

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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Welcome to the third 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.

For free monthly updates please visit 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

OFFENCE—CREATING MISLEADING IMPRESSION AS TO MARKETS

Hipwell

[2007] EWCA Crim 562

Where shares or other investments are 'tipped' as a good buy in a newspaper etc, one of the factors that might affect the willingness of prospective purchasers to risk their money is their knowledge and understanding of the tipper's recommendation. If would-be purchasers were made aware of the fact that the tipper has a vested interest in recommending the purchase of a particular share, and stands to profit substantially from his own recommendation, it is obvious that this would be capable of influencing their decisions. Accordingly, where a tipper fails to disclose that he has such an interest, an offence under the Financial Services and Markets Act 2000, s. 397, may well be committed (although *Hipwell* itself was decided under the Financial Services Act 1986, s. 47(2) (now repealed)).

See *Blackstone's Criminal Practice*, B7.19

OFFENCES—TERRORISM

F

[2007] EWCA Crim 243

The definition of 'terrorism' in the Terrorism Act 2000, s. 1, was examined here. The court rejected arguments that anti-terrorism laws in the UK do not apply to those who seek the overthrow of despotic foreign governments. The regime in question was Libya, but it is clear that the UK's anti-terrorism laws now apply (*inter alia*) to all those

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who would for political, religious or ideological purposes use force or threats of force to influence any government in the world.

See *Blackstone's Criminal Practice*, B10.2

OFFENCES—RACIAL AND RELIGIOUS HATRED

Rogers

[2007] UKHL 8

The House of Lords affirmed the decision of the Court of Appeal in *Rogers* [2006] 1 WLR 962, [2005] EWCA Crim 2863. In upholding the appellant's conviction, the Court of Appeal had certified the following question for consideration by the Appellate Committee:

Do those who are not of British origin constitute a racial group within section 28(4) of the Crime and Disorder Act 1998?

To this question the answer was an unqualified, 'Yes', as would it be to the question whether 'foreigners' constitute such a group. Whether the evidence in any particular case proves that the offender's conduct demonstrated hostility to such a group, or was motivated by such hostility, is a question of fact for the decision-makers in the case.

See *Blackstone's Criminal Practice*, B11.156

OFFENCES—MALICIOUS COMMUNICATIONS

Connolly v DPP

[2007] EWHC 237 (Admin)

The Malicious Communications Act 1988, s. 1, was examined by the Court of Appeal. The first question that arose was whether photographs of an abortion or of an aborted foetus were capable of being classed as 'indecent or grossly offensive' when sent unsolicited by an anti-abortion campaigner to employees of pharmacy stores that sold the morning after pill. The Divisional Court held that a jury was fully entitled to come to such a conclusion: Dyson LJ said:

The words 'grossly offensive' and 'indecent' are ordinary English words. They are not used in a special sense in section 1 of the 1988 Act. This is an appeal by way of case stated and it can only succeed if the appellant can

identify a material error of law. On well established domestic law principles, that means that Mrs Connolly must show that the decision below that the photographs were indecent and grossly offensive was one which no court acquainted with the ordinary use of language could have reached: see per Lord Reid in *Cozens v Brutus* [1973] AC 854, 861 and Lord Hoffmann in *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 paras 23–25.

The court was unimpressed with arguments based on freedom of expression, conscience and religious belief under the ECHR, Articles 9 and 10. As Dyson LJ explained, the appellant's right to express her views about abortion did not justify the distress and anxiety that she intended to cause those who received the photographs.

See *Blackstone's Criminal Practice*, B19.41

OFFENCES—MONEY LAUNDERING

Hogan v DPP

(2007) *The Times*, 28 February 2007

This judgment appears to confirm the view taken in *Blackstone's Criminal Practice 2007* as to the allocation of the burden of proof where a defence is raised under the Proceeds of Crime Act 2002, s. 329(2). The wording of s. 329(2) does not suggest that any reverse burden was intended and as the court observed in *Hogan* it must therefore be for the prosecution to disprove a s. 329(2) defence if (but only if) it has been raised.

See *Blackstone's Criminal Practice*, B22.14

OFFENCES—SPEEDING

Coombes v DPP

[2006] EWHC 3263 (Admin)

The driver's conviction for speeding, contrary to the Road Traffic Regulation Act 1984, s. 89, was quashed by the Divisional Court (following an unsuccessful appeal to the Crown Court) because the road sign imposing the 30-mph limit in question was obscured by overgrown hedgerows, so that it became visible to motorists only at the point where it was passed.

Referring to the Road Traffic Regulation Act 1984, s. 85, Walker J held that this imposed (at the least) a

requirement that, at the geographical point where the motorist exceeded the limit, the signs could reasonably have been expected to have conveyed the limit to an approaching motorist in sufficient time for him to reduce from a previous lawful speed to a speed within the new limit. Motorists should not be convicted of speeding in the absence of adequate guidance.

See *Blackstone's Criminal Practice*, C6.44

PROCEDURE—JUDICIAL REVIEW

R (Dennis) v DPP

[2006] EWHC 3211 (Admin)

This case provides an example of circumstances in which a decision by the CPS not to prosecute might successfully be challenged by judicial review. The deceased, a young man who had recently started work in the building trade, fell to his death through a skylight from the roof of a commercial building that was being renovated. A coroner's jury returned a verdict of unlawful killing but, having reviewed the evidence, the CPS decided that a prosecution for manslaughter would not be appropriate. The CPS view was that although his employers owed a duty of care towards the deceased and were in breach of that duty, the degree of negligence exhibited was not such as to amount to criminal negligence.

