five years'

imprisonment. The Act repeals the Criminal Justice and Court Services Act 2000, ss. 26 to 34. None of the Act's material provisions are yet in force.

See *Blackstone's Criminal Practice*, E23.6

### Violent Crime Reduction Act 2006

This Act received Royal Assent on 8 November but, with minor exceptions, is not yet in force. Particular provisions include the following.

#### Alcohol-related violence and disorder

Chapter 1 deals with 'drinking banning orders' to exclude persons from licensed premises in an area. Chapter 2 permits local authorities to designate alcohol disorder zones. Chapter 3 includes provisions creating a new offence of persistently selling alcohol to children and widening powers to give directions requiring persons to leave a given locality.

#### Weapons

Part 2 creates new offences relating to dangerous weapons; applies the provisions as to minimum sentences for firearms offences under the Firearms Act 1968, s. 51A to a wider range of offences, increases the level of regulation in respect of air weapons and ammunition; and prohibits the manufacture, sale or importing of 'realistic imitation firearms'. It also increases the penalties for certain knife-related offences and widens the ambit of the Crossbows Act 1987 (increasing the specified age from 17 to 18).

#### Football

Part 3 includes amendments to the Football Spectators Act 1989 and associated powers. It also amends the Criminal Justice and Public Order Act 1994, s. 166 (ticket touting) and adds a new s. 166A providing protection from proceedings under that section for information society service providers (e.g., internet-based companies).

#### Sexual offences

The provisions in ss. 54 to 58 include new powers of forfeiture, provision for the continuity of sexual offences law, and amendments to the law on cross-border offences.

**Criminal Defence Service (General) (No. 2) (Amendment) Regulations 2006 (SI 2006 No. 2490)**

These Regulations amend the Criminal Defence Service (General) (No. 2) Regulations 2001 (SI 2001 No. 1437) as a result of the transfer of responsibility for granting legal aid in criminal proceedings in magistrates' courts from the court to the Legal Services Commission pursuant to the Criminal Defence Service Act 2006.

**Criminal Defence Service Act 2006 (Commencement) Order 2006 (SI 2006 No. 2491)**

This Order brings ss. 1 to 4 of the Act into force on 2 October 2006.

**Criminal Defence Service (Financial Eligibility) Regulations 2006 (SI 2006 No. 2492)**

These Regulations set out the criteria relating to financial eligibility which must be satisfied before individuals involved in criminal proceedings in a magistrates' court may receive publicly funded representation.

**Criminal Defence Service (Representation Orders and Consequential Amendments) Regulations 2006 (SI 2006 No. 2493)**

These Regulations empower the Legal Services Commission, instead of the court, to grant a right to publicly funded representation in criminal proceedings in magistrates' courts where it does not already have that power and make a number of connected and consequential changes.

**Criminal Defence Service (Representation Orders: Appeals etc) Regulations 2006 (SI 2006 No. 2494)**

These Regulations provide for appeals or renewed applications where an individual involved in criminal proceedings has been refused publicly funded representation on the grounds that the interests of justice do not require him to be granted an order giving a right to such representation.

**Criminal Procedure (Amendment No. 2) Rules 2006 (SI 2006 No. 2636)**

These Rules amend the Criminal Procedure Rules 2005. The main changes affect expert evidence (including a new part 33) and evidence about a complainant's sexual behaviour (a largely new part 36). Further amendments prescribe procedure relating to requisitions issued by a public prosecutor under the Criminal Justice Act 2003, s. 29, applications under the Domestic Violence, Crime and Victims Act 2004, s. 17 for counts to be tried without a jury, and appeals against a sentence review decision.

**Terrorism (United Nations Measures) Order 2006 (SI 2006 No. 2657)**

This Order revokes and replaces the Order of 2001. It gives effect to Resolution 1373(2001), adopted by the Security Council of the United Nations on 28th September 2001 relating to terrorism, and resolution 1453(2002) adopted on 20th December 2002 relating to humanitarian exemptions. It also provides for enforcement of Regulation (EC) 2580/2001 on specific measures directed at certain persons and entities with a view to combating terrorism.

