

# BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

Issue 1, October 2007

Welcome to *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. Further Bulletins will publish in January, April and July. They can be downloaded free of charge from <<http://www.oup.com/blackstones/criminal>>.

*Blackstone's Criminal Practice* is also updated each month on our website. To access these updates for free, please visit <<http://www.oup.com/blackstones/criminal>>. The updates are set out on a chapter-by-chapter basis, with links to the full text of available judgments and to relevant legislation. By registering online you can be alerted to the posting of new material on the site and will receive news of all important changes by email.

## CASE DIGEST—IN BRIEF

### GENERAL PRINCIPLES—INSANITY

**Johnson** [2007] EWCA Crim 1978

*Windle* [1952] 2 QB 826 was followed in this case, and the discussion of it in *Blackstone's Criminal Practice* approved. The basis of the application made on D's behalf was that on a proper reading of the M'Naghten Rules he was entitled to a verdict of insanity if the jury concluded that, even though he knew that what he did was wrong as a matter of law he did not consider that what he did was morally wrong, because on the basis of his mental condition he felt that there was a moral justification for doing what he did.

That submission would have required the Court of Appeal to reject *Windle* and follow instead the ruling of the High Court of Australia in *Stapleton* (1952) 86 CLR 358. The Court of Appeal declined to do this. The Court of Appeal certified the following three questions so that the House of Lords might determine whether to revisit the M'Naghten Rules on the issue:

- (1) Do the answers given by the judges to the first, second and third questions asked by the House of Lords in M'Naghten's case remain an appropriate basis for determining insanity for the purposes of the special verdict of not guilty by reason of insanity?
- (2) If they do, does a defendant have to prove that he did not know that what he was doing was against the law, or he did not know that what he was doing was wrong in some other sense, and, if so what sense?

#### Contents

Case Digest—In Brief	1
Sentencing	4
Case Digest—In Detail	5
Legislation	7
Comment and Analysis	9
Publishing News	19

- (3) If they do not, what should be the proper basis for the special verdict of not guilty by reason of insanity?

See *Blackstone's Criminal Practice*: A3.19

### GENERAL PRINCIPLES—CORPORATE LIABILITY

P [2007] All ER (D) 173 (Jul)

The Court of Appeal considered the possible liability of a director for 'neglect' (as opposed to 'consent or connivance') in connection with an offence under the Health and Safety at Work etc. Act 1974 allegedly committed by his company. It was held that, in considering whether there had been neglect on the part of a director or other officer, it was necessary to ascertain whether he had failed to take some steps which fell within the scope of the functions of the office which he had held. Where 'wilful neglect' is not required, it is not necessary to determine whether an accused 'turned a blind eye'. That would equate the test of neglect with that to be applied where the allegation was connivance. The question was whether, in the absence of actual knowledge, the director or officer should have been put on enquiry. That would depend on the evidence in every case.

See *Blackstone's Criminal Practice*: A5.17

### OFFENCES—UNAUTHORISED DEMONSTRATIONS IN DESIGNATED AREAS

DPP v Haw [2007] EWHC 1931 (Admin)

Litigation arising from the potential application of the Serious Organised Crime and Police Act 2005, ss. 132 to 138 to Brian Haw's permanent one-man demonstration in Parliament Square against the government's policy on Iraq rumbles on. In this latest case (the third to be reported) the prosecution appealed against Haw's acquittal on charges of breaking conditions imposed on his demonstration by the police. The Divisional Court confirmed that certain statutory powers given to the Metropolitan Police Commissioner by s. 134 could properly be exercised by a subordinate on his behalf, but this was of no immediate assistance to the prosecution because the court also agreed with the court's conclusion that there was no case to answer because the conditions in question were unworkable

and unlawful. The Court warned Haw that he 'would be well advised to co-operate with the police' in respect of the more carefully drafted conditions that would follow.

See *Blackstone's Criminal Practice*: B11.137

### ROAD TRAFFIC—PRELIMINARY TESTING

Breckon v DPP [2007] EWHC 2013 (Admin)

A challenge to a drink-driving conviction focused on the absence of type approval for the device used following its adaptation. The Divisional Court held that there was no duty to obtain a fresh type approval following minor modifications and that the device remained properly described in the relevant schedule to the Approval Order. The Court also endorsed the judgment in *Smith v DPP* [2007] EWHC 100 (Admin) as to the disclosure of roadside breath test figures. Such figures should be disclosed if requested but there was no duty to do so in the absence of a request.

See *Blackstone's Criminal Practice*: C5.2

### PROCEDURE—CAUTIONS

Devani [2007] EWCA Crim 1926

The obligation to caution and the scope of the Police and Criminal Evidence Act 1984, s. 67(9) were considered by the Court of Appeal in a case involving a young solicitor. D was observed by prison operational support officers during a visit to a client who was on remand for attempted murder. CCTV images appeared to show the client passing her two envelopes. She was challenged over this, and questions were put to her first by the officers, and later by a more senior prison officer in the presence of an experienced partner from her firm, who happened to be visiting another client at the time, but she was still not cautioned. It transpired that one of the letters was addressed to the client's co-defendant and contained plans to fabricate evidence. She was charged with an attempt to pervert the course of justice.