The applicants (parents of the deceased) disputed this on the basis that the CPS had not dealt with the real thrust of any case that might be brought against the employers, and on the basis that no clear reasons had been given as to why the inquest jury's verdict should not have led to a prosecution. The court agreed. Having reviewed the authorities, Waller LJ said:

First, if it can be demonstrated on an objective appraisal of the case that a serious point or serious points supporting a prosecution have not been considered, that will give a ground for ordering reconsideration of the decision. Second, if it can be demonstrated that in a significant area a conclusion as to what the evidence is to support a prosecution is irrational, that will provide a ground. Third, the points have to be such as to make it seriously arguable that the decision would otherwise be different, but the decision is one for the prosecutor and not for this court. Indeed it is important to bear that fact in mind at all

stages. Fourth, where an inquest jury has found unlawful killing, the reasons why a prosecution should not follow need to be clearly expressed.

His lordship added that he was by no means prejudging the final decision, which remained one for the CPS, once the matters identified had been taken into account.

See *Blackstone's Criminal Practice*, D1.143

PROCEDURE—CASE MANAGEMENT

A revised version of the Protocol relating to the management of terrorism cases has been issued. The revised version can be accessed at: www.hmcourts-service.gov.uk/cms/files/management_of_terrorism_cases.pdf.

See *Blackstone's Criminal Practice*, D3.8

PROCEDURE—COUNSEL'S DUTY AT SENTENCING STAGE

Cain and other appeals

[2006] EWCA Crim 3233

The Court of Appeal has emphasised the duty of prosecution and defence advocates to assist the court or judge in ascertaining what sentences may lawfully be imposed in the case in which they are involved. A judge will very often not see the papers very long before the hearing and will not have the time for preparation that the advocates should enjoy. It is unacceptable for advocates not to ascertain and be prepared to assist the judge with the legal restrictions on the sentence that he can impose on the defendant. It is the duty of prosecuting counsel to ensure that the judge does not, through inadvertence, impose a sentence which is outside his powers. The court also emphasised the duty of a prosecution advocate to draw the court's attention to any relevant sentencing guidelines or guideline decisions of the Court of Appeal. The court concluded by warning that the only way of achieving an acceptable standard of practice may be to require prosecuting advocates to prepare a schedule or memorandum that identifies the matters relevant to sentence.

See *Blackstone's Criminal Practice*, D18.3

PROCEDURE—COSTS AGAINST LEGAL REPRESENTATIVES**Re Boodhoo**

[2007] EWCA Crim 14

The right of a defendant's legal representatives to withdraw from the case should be respected where they genuinely believe that, having regard to the defendant's best interests, he cannot properly be represented by them. The Court of Appeal accordingly quashed a wasted costs order which had been made against a firm of solicitors when they withdrew from a criminal trial after the defendant had deliberately absented himself. The court recognised that fundamental questions of trust between lawyers and clients would arise in such cases, as did practical questions as to the conduct of the trial. The solicitors in this case had done all that could reasonably be expected of them. In all the circumstances, they had been entitled to conclude, when informed of the circumstances, that they could not properly represent the defendant at trial.

See Blackstone's Criminal Practice, D29.34

EVIDENCE—MISCONDUCT ADDUCED BY A CO-ACCUSED**Stephenson**

[2006] EWCA Crim 2325

Evidence of a defendant's previous convictions that would not be considered to demonstrate any 'propensity for untruthfulness' for the purposes of the Criminal Justice Act 2003, ss. 101(1)(d) and 103(1)(b) (evidence going to important issue of credibility between defendant and prosecution)

might nevertheless be considered sufficiently relevant to an important issue of credibility arising between him and a co-defendant under s. 101(1)(e). Distinguishing *Hanson* [2005] EWCA Crim 824, in the context of the Criminal Justice Act 2003, s. 100, Hughes LJ said:

It does not follow [from *Hanson*] that previous convictions which do not involve either the making of false statements or the giving of false evidence, are incapable of having substantial probative value in relation to the credibility of a non defendant under [the CJA 2003] section 100 . . . The same degree of caution which is applied to a Crown application when considering relevance and discretion does not fall to be applied when what is at stake is a defendant's right to deploy relevant material to defend himself against a criminal charge.

See Blackstone's Criminal Practice, F12.26

EVIDENCE—FEAR**Davies**

[2006] EWCA Crim 2643

The suggestion in *Hand others* [2001] Crim LR 815, that a court should test oral testimony of fear through video link or recording, was not followed by the Court of Appeal in this case. The trial judge had allowed evidence of three witnesses (alleged victims of the appellant's violence) to be read, pursuant to the Criminal Justice Act 2003, s. 116, because of their fear of the appellant. He acted on the basis of written statements by the witnesses to that effect. The Court of Appeal rejected argument that more should have been done to ascertain the extent and basis of the fear.

See Blackstone's Criminal Practice, F16.8

SENTENCING

Fraudulent Trading**Furr** [2007] EWCA Crim 191

As in cases of systematic and large-scale theft (of which *Price* [2007] 1 Cr App R (S) 6 provides a particularly grave example), it is clear that substantial prison sentences may still be awarded in cases involving grave and substantial frauds. The court in *Furr* identified the following factors as being critical to the determination of sentence:

- the total loss;
- the benefit to the defendant;
- the identity and vulnerability of those defrauded;
- the duration and mechanism of the fraud;
- whether the fraud had taken place from the outset;
- whether a genuine attempt had been made to 'trade out of' difficulties;
- the defendant's co-operation with the authorities;
- any guilty plea; and
- the defendant's personal mitigation.

Revenue Fraud**A-G's Refs (Nos. 88, 89, 90 and 91 of 2006); Meehan** [2006] EWCA Crim 3254

The offenders had each controlled companies used as 'buffer companies' in the course of multi-million pound 'missing trader' VAT frauds, and had made large profits, but had not themselves been centrally involved in the organisation of the frauds.

The court held that those who organised fraudulent activity on such a scale could and should expect sentences well into double figures; but the offenders in this case were not the organisers and the appropriate sentencing bracket in such cases was seven to eight years' imprisonment for those who had been involved for a long period. A sentence of three years was held to be appropriate for one who had been involved for a much shorter period (only one month) and had profited to a much smaller extent.

The court further held that disqualification orders should also be imposed where company directors have involved their companies in dishonest fraudulent activity of a significant sort.