## COMMENT AND ANALYSIS

**Punishing Human Error**

The Road Safety Act 2006, which received the Royal Assent on 8 November, contains controversial provisions designed to bridge the gap between the very serious offence of causing death by dangerous driving (RTA 1988, s. 1) on the one hand and the relatively minor offence of driving without due care and attention (s. 3) on the other. The former offence is punishable by up to 14 years' imprisonment and almost invariably attracts a custodial sentence of some kind, in addition to obligatory disqualification from driving. The latter offence, even where it involves causing a fatal accident, is punishable only by a fine together with endorsement or disqualification.

Two new homicide offences have been inserted into the RTA 1988. Section 2B will, when brought into force, create an offence of causing death by careless or inconsiderate driving. This offence will be triable either way and punishable on indictment by up to 5 years' imprisonment (or by 12 months on summary conviction) and by obligatory disqualification. Section 3ZB will create an offence of causing death by driving when disqualified, unlicensed or uninsured, and will attract a maximum sentence of two years' imprisonment, even where the standard of driving cannot itself be faulted.

The new s. 3ZB offence may be contrasted with the existing offence of causing death by careless driving when intoxicated (s. 3A). A drunken driver involved in a fatal accident is not necessarily guilty of unlawful homicide, but if any significant fault can be attributed to him, he will face severe penalties identical to those imposed for causing death by dangerous driving. The disqualified or uninsured driver will be deemed guilty of unlawful homicide under s. 3ZB, even where the fatal accident was not his fault at all, but even if careless driving can be proved he remains guilty of nothing more serious than the new s. 2B offence. To put it another way, the otherwise blameless but uninsured driver fares worse than the intoxicated driver in a comparable case, whereas if careless driving is proved he fares much better. Is there any good reason for this?

Controversy has focused on the s. 3B offence, and in particular on the savage penalties provided for. The assumption seems to be that sentences of imprisonment will often be imposed, despite the minimal level of fault required, and despite the fact that any seriously bad driving involving obvious risks of serious harm will, by definition, amount to dangerous driving and thus give rise to liability under s. 1. Sentences of imprisonment are what the government seek and expect. As Road Safety Minister Fiona McTaggart explained when the proposed offences were first unveiled:

We're on the side of the victim: we're making sure that people who kill on the road can get proper prison sentences. We're making sure that if someone kills when they're driving carelessly—even if they didn't mean to—then they can be sent to prison.

Whether prison sentences will in fact be imposed on a regular basis remains to be seen. The judiciary was opposed to the reforms and some judges may be reluctant to add to the misery of a fatal accident by imprisoning a driver whose momentary error caused or contributed to it. The Sentencing Guidelines Council will need to address the issue, but may have some difficulty in distinguishing between the lowest band of sentencing for the s. 1 offence (which under the Cooksley guidelines may in some cases be no higher than 12 months) and the upper level of sentencing for the new offence. Aggravating factors, such as a bad driving record and subsequent misconduct (e.g. hit-and-run) may be significant, even where the defendant's standard of driving was not greatly at fault, but it is difficult to see how any case that does not involve dangerous driving could ever merit a sentence approaching the five-year maximum.

One cause for concern is that, rather than struggle to prove dangerous driving in a fatal accident case where the precise level of fault (and its apportionment) is not entirely clear, the CPS may prefer the 'soft' option of prosecuting only under s. 2B. In theory this would be more likely to result in a guilty plea or conviction and would still enable the court to impose a 'suitable' prison sentence. Whether juries can be relied upon to convict in such cases is

another matter; but even if a jury does convict, the judge must then resist any temptation to sentence as if the more serious offence had been charged and proved.

Another possible objection to the new law is that if a cyclist or pedestrian is two-thirds to blame for a fatal accident and a motorist who swerves to avoid him is just one-third to blame, only the latter will be held accountable unless the former was so grossly negligent as to become guilty of manslaughter. The criminal law already discriminates against motorists in comparison to other road users, but this adds significantly to the sources of discrimination.