The trial judge rejected an application to exclude the evidence of the three prison officers pursuant to the PACE 1984, s. 78 for alleged breaches of Code C, para. 10.1. Dismissing her appeal against conviction, the Court of Appeal ruled that the prison officer did, but the support officers did not, fall within s. 67(9) so

as to be directly subject to the PACE Codes. When the support officers first challenged her, it was in any case too soon in the process of observing, and drawing possible conclusions, for an obligation caution to have arisen. They did not at that stage have sufficient grounds to suspect an offence so as to trigger the obligation to caution before questioning. As for the subsequent failure to caution, the trial judge held that D had not been prejudiced by this, given the status and the experience of D herself and, in particular, the presence by her side of her principal, an extremely experienced legal practitioner.

See *Blackstone's Criminal Practice*: D1.55

## PROCEDURE—RESTRAINT ORDERS

### Director of the Serious Fraud Office v A

[2007] EWCA Crim 1927

The Court of Appeal upheld the contention of the Director of the Serious Fraud Office that the judge in the Crown Court was wrong to discharge on grounds of want of disclosure a restraint order previously made *ex parte* under the Proceeds of Crime Act 2000 at the request of a foreign investigator. The order was sought by an investigator in Iran and the judge was inclined to discharge it on the basis that it had not been disclosed that the investigator was acting on behalf of the military courts as opposed to the courts under civil control. The Court of Appeal did not dismiss the possibility that a want of disclosure might justify discharge of a restraint order but made it clear that the import and ambit of the want of disclosure required more careful examination than was applied in the instant case.

See *Blackstone's Criminal Practice*: D8.27

## PROCEDURE—JUDICIAL INDICATIONS OF SENTENCE

*Goodyear* [2005] 3 All ER 117, [2005] EWCA Crim 888 was considered in *Kulah* [2007] EWCA Crim 1701 in the context of sentencing dangerous offenders. Lloyd Jones J, giving the judgment of the court, gives detailed and important guidance on such cases and stresses the limits of judicial discretion in cases where the dangerous offender provisions may bite.

See *Blackstone's Criminal Practice*: D12.53

## EVIDENCE—IMPEACHING CREDIT OF OWN WITNESS

**Ross** [2007] EWCA Crim 1457

This case demonstrates that evidence of a witness' previous convictions may in some cases be relevant and admissible for purposes other than impeaching credit.

D was prosecuted for money laundering offences allegedly connected to drug trafficking, and C, one of D's alleged accomplices in the drug trafficking, was called as a prosecution witness. C was alleged to have accompanied D on drug trafficking trips abroad, and to have sold him a car that also represented criminal property. C had previous convictions for drug-related offences, including one for possession with intent to supply. Before the trial, the prosecution applied to admit those convictions in evidence. D's lawyers protested that this would involve discrediting their own witness. Even where a witness is declared hostile, he cannot be discredited in this way by the party calling him.

When the application was made, however, it did not appear to the judge that the prosecution would be doing any such thing. The judge expected C to confirm that the trips made with D were connected with drug trafficking, and in that context his convictions would have tended to 'fit' his testimony, rather than discredit it. In the event, C claimed that the trips were made for quite different purposes, and this gave a wholly different complexion to the evidence of his convictions. There was, accordingly, an irregularity in this aspect of the trial; but despite it the Court of Appeal was satisfied that D's conviction was safe.

See *Blackstone's Criminal Practice*: F6.27

## MULTIPLE CHARGES AND ACCUSATIONS: RISK OF COLLUSION BETWEEN WITNESSES

**Lamb** [2007] EWCA Crim 1766

This case is an example of strikingly similar allegations made by girls who attended the same school. The complaint in each case was that D, a schoolteacher, behaved sexually towards them (in breach of trust) at a leavers' ball. AB made a complaint concerning the 2004 leavers' ball and CD made a similar complaint concerning the 2005 ball. Although the complainants did at one point discuss their experiences (and one persuaded the other to make a supporting complaint)

there was no real suggestion of deliberate conspiracy or collusion. The defence did however submit that there was a risk of 'innocent contamination', and the central argument on appeal was that the trial judge failed properly to direct the jury as to that issue. Instead, he dealt at length with collusion, which was not appropriate on the facts. In the judgment of the Court of Appeal 'not only was the necessary point not made, but the wrong point was emphasised. The jury would have been likely to think that, having rejected collusion, as they were invited to do, they were entitled to give the cross-admissible evidence full weight on each count'.

See *Blackstone's Criminal Practice*: F12.20

## EVIDENCE—DISCRETIONARY EXCLUSION OF STATEMENTS

**Cole** [2007] EWCA Crim 1924

*Sellick* [2005] 1 WLR 3257, *Al-Khawaja* [2006] 1 WLR 1078, *Xhabri* [2006] 1 All ER 776, *KM* [2003] EWCA Crim 357 and *Grant v The Queen* [2007] 1 AC 1 were applied in this case. The Court of Appeal rejected arguments that D's right to a fair trial under the ECHR, Article 6 is necessarily infringed where the prosecution are permitted to rely on hearsay statements from dead, frightened or otherwise absent witnesses, even where such evidence is absolutely critical to the prosecution case.