Computer Misuse Act 1990**Waters** [2007] EWCA Crim 222

A sentence of four months' imprisonment was upheld in respect of a defendant, aged 67 and of previous good character, who had conspired to install surveillance software ('spyware') on his wife's computer because he wrongly suspected that she had concealed her true assets from him during divorce proceedings. The Court of Appeal recognised that his offending was 'far from the top of the range', but computers were an established part of modern life, and an increasing amount of information relating to individuals was held on them. Individuals' privacy had to be protected from intrusion and it followed that deterrence was an appropriate element in sentencing in cases involving offences of this kind.

Class C Drugs; Cultivation of Cannabis for Own Use**Saunders** [2006] EWCA Crim 2621

D, aged 53 and arthritic, cultivated cannabis for his own use as a painkiller. A sentence of 14 months' imprisonment was quashed as manifestly excessive. The appropriate sentence in most 'personal use' cultivation cases would be between six and nine months' imprisonment, but the judge should have taken account of the fact that the production in the instant case was for accepted medical reasons. In those circumstances the court substituted a four-month sentence that would permit the offender's immediate release.

Concurrent and Consecutive Sentences**Williams** [2006] EWCA Crim 3194

The Court of Appeal condemned the practice of imposing consecutive specified terms when imposing imprisonment for public protection. A single specified term must be imposed in such cases, having regard to all relevant factors.

Murder: Life Imprisonment**Bouhaddaou** [2006] EWCA Crim 3190.

A burglar who kills in order to escape does so in the course of a burglary and any such murder is properly to be characterised as a murder for gain within the meaning of the Criminal Justice Act 2003, sch. 21, para. 5. A lack of intention to kill could constitute a mitigating factor, however.

Murder: Detention at Her Majesty's Pleasure**A-G's Ref (No. 127 of 2006); R v H**

[2007] EWCA Crim 53

This was described by the court as a 'profoundly disturbing' case in which the offender, aged 15 at the time of the reference, was of low intelligence and emotionally damaged. He savagely murdered an 11-year-old child and had carefully planned the means by which his victim (who suffered from cystic fibrosis) was lured to his home for sexual purposes. He then disposed of the body by wheeling it away in a dustbin. Sir Igor Judge P noted that, under the Criminal Justice Act 2003, sch. 21, para. 7, the

starting point for the tariff in cases involving juvenile defendants must always be 12 years, but added:

When the court is dealing with an offender aged under 18 years the provisions of paragraph 7 do not preclude the sentencer from reflecting on all the express features of the crime of murder identified in paragraph 4 and 5 of the schedule, and when they are found to be present, from treating them as features which aggravate the offence. The determination represents the end of the sentencing process which begins at the starting point . . .

No mathematical table can be produced which calculates the culpability of a young offender with any specific age, and no list, however carefully drawn up, can provide an accurate reflection of the way in which a young offender may or may not have learned from or been damaged by the experiences to which his young life has been exposed. The sentencer must make a balanced judgment of these matters. . . .

The trial judge had determined that the aggravating and mitigating features in this case cancelled each other out, leaving the tariff at 12 years; but the Court of Appeal disagreed. A sentence of 15 years, reduced from 18 on account of a guilty plea, was substituted.

CASE DIGEST—IN DETAIL**Rahman**

[2007] EWCA Crim 342

The authorities on joint enterprise, including *Powell, English* [1999] 1 AC 1, were reviewed by the Court of Appeal in this case. The court noted the difficulties that may arise where one person in a group or gang of attackers has struck a fatal blow, and where although the defendants may each be identified as members of that gang or group, none can be identified as the actual perpetrator. A defendant who agreed to the killing or who knew what the perpetrator was likely to do may still be guilty of murder, even if he did not personally intend or desire the killing, but one who did not foresee what would or might happen cannot be guilty even of manslaughter. Even where a given defendant per-

sonally intended or foresaw that serious injury would be inflicted, he will not be guilty of murder if another attacker killed by means of a fundamentally different and more deadly act (as where the gun which was supposed to be used to 'kneecap' the victim is used instead to blow out his brains).

It was argued on behalf of the appellant in *Rahman* that even where the defendants all anticipated the possible use of (say) a knife to stab the deceased in the chest and inflict serious injury, they could not on that basis be guilty of murder if the killer or knifeman stabbed as expected, but with an intent to kill that was not foreseen by the others. Stabbing with intent to kill would on that argument be a fundamentally different act from stabbing with intent only to cause serious injury.

The court rejected the argument before going on to suggest 'albeit with trepidation', a 'concise route to verdict' in a case of this kind, avoiding any directions which are too favourable to the defendants. Hooper LJ said (at [68] to [70]):

We assume an attack by a group of armed people on a person (V) who is killed during the attack. It is the prosecution's case that the defendants were parties to that murder. The prosecution accept that none of the defendants on trial can be shown to have caused the death of V and there is no dispute that a distinct member of the group whom we shall call P caused the death. The prosecution's case is that all of the defendants participated in the attack intending (at the least) that really serious harm would be caused to V.

In order to convict D of murder the jury must first be sure that P unlawfully caused the death of V intending to kill him or cause him really serious bodily harm and secondly be sure that D played some part in the attack on V. The route to verdict could then be:

1. Are you sure that D intended that one of the attackers would kill V intending to kill him or that D realised that one of the attackers might kill V with intent to kill him? If yes, guilty of murder. If no, go to 2.
2. Are you sure that either:
 - a) D realised that one of the attackers might kill V with intent to cause him really serious bodily harm; or
 - b) D intended that really serious bodily harm would be caused to V; or
 - c) D realised that one of the attackers might cause serious bodily harm to V intending to cause him such harm?

If no, not guilty of murder. If yes, go to question 3.