The debate over s. 2B also raises some wider issues of principle. Amongst the many eminent critics of the new law are Lord Lyell (a former Attorney-General) and James Richardson. Richardson has described the new law as:

... an intolerable abandonment of the principle that the criminal law should punish people only for their criminality, and that criminality involves an evil act and a mind that goes with the act.

Lord Lyell meanwhile reminds us that,

The courts have emphasised repeatedly that, while the consequences must be considered, the level of culpability must be the key factor in sentence.

Unfortunately, the principle referred to by Richardson has long been in decline, even in offences of 'true criminality' such as rape or sexual assault, where substantial prison sentences are the norm. A defendant may now be convicted of such an offence on the basis of a farcical error or misunderstanding, as was illustrated recently in *Attorney-General's Reference (No. 79 of 2006)*; *Whitta* [2006] EWCA Crim 2626. A rapist need no longer be an evil man. He may merely be a confused one. In that respect, therefore, the new road traffic offences break no new ground.

As to the defendant's level of culpability, the courts do indeed pretend that this is the most important consideration in sentencing, but in practice the consequences of his behaviour often have a much greater influence on both liability and sentence. Nowhere is this more evident than in cases involving dangerous driving. A major blunder causing death will generally attract a more serious penalty than a prolonged, deliberate and terrifying display

of irresponsible driving (perhaps with police vehicles in hot pursuit) that miraculously caused no serious casualties. This remains true even if the former case involves a driver of positive good character and the latter involves an incorrigible serial offender.

Reading the Parliamentary debates on the new road traffic offences, one might easily imagine that dangerous driving requires a fault element utterly different from that required by careless driving: something akin to subjective recklessness or wilful endangerment. The reality, of course, is that dangerous driving, as defined by the RTA 1988, s. 2A, may well involve nothing more than incompetence, confusion, panic or clumsiness, if this creates an obvious risk of injury or serious damage. The dangerous driver, like the careless one, may be doing his incompetent best, or he may be an otherwise excellent and responsible driver who falls prey just once to a catastrophic error or misjudgment.

*Topasna* [2006] EWCA Crim 1969 provides a good illustration. The defendant, a bus driver of previous good character, caused five deaths because of an incompetent blunder in which he pressed on the accelerator instead of the brake pedal of a new bus, and then froze in panic as the bus lurched forwards. As the Court of Appeal observed, there was no malice on his part and no significant period of bad or irresponsible driving, nor were there any of the usual aggravating factors of alcohol or excessive speed. Because of the multiple deaths, however, a sentence of 5 years' imprisonment (reduced from 7½ years' on the basis of his guilty plea) was upheld. Lesser sentences are often imposed in manslaughter cases involving serious and deliberate acts of violence. A notable example is *Parnham* [2003] EWCA 416, in which the defendant beat his wife to death in a prolonged attack with an iron bar, raining 44 blows on her head alone. His original sentence of 6 years was quashed as 'manifestly excessive', given that he had offered a plea of guilty to manslaughter and the jury had somehow failed to convict him of murder. In terms of moral culpability, *Parnham* and *Topasna* clearly stand far apart, even though *Topasna* caused the greater carnage.

Incompetence or stupidity may merit a penalty of some kind, and in a case such as *Topasna* a substantial period of disqualification from driving is entirely appropriate, but in my submission we must

question whether even a very short period of imprisonment can be justified in such a case. It can serve no deterrent value, because a confused or panic-stricken driver will not be dissuaded from panicking by the threat of imprisonment. It may help to placate the friends and families of the deceased, but only by pandering to a crude desire for retribution; and (with respect) that is no justification for such a sentence.

The new offences created by the Road Safety Act 2006 will throw up many more cases of this kind. They will further blur the line between serious criminality and simple human error, and will almost inevitably lead to the imprisonment of decent and law abiding (but fallible and unlucky) motorists.