3. What was P's act which caused the death of V? (e.g. stabbing, shooting, kicking, beating). Go to question 4.
4. Did D realise that one of the attackers might do this act? If yes, guilty of murder. If no, go to the question 5.
5. What act or acts are you sure D realised that one of the attackers might do to cause V really serious harm? Go to question 6.
6. Are you sure that this act or these acts (which D realised one of the attackers might do) is/are not of a fundamentally different nature to P's act which caused the death of V? If yes, guilty of murder. If no, not guilty of murder.

[Counsel] submitted that the expression 'fundamentally different' would normally need no further clarification, albeit that the judge would summarise the competing arguments... We agree.

See *Blackstone's Criminal Practice*, A5.5

Richardson and other appeals

[2006] EWCA Crim 3186

The *Cooksley* guidelines on sentencing in cases of causing death by dangerous driving (or by careless driving when intoxicated) were reconsidered in Richardson, in light of the increase in the maximum sentence now available in such cases. The court also offered some guidance on the likely impact of the new offences of causing death by careless driving (Road Traffic Act 1988, s. 2B) or by driving when disqualified, uninsured or unlicensed (s. 3ZA), neither of which is yet in force.

One issue before the court was whether the increases in maximum sentences effected by the Criminal Justice Act 2003, s. 285, should lead to increased sentences generally, or whether such increases should be directed only 'at cases of the greatest culpability, which have caused the greatest harm'. On this issue, the court opined (at [14] and [16]):

The primary object of the increase in the maximum sentence was to address cases of the most serious gravity, so as to permit the sentence to be greater than before, [but] if the level of sentence in cases of the utmost gravity is significantly increased... there should be some corresponding increase in sentences immediately below this level of gravity, continuing down the scale to the cases where there are no aggravating features at all. In adopting this approach, we are following earlier guidance given by this court in *Attorney General's References 14 and 24 of 1993*, where the court addressed the doubling in the maximum sentence from five to ten years' imprisonment by significantly increasing the higher, but not the lower starting points...

At the lowest levels of seriousness, ... the 2003 Act itself requires the sentencer only to impose a custodial sentence if such a sentence is necessary, and if it is, for the sentence to be no longer than necessary to fulfil the statutory purposes of sentencing laid down in s. 142. For these reasons, at these levels there will continue to be cases in which the broad guidance in *Cooksley* will remain appropriate and, we should add, exceptional situations where even shorter sentences, or non custodial sentences, may be appropriate.

As to causing death by careless driving when intoxicated, the court forcefully emphasised that, 'in culpability terms this is and should be equated with causing death by dangerous driving', but noted (at [24] to [25] and [29]) what it regarded as a critical difference in culpability between those offences

and the new 'death by [non-intoxicated] careless driving' offence:

The dangerous driver falls 'far below' what would be expected of a competent and careful driver to whom it would be obvious that the driving in question is dangerous. In summary, the standard of driving is very bad, and the driver himself should appreciate that it is. By contrast careless driving involves a failure to exercise the degree of care and attention required of drivers, and is an offence designed to address the daily cases which involve, '... the kind of inattention or misjudgment to which the ordinarily careful motorist is occasionally subject without it necessarily involving any moral turpitude, although it causes inconvenience and annoyance to other users of the road' (per Lord Diplock in *Lawrence* [1982] AC 510 at 525).

Taken on its own, and wholly excluding any element of drink or drugs, careless driving is hugely less culpable than dangerous driving. And the true level of culpability of the driving should always ... be taken into account when sentence is determined. This is elementary.

... Absent the consumption of alcohol, careless driving on its own almost always involves culpability at the lowest possible scale. In one sense, every driver is careless when he makes a mistake. Every driver, even the best, and most experienced, and normally careful, does so from time to time. ... We therefore suggest that when the [new s 2B offence] comes into force, it will no longer be appropriate for the difference between dangerous and careless driving to be elided. Indeed it will shortly become critical to a fair and balanced sentencing process for the difference to be understood and acknowledged. ... These issues, and indeed the various difficult issues arising from driving offences which result in death will shortly be the subject of a fresh public consultation by the Sentencing Advisory Panel. And this may produce further guidance from the Sentencing Guidelines Council.

See *Blackstone's Criminal Practice*, C3.13

N (K)

[2006] EWCA Crim 3309

The Criminal Justice Act 2003, s. 115(3) provides that the rules in that Act governing the admissibility of hearsay evidence apply if (and only if) the purpose (or one of the purposes) of the person making the statement appears to the court to have been to cause another person to believe the matter, or to cause another person to act or a machine to operate on the basis that the matter is as stated. This was intended to, and clearly does, rid us of the trouble-

some 'implied assertion' doctrine as seen in cases such as *Wright v Doe d. Tatham* (1837) 7 A & E 313 and *Kearley* [1992] 2 All ER 345.

But this also means that a plain and explicit statement found in a diary, when relied upon in court, can be classed as hearsay (and subject to the rules governing the admission or exclusion of hearsay) only if the diarist intended someone else to read and believe the passage in question. In *N (K)*, McCombe J said (at [16] and [21]):

To our mind it would be a very strange state of the law if a defendant could introduce a diary such as this on the basis that it is an inconsistent statement, but yet it remained outside the provisions made by Chapter 2 of the Act for the regulation of the admission of statements other than those made in court. Nevertheless, if that is the conclusion which the statute compels, we must give effect to it. In our judgement the fallacy in this argument is the underlying assumption that if the diary is not admissible hearsay, it cannot be admissible at all. The rule against hearsay is, was and always has been an exclusionary rule. That is to say, it operates to render inadmissible what would otherwise be relevant and thus admissible. The rationale has always been that assertions out of court may be false either because they are untruthful or because innocently inaccurate, and, unlike sworn testimony, those possibilities cannot be rectified by being tested in examination and cross-examination. ...

... If, as the appellant contends, the diary was never intended to be read by anyone, it was not hearsay because it did not fall within section 115. But that does not mean it is not admissible. On the contrary, if relevant it is admissible. It is real or direct evidence outside the hearsay rule. The statutory restrictions upon the admissibility of hearsay have no occasion to apply to an action by the complainant which never had as its purpose, principal or supplementary, that any other person should believe or act upon it. It is simply a fact from which the jury is entitled, but not bound, to infer that L's uncle had had intercourse with her. It is a fact from which that may, but not necessarily will, be inferred, in exactly the same way as if she had been observed by other people kissing him, for example, passionately or making a booking of a hotel room for an afternoon in his name.

The conclusion that the Criminal Justice Act 2003 does not restrict the admissibility of such evidence seems inescapable. But can such a diary entry really become 'real or direct evidence' of facts stated inside, merely because the maker did not expect anyone else to read it? If (for the sake of argument)

Samuel Pepys kept his famous diary solely for his own reference, does this mean it would now be seen as direct, first-hand evidence of the Great Plague

and Fire of London? Does its essential character change according to the purpose for which it was kept?

See *Blackstone's Criminal Practice*, F15.11

LEGISLATION

Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006 No. 2952)

This Order amends the Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (SI 2002 No. 111), revokes the amendment to that Order (SI 2002 No. 251) and imposes a series of new restrictions, principally restrictions arising from Treasury order or designation, which affect any dealings aimed at supporting Usama bin Laden or other designated persons.

North Korea (United Nations Measures) Order 2006 (SI 2006 No. 2958)

This Order gives effect to UN Security Council Resolution 1718 (2006). Under the Security Council Resolution, the Security Council or a committee of the Security Council can designate persons in respect of whom States are to take measures to impose financial restrictions. The Order closely follows the pattern and style of similar UN Measures Orders.

Criminal Justice Act 2003 (Commencement No. 14 and Transitional Provision) Order 2006 (SI 2006 No. 3217)

This Order brings into force ss. 14 (offences committed while on bail) and 15(1) and (2) (failure to surrender by persons on bail) and sch. 36, para 3 of the Act on 1 January 2007. Sections 14 and 15(1) and (2) are brought into force for the purposes only of any offence to which para. 2A(2)(b), 6(2)(b), 9AA(1)(b) or 9AB(1)(b) of part 1 of sch. 1 to the Bail Act 1976 applies and in relation to which the defendant is liable on conviction to a sentence of imprisonment for life, detention during Her Majesty's pleasure or custody for life. Further, s. 14

has effect only where the offence to which para. 2A(2)(b) or 9AA(1)(b) applies was committed after 1 January 2007 and s. 15(1) and (2) has effect only where the failure to surrender occurred on or after that date.

Misuse of Drugs Act 1971 (Amendment) Order 2006 (SI 2006 No. 3331)

This Order amends Parts 1 and 2 of sch. 2 to the Act with the effect of reclassifying methylamphetamine as a Class A drug with effect from 18 January 2007. It was previously a Class B drug.

Police and Justice Act 2006 (Commencement No. 1, Transitional and Saving Provisions) Order 2006 (SI 2006 No. 3364)

Police and Justice Act 2006 (Commencement No. 1, Transitional and Saving Provisions) (Amendment) Order 2007 (SI 2007 No. 29)

These Orders bring into force, on 15 January 2007, the following provisions of the Act:

- s. 2 insofar as it relates to sch. 2, paras. 1 to 6 and 8 (amendments to the Police Act 1996)
- s. 11 (power to detain pending DPP's decision as to charging)
- s. 42 (amendments to the Extradition Act 2003) and all the provisions of sch. 13 to which it relates except paras. 4, 5 and 6
- s. 44 (transfer of prisoners under international arrangements not requiring consent)
- s. 45 (attendance by accused at certain preliminary or sentencing hearings) but not insofar as it inserts a new s. 57C in the Crime and Disorder Act 1998
- s. 47 (evidence of vulnerable accused)

- s. 48 (live link and appeals under the Criminal Appeal Act 1968)
- sch. 14 (minor and consequential amendments), paras. 3, 4, 9, 10, 61 and 62
- sch. 15 (repeals) so far as it relates to the repeal of the Police Act 1996, sch. 3.

Domestic Violence and Victims Act 2004 (Commencement No. 7 and Transitional Provision) Order 2006 (SI 2006 No. 3423)

This Order brings into force, on 8 January 2007, the following provisions of the Act:

- ss. 17 to 21 (trial by jury of sample counts only)
- s. 30 (prosecution appeals—amendment of the Criminal Justice Act 2003, s. 58)
- s. 56 (grants for assisting victims, witnesses etc.)
- sch. 1 (modifications of ss. 17 to 20 for Northern Ireland)
- sch. 10, para. 62 (amends the Criminal Justice Act 2003, s. 74 so as to enable the Secretary of State to order modifications to the prosecution appeal procedures for the purpose of appeals under ss. 17 to 20 of the 2004 Act).

The coming into force of ss. 17 to 20 of the 2004 Act has no effect in relation to cases where one of the following events has occurred before 8 January 2007—

- (a) the defendant has been committed for trial;
- (b) a notice of transfer has been given under the Criminal Justice Act 1987, s. 4 (serious or complex fraud) or the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988, art. 3;
- (c) a notice of transfer has been given under the Criminal Justice Act 1991, s. 53 (cases involving children) or the Children's Evidence (Northern Ireland) Order 1995, art. 4; or
- (d) the prosecution evidence has been served on the defendant in a case sent for trial under of the Crime and Disorder Act 1998, s. 51.

Violent Crime Reduction Act 2006 (Commencement No. 1) Order 2007 (SI 2007 No. 74)

This Order brings provisions of the Act into force, on 12 February 2007, namely ss. 42 (increase of

maximum sentences for possession of knife), 54 (forfeiture and detention of vehicles), 55 (continuity of sexual offences law) and 57 (amendment of Sexual Offences Act 2003, s. 82) and sch. 4 (sexual offences: forfeiture and detention of vehicles).

Environmental Offences (Fixed Penalties) (Miscellaneous Provisions) Regulations 2007 (SI 2007 No. 175)

These Regulations revoke and replace the corresponding Regulations of 2006 (SI 2006 No. 783).