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### Dangerous Offenders

The provisions on sentencing dangerous offenders under the CJA 2003 (see E5) will have been in force for two years by April 2007. Home Office figures available so far suggest that IPP (Imprisonment for Public Protection) sentences are being imposed by the courts at the rate of about 100 per month. The offences for which IPPs are most frequently imposed are (in descending order) robbery, wounding with intent, arson, rape or attempted rape, and attempted murder. IPPs have been passed in a wide range of other offences, but only in small numbers. It is robbery sentencing which predominates, and this is reflected in the number of decisions of the Court of Appeal which deal with appeals against sentence in such cases.

The average length of the minimum term being set by the courts, across the range, is around 30 months. For all practical purposes an IPP amounts to a life sentence, except that in the case of an IPP the Parole Board may, on application ten years after release from prison, direct that the licence period shall come to an end. A life licence always lasts for life. The procedure for fixing the minimum term in relation to the new sentences is the same as has applied in relation to discretionary and automatic life sentences in the past (see E5.14). In fixing the

minimum term an appropriate reduction should be made for a guilty plea, and the term should normally be half of the notional determinate sentence which would otherwise have been imposed. The minimum term should not incorporate an element of risk assessment, since that is designed to be covered by the indeterminate sentence.

Inevitably, given the length of these sentences, and the uncertainty which initially existed over their appropriate use by the courts, there is now a significant body of Court of Appeal decisions in relation to the use of these provisions. They all follow and apply the leading case of *Lang and Others* [2006] 2 All ER 410, so that the decisions are largely fact-specific, and simply illustrate the operation of *Lang* in a wide variety of circumstances, rather than providing additional guidance. Useful decisions in relation to particular offences of conviction include *Frazer* [2006] EWCA Crim 1977 (on 'one-punch' manslaughter); *McGrady* [2006] EWCA Crim 1547, *Bryan* [2006] EWCA Crim 1660, *Shaffi* [2006] 2 Cr App R (S) 606, *Davies* [2006] 2 Cr App R (S) 486, *Folkles* [2006] 2 Cr App R (S) 345, and *Johnson* [2006] 2 Cr App R (S) 338 (on robbery); *Bennett* [2006] 2 Cr App R (S) 478, *Feihn* [2005] EWCA Crim 2864 and *Marriott* [2006] 2 Cr App R (S) 657 (on firearms offences); *Glave* [2005] EWCA Crim 2864 (on section 20 wounding); *Bailey* [2006] 2 Cr App R (S) 323 (on section 47 assault); *S* [2005] EWCA Crim 316 and *Taylor* [2005] EWCA Crim 3616 (on arson reckless as to endangering life); *Greaves* [2006] 2 Cr App R (S) 590 (on sexual activity with a child); and *Monks* [2006] 2 Cr App R (S) 315, and *B* [2006] 2 Cr App R (S) 472 (on rape of a child).

Many of these decisions underline the importance of the sentencer reaching his or her own decision on the dangerousness of the offender on the basis of all the evidence, including the full facts of the offence and any relevant earlier offences committed by the offender. In particular, they emphasise that the rebuttable presumption in section 229(3) involves an exercise of judgment, rather than the application of a rule. The decision in *Johnson* [2006] EWCA Crim 2486 stresses, as do a number of other cases, that the relevant provisions of the CJA 2003 are concerned with a prediction of future risk and

public protection. It is clear that it is not just previous *specified* offences which are relevant in the assessment of dangerousness. The court may have regard to offences on the record which are not specified offences, especially where they indicate an escalating pattern of seriousness. Indeed, it is not a prerequisite to a finding of dangerousness that the offender has previous convictions at all. It is not necessary that serious harm has been caused by the offender during past offences—a public protection sentence may be appropriate where there is a significant risk of serious harm from such offences in the future (see also *Bryan* [2006] EWCA Crim 1660 on a robbery case of this sort).

Wherever possible the prosecution should be able to describe the facts of previous specified offences on the record, and counsel for the defendant should be in a position to explain the circumstances of those offences. An assessment of dangerousness will also generally require the risk assessment, together with other material, in the pre-sentence report. Where appropriate (though this will be relatively rare: *S* [2005] EWCA Crim 3616), a psychiatric report will also be required.