Road Safety Act 2006 (Commencement No. 1) Order 2007 (SI 2007 No. 237)

This Order brings into force, on 27 February 2007, ss. 26 (breach of requirements as to control of vehicle, mobile telephones etc), 36 (driving tests), 40 (fees for licences), 50 (safety arrangements at level crossings) and related repeals.

Sexual Offences Act 2003 (Amendment of Schedules 3 and 5) Order 2007 (SI 2007 No. 296)

Section 80 of the Sexual Offences Act 2003 provides that if a person is convicted, found not guilty by reason of insanity or cautioned for an offence listed in sch. 3 to the Act, or found to be under a disability and to have done the act charged against him in respect of such an offence, then that person is subject to the notification requirements set out in part 2 of the Act. An offence under sch. 3 may also make a person a qualifying offender for the purposes of a foreign travel order under s. 114. Article 2 of this Order adds three offences to sch. 3, namely offences under ss. 48 to 50 of the Act (all of which relate to child prostitution or child pornography). Schedule 5 to the Act lists the offences which, in addition to those listed in sch. 3, may lead to a person being made subject to a sexual offences prevention order under s. 104 of the Act. Article 3 of this Order adds eight offences for England and Wales and also removes the three offences being added to sch. 3.

Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) (Amendment) Order 2007 (SI 2007 No. 391)

This Order amends the principal Order (SI 2005 No. 950) so as to postpone commencement of

ss. 177, 179 and 180 of, and schs. 8 and 9 to, the Act to April 2009. The postponement has effect insofar as the provisions apply to an offender aged 16 or 17. A similar postponement is applied to related amending provisions in sch. 32 of the 2003 Act.

COMMENT AND ANALYSIS

Basic and Specific Intent Revisited

For decades, English criminal lawyers have grappled with the problematic distinction between crimes of basic intent and crimes of specific intent. How do we distinguish one from the other? Is there a reliable way of so doing? The latest guidance of the Court of Appeal is to be found in *Heard* [2007] EWCA Crim 125. That guidance is technically *obiter* because the appellant's intent to commit a sexual assault in that case was not in doubt. As the court rightly points out, a drunken intent can still be a criminal intent, whatever the offence. *Obiter* though it may be, the guidance provided in *Heard* is impressively detailed and demands careful consideration. In my submission, however, the conclusions are flawed and ought not to be followed.

Why the distinction matters

The importance of the distinction between basic intent and specific intent is clear. If the crime with which the accused is charged is one of basic intent, voluntary or self-induced intoxication cannot be relied upon to support a denial of *mens rea*, nor can the accused rely upon a defence of self-induced automatism. But if the crime requires specific intent, such intent must always be proved. If the accused cannot be shown to have acted with the requisite intent, he cannot be guilty of the offence, whether that lack of intent is attributed to voluntary intoxication, involuntary intoxication, thoughtlessness, stupidity, or any other cause.

Classifying offences

The distinction between voluntary and involuntary intoxication can be problematic: see for example *Hardie* [1984] 3 All ER 848. But the most

intractable problem has long been the classification of offences. Judicial attempts to distinguish between crimes of basic intent and crimes of specific intent have never proved convincing and despite occasional interventions (e.g., in the Public Order Act 1986, s. 6) Parliament has done little to help.

The contribution of the House of Lords in this area is particularly disappointing. The landmark ruling in *DPP v Majewski* [1977] AC 443 remains open to various interpretations, one of which defines a crime of basic intent as one that does not require proof of intent at all. If recklessness, negligence or maliciousness suffices, and intent or knowledge need not be established, then the crime is (on that test) one of basic intent. But if intent or knowledge must be proved in respect of any element(s) of the crime, it is (in that respect at least) a crime of specific intent.

This interpretation gains weighty support from Lord Diplock's speech in *Caldwell* and this support is not necessarily invalidated by the subsequent demise of 'Caldwell recklessness'. It also has the merit of simplicity. A first year law student could (in theory) be trusted to draw such a distinction where required. Regrettably, however, it has been rejected in *Heard*.

In its place, the Court of Appeal has adopted a test derived, via Lord Simon's speech in *Majewski*, from Fauteux J's judgment in *George* (1960) 128 Can CC 289, according to which the correct distinction is between crimes requiring 'ordinary' *mens rea*, and those requiring 'purposive' *mens rea*.

Crimes of specific intent are those where the offence requires proof of purpose or consequence, which are not confined to, but amongst which are included, those

where the purpose goes beyond the *actus reus* (sometimes referred to as cases of ulterior intent) . . .

In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

Any nagging disquiet or queasiness the reader may begin to feel at this point is surely confirmed by the court's acceptance of counsel's concession that it leaves us with no 'universally logical' (meaning 'no workable?') test for distinguishing between crimes in which voluntary intoxication can be advanced as a defence and those in which it cannot. Instead we must be guided by policy considerations and categorisation will have to be achieved 'on an offence by offence basis'.

It may, with respect, be far from easy to draw distinctions of this kind. As *Smith and Hogan* points out (11th edn at p. 279):

There need be no purposive element in the *mens rea* of murder [but] rape, which is said not to be a crime of specific intent, obviously requires a purposive element.

Nobody doubts that murder will remain a crime of specific intent, and the court in *Heard* confirms, through its endorsement of *Woods* (1981) 74 Cr App R 312, that rape remains a crime of basic intent: proof, if proof were needed, that the proposed test is more or less unworkable. The biggest surprise, however, is that the offence of arson or criminal damage under the Criminal Damage Act 1971, s. 1(2), is construed (again, *obiter*) as a crime of specific intent, even if D is accused only of reckless damage coupled with recklessness as to the possible endangerment of life. Hughes LJ said (at [31]):

The [s. 1(2)] offence requires proof of a state of mind addressing something beyond the prohibited act itself, namely its consequences. We regard this as the best explanation of the sometimes elusive distinction between specific and basic intent in the sense used in *Majewski*, . . .