A couple of additional issues have been settled, and need to be added to the general guidance in *Lang*.

The first concerns eligibility by age. Sections 225 and 227 provide for sentences of life imprisonment, imprisonment for public protection and extended sentences for persons aged 18 and over. In *Robson* [2006] EWCA Crim 1414, a case involving committal for sentence from the youth court to the Crown Court, the Court of Appeal confirmed that it is the *date of conviction* which matters here, rather

than the date of the offence, or the date of the sentence. So if the defendant is 17 when he commits the offence but 18 when convicted, sections 225 and 227 apply. This decision is consistent with cases such as *Danga* [1992] QB 476 and *Robinson* [1993] 1 WLR 168 (see E9.2), on other forms of custodial sentences.

The second concerns the relationship between indeterminate sentences and other sentences. In *O'Brien, Moss and Llewellyn* [2006] EWCA Crim 1741 the Court of Appeal held that it was undesirable to impose consecutive indeterminate sentences or to pass an indeterminate sentence to run consecutively to another period of imprisonment. Life imprisonment, or an IPP, should start as soon as it is imposed. In a case where the judge intends that the life sentence or IPP should include the balance of an existing sentence (or, if the relevant offence was committed before April 4, 2005, a period of return to prison under the PCC(S)A 2000, s.116) this should be achieved by increasing the notional determinate term to reflect that balance or period. Further, in *Brown* [2006] EWCA Crim 1996 the Court of Appeal said that the passing of consecutive extended sentences, or the passing of an extended sentence followed by consecutive determinate sentence was undesirable and should be avoided. Where otherwise appropriate, however, an extended sentence could be made to run consecutively to a determinate sentence. Again, these decisions are consistent in approach with cases on longer than commensurate sentences under earlier legislation (eg *Ellis* [2001] 1 Cr App R (S) 148).

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Professor of Criminal Justice, Keele University

## PUBLISHING NEWS

## NEW—OUT MARCH 2007

**Smith, Owen, and Bodnar on Asset Recovery:** Criminal Confiscation and Civil Recovery

Edited by

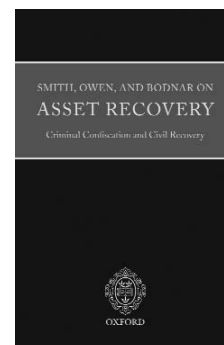
**Ian Smith**, Barrister, 11 Stone Buildings, Lincoln's Inn; **Tim Owen QC**, Barrister, Matrix Chambers; **Andrew Bodnar**, Barrister, Charter Chambers—and a team of specialist practitioners

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2 volume looseleaf, 978-0-19-929898-3, Mainwork £195.00, service price £125.00, **March 2007**



## NEW—OUT FEBRUARY 2007

**Blackstone's Guide to the Fraud Act 2006****Simon Farrell QC, Guy Ladenburg, and Nicholas Yeo**, Barristers, 3 Raymond Buildings

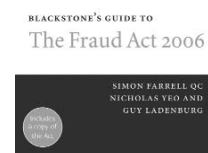
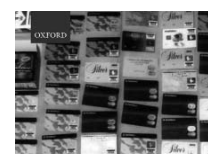
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400 pages, 978-0-19-929624-8, Paperback, £34.95, **February 2007**

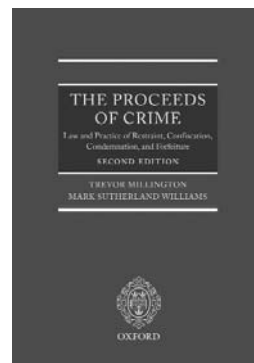


NEW—OUT MARCH 2007

**The Proceeds of Crime**

The Law and Practice of Restraint, Confiscation,  
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Second edition

**Trevor Millington**, Barrister of the Middle Temple, Senior Lawyer,  
Asset Forfeiture Unit, Revenue and Customs Prosecutions Office,  
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850 pages, 978-0-19-929864-8, Hardback, £95.00 March 2007

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