Furthermore,

It should not be supposed that every offence can be categorised simply as either one of specific intent or of basic intent. So to categorise an offence may conceal the truth

that different elements of it may require proof of different states of mind.

This last point, however, is well made. An offence may in other words require recklessness as to one element but intention as to another. An alleged burglar may have a specific intent to steal and yet not even suspect that he has entered the building in question as a trespasser. If that is the case, he cannot ordinarily be guilty of burglary, but might be convicted under the *Majewski* principle if it transpires that his lack of awareness results from voluntary intoxication. Why? Because D has the specific (or purposive) intent required, and the missing *mens rea* is mere recklessness as to the circumstances, which is a matter only of basic intent and therefore cannot be negated by D's intoxication.

Intoxication, accidents and assaults

The crime of sexual assault, contrary to the Sexual Offences Act 2003, s. 3, expressly requires intentional touching, which must be sexual and non-consensual, and the accused must not reasonably believe that it has been consented to. The court in *Heard* rejected the submission that the need for proof of intent as to the touching made the crime one of specific intent. Hughes LJ said (at [31]):

The touching . . . in sexual assault . . . is an element requiring no more than basic intent. It follows that voluntary intoxication cannot be relied upon to negate that intent . . .

Suppose then that D staggers groggily into V and his hands briefly touch her breasts before he falls drunkenly to the floor. Is this to be construed as a sexual assault, as clearly it would be if he had fondled her breasts deliberately? One might suppose that it would be so construed, given that voluntary intoxication is no defence and that such intoxication is the only explanation for his behaviour. But no: if a drunken intent remains an intent, said Hughes LJ (at [34]), a jury should be reminded that a drunken accident remains an accident.

Sexual touching must be intentional, that is to say deliberate. . . . If, whether the defendant is intoxicated or otherwise, the touching is unintentional, this offence is not committed.

The 'accident' scenario is contrasted in *Heard* with the *Lipman* type of scenario in which alcohol or drug abuse induces a confused state of mind in which D

believes that 'what he is doing is something different to what he in fact does'. In that scenario, D has no valid defence to a crime of basic intent.

The exemption of 'mere accidents' from the scope of the *Majewski* principle creates further problems, because an accident may itself result from an earlier deliberate act, as the Court of Appeal observed in *Brady* [2006] EWCA Crim 2413. In that case (not cited in *Heard*) the appellant, who had spent the evening drinking at a nightclub, hoisted himself up onto the railings of a gallery overlooking the dance-floor. He then fell onto V causing her serious and crippling injury. On a charge of maliciously inflicting grievous bodily harm (a crime of basic intent) the Court of Appeal opined (*obiter*) at [25]:

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.

A workable test?

If these dicta from *Heard* and *Brady* are correct, we must conclude:

- a crime of basic intent may sometimes require proof of intent, but not of purpose;
- a crime of specific intent may not necessarily require intent at all;
- there is no wholly reliable method of distinguishing between crimes of basic intent and crimes of specific intent, because policy considerations also affect the classification;
- even where the crime is one of basic intent, D may rely upon a drunken accident to negate his liability;
- but not where the accident can be attributed to an earlier deliberate (or reckless?) act on D's part.

With respect, this test will surely cause endless problems, especially since it is a test that lay magistrates and juries must be able to understand and apply.

There is surely much to be said for the adoption of a simple test that distinguishes crimes requiring proof of intent from crimes that do not require proof of intent. It may not be a perfect test, but it is at least one that can be made to work.

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Guidelines on Domestic Violence and Breach of a Protective Order

The Sentencing Guidelines Council has issued two Definitive Guidelines on the above topics, following advice tendered after consultation by the Sentencing Advisory Panel. By the CJA 2003, s.172, every court sentencing an offender must have regard to any relevant Definitive Guidelines issued by the Council.

The guideline on *domestic violence* applies to offences sentenced on or after 18 December 2006. Obviously, since there is no specific offence of domestic violence, the guideline is designed to assist sentencers dealing with violence arising in a domestic context, whatever the precise offence charged. This means that there are no sentencing ranges or starting points in the guideline. It sets out a number of principles. The key point in the guideline is that offences committed in a domestic context should be regarded as being no less serious than offences committed in a different context, and that if there is a domestic context there are likely to be aggravating factors present that make it more serious. The Court of Appeal has made similar comments in the past (see, for example, *Nicholas* (1994) 15 Cr App R (S) 381), but the reaffirmation of the principle is welcome. The guideline adopts a very broad definition of domestic violence involving 'threatening behaviour, violence or abuse (psychological, physical, financial or emotional) between adults who are or have been intimate partners or family members...'. While the classic example of domestic violence is physical violence by a man on a female partner, the definition also includes violence between former partners and abuse of an elderly person in the household. Crimes committed against children are not within the definition.

The guideline investigates in some detail a number of aggravating factors often found in such cases, and explains their importance in this context. It specifies *abuse of trust* as a violation of the mutual expectation of a caring relationship, and *abuse of power* as the exercise of control over one individual by another through physical, sexual, psychological, financial or emotional means. The Council envisages that these factors will often be present, and therefore aggravate many cases of domestic violence, but not for example where the offender and the victim have been separated for a long time. The victim's vulnerability is another obvious aggravating feature, but the guideline explores different aspects of this vulnerability, which may be due to cultural, religious, language, financial or other reasons. Exploitation of victim vulnerability will always make an offence more serious. Other identified aggravating factors include the impact of the offending on children, a proven history of violence or threats by the offender in a domestic setting, and a history of disobedience to court orders.

What may be said by way of mitigation in such cases? The Council mentions positive good character which is relevant as a general principle but, in this context, an offender's good conduct in relation to conduct outside the home should generally be of no relevance where there is a proven pattern of violent or abusive behaviour. Positive good character is of greater importance in the 'rare case' where the court is satisfied that the offence was an isolated incident. There are also circumstances in which provocation by the victim may be relevant, but this needs to be treated with 'great care', both in assessing whether allegations of provocation are true and whether, even if true, it amounts to provocation sufficient to mitigate the offence committed. For provocation to be a mitigating factor, it will usually need to involve actual or anticipated violence including psychological bullying, and provocation is more likely to be relevant if it has taken place over a period of time.

The guideline enters difficult territory when considering the wishes of the victim. It begins by restating the principle that a sentence should be imposed to reflect the seriousness of the offence and not the wishes of the victim (see E1.18). This is of particular importance in the domestic violence con-

text, because it is undesirable that a victim should feel responsibility for the sentence passed, and there is the clear risk that pleas for mercy from the victim may have been induced by threats or fear. The risk of such threats may be increased if it becomes generally believed that sentence can be influenced by victim wishes. Nonetheless, the Council says, there may be circumstances in which the court can give effect to the expressed wish of the victim that the relationship should continue, so long as the court is confident that the preference is genuine and that giving effect to it will not expose the victim to the risk of further violence. The importance of up-to-date information in a pre-sentence report or victim personal statement is stressed. If the custody threshold is only just crossed the court will wish to consider whether a better option is a suspended sentence or a community order, including in either case a requirement to attend an accredited domestic violence programme. Such an option will only be appropriate where the court is satisfied that the offender genuinely intends to reform, and there is a real prospect of rehabilitation. This is unlikely where there has been a pattern of abuse.

The separate guideline on *Breach of a Protective Order* also applies to offenders sentenced on or after 18 December 2006. It deals with sentencing offenders who have breached either (a) a restraining order imposed to prevent conduct causing harassment or fear of violence, or (b) a non-molestation order. It is an offence contrary to the Protection from Harassment Act 1997 to behave in a way which a person knows (or ought to know) will cause someone else harassment (section 2: B11.87) or fear of violence (section 4: B11.78). When imposing sentence on an offender, the court may also impose a restraining order to prevent future conduct causing harassment or fear of violence (E23.8). An offence under these provisions might have occurred in a domestic context or not. The Domestic Violence, Crime and Victims Act 2004 provides for such orders to be made on conviction for any offence or (remarkably) following an acquittal. The relevant section, section 12 of the 2004 Act, is not in force. When implemented it will amend section 5 of the 1997 Act and insert a new section 5A. During family proceedings a court may make a non-molestation order under section 42 of the Family Law Act 1996. Section 1 of the Domestic Violence, Crime and Victims Act, when

in force, inserts a new section 42A into the 1996 Act, and will provide that it is an offence to fail to comply with the non-molestation order without reasonable excuse. That offence is punishable with a maximum of five years' imprisonment.

The guideline stresses the importance of ensuring that the terms of the original order are necessary and proportionate, and states that where a breach has occurred the main aim when sentencing for that breach should be to achieve future compliance with the order where that is realistic. The nature of the conduct which gave rise to the order in the first place is relevant when dealing with breach, in so far as it allows a judgment to be made on the level of harm caused to the victim by the breach and the extent to which that harm was intended by the offender. However, sentence for breach is for the breach alone and should avoid punishing the offender again for the offence or for the conduct as a result of which the order was made. Breach of a protective order will generally be regarded as more serious than breach of a conditional discharge, since breach of a protective order is an offence in its own right and also undermines a specific prohibition imposed by the court. Since protective orders are designed to protect a victim, a key issue in determining the penalty for breach will be the extent to which the conduct amounting to breach put the victim at risk of harm. Where the order is breached by the use of physical violence the starting point should normally be a custodial sentence, but the Council makes the point that normally a separate offence would be charged in such circumstances. Important aggravating features in such cases are the particular vulnerability of the victim (bearing in mind that for cultural, religious, language, financial or other reasons, some victims may be more vulnerable than others). Adverse impact on children aggravates the breach, as does a proven history of violence or threats by the offender, where the breach is a further breach, following earlier breach

proceedings, or was committed shortly after the order was made.

The sentencing table indicates ranges for breach of a protective order. Previous sentencing decisions of the Court of Appeal on breach of restraining orders, especially *Liddle* [2000] 1 Cr App R (S) 131, but also *Lumley* [2001] 2 Cr App R (S) 110, *Pace* [2005] 1 Cr App R (S) 370 and *Bennett* [2005] 2 Cr App R (S) 362, will now have to be read in light of the guidelines. The guidelines state that a custodial sentence of more than 12 months will be appropriate where breach (one or more) involved significant physical violence and significant physical or psychological harm to the victim. The actual sentence imposed will depend on the nature and seriousness of the breach(es). A sentencing range of 26-39 weeks custody is appropriate where there has been more than one breach involving some violence and / or significant physical or psychological harm to the victim. A sentencing range of 13-26 weeks custody is appropriate for a single breach involving some violence and / or significant physical or psychological harm to the victim. A non-custodial sentence (medium range community order) is indicated as the starting point where there has been more than one breach involving no / minimal contact or some direct contact, and a non-custodial sentence (low range community order) is appropriate where there has been a single breach involving no / minimal direct contact. Custodial sentences and the punitive elements in a non-custodial sentence are subject to an appropriate reduction for a guilty plea as set out in the Council's guideline on *Reduction in Sentence for a Guilty Plea*. It should be noted that the guilty plea guideline is currently being revised. For further information on all guideline matters see:

www.sentencing-guidelines.gov.uk.

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BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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PUBLISHING NEWS

NEW—OUT APRIL 2007

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

Edited by

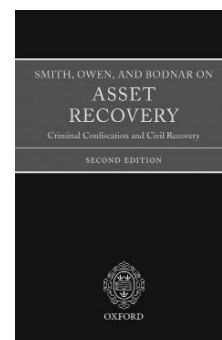
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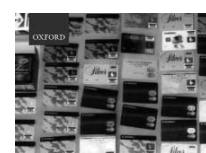
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BLACKSTONE'S GUIDE TO
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