See *Blackstone's Criminal Practice*: F16.9

## SENTENCING

### Fraud

**Dougill** [2007] EWCA Crim 2120

The offender pleaded guilty to offences of obtaining a pecuniary advantage by deception, of making a false statement to procure a passport and of furnishing false information in relation to benefits. His criminal behaviour included adopting another identity and working as a probation officer whilst entirely unqualified to do so. He was sentenced to concurrent sentences of three years' imprisonment. The sentence was upheld. The Court of Appeal observed 'those who use deceit to obtain employment, particularly in a field as sensitive as the probation service, must expect significant prison sentences, as must those who obtain false passports by the adoption of somebody else's identity'.

### Drugs

**Mejia** [2007] EWCA Crim 2128

The offender pleaded guilty to conspiracy to supply cocaine and was sentenced to 12 years' imprisonment. The cocaine in question was brought into the UK impregnated into fibreboard which was used to construct ornate doors. The drugs were virtually undetectable in that condition. The offender, together with three conspirators, was arrested whilst in the process of extracting the fibreboard from the doors before the fibreboard itself was relieved of the cocaine. The doors yielded just over 17 kilogrammes of 100 per cent

cocaine hydrochloride with a street value, it was said, in excess of £3 million. The offender had entered bases of plea which had not been accepted by the Crown and was not accepted by the judge. In those circumstances, the Court of Appeal was quick to uphold the sentence.

### Causing Death by Dangerous Driving

**A-G's Ref (No. 56 of 2007), Legrys**

[2007] EWCA Crim 1605

The Court of Appeal considered the issue of sentencing in a case of causing death by dangerous driving involving something close to the lowest level of culpability, with several mitigating circumstances and no aggravating ones. It was a case involving a misjudged overtaking manoeuvre, where D attempted to overtake a long vehicle and was unable to avoid a fatal collision with an oncoming motorcycle. It was an uncharacteristic error by a man of 59 with an excellent driving record. Character witnesses described D as a quiet, careful, gentle and kind person, and that was reflected in the manner in which he drove. The trial judge imposed a 12-month sentence, suspended on condition that D undertook 200 hours unpaid work. He referred to prison overcrowding as one of the reasons for suspending the sentence.

It was argued that the sentence was unduly lenient, but the Court of Appeal disagreed, even though they did not consider prison overcrowding to be a good reason for suspending it. Hooper LJ said:

There is nothing in the circumstances of the accident or in the history of the offender's driving to suggest that the offender himself realised that what he was doing was dangerous and could put the lives of others at risk. His error was to underestimate how long it would take to overtake the vehicles in front of him. In a more powerful car he would no doubt have succeeded. We are, for our part, not prepared to say that the offender was reckless in the sense of realising the risk of what he was doing.

The court concluded that despite this a custodial sentence was still required and that a 12-month sentence would ordinarily have been appropriate, but were not prepared to alter the sentence given all the circumstances including the fact that the offender had all but completed his 200 hours unpaid work.

### Power to Recommend for Deportation

**Abdi** [2007] EWCA Crim 1913

Failure to give written notice in accordance with the Immigration Act 1971, s. 6(2) does not necessarily render a recommendation for deportation invalid. Having considered *Nazari* [1980] 1 WLR 1366 and *Soneji* [2006] 1 AC 340, Toulson LJ said (at [29]):

The language of s 6(2) might suggest that its purpose is to avoid the risk of a person being recommended by a court for deportation who is not eligible to be deported because he is a British Citizen. But the appellant is not a British citizen. It is difficult to see why Parliament should have intended that a recommendation for deportation of a non-British citizen should be automatically invalidated by a failure to serve a notice which would on the facts have been irrelevant to the offender.

### Power to Recommend for Deportation

**Chirimimanga** [2007] EWCA Crim 1684

The appellants, who were overstayers or failed asylum seekers, pleaded guilty (*inter alia*) to offences concerning the use of falsified passports (genuine passports falsified with 'indefinite leave to remain' stamps) in order to obtain employment at a nursing home. One also pleaded guilty to possessing an identity document that related to another, contrary to the Identity Cards Act 2006, s. 25(5). Having imposed sentences of imprisonment, the trial judge recommended that all three be deported on the basis that their offending made it undesirable for them to be allowed to remain.

It was argued that the deportation orders were unjustified, having regard to the previous good character of the appellants, the modest level of criminality involved and the fact that they had not entered the country illegally. Furthermore, the judge had failed to give detailed reasons for making his recommendation.

Having considered a wide range of authorities, the Court of Appeal upheld the deportation orders. The appellants were not merely overstayers but had engaged in forgery and deception. The public interest in preventing the fraudulent use of passports to gain entry or support residence was of considerable importance and deserved protection. Failure to spell out why an offender's continued presence in the UK was to its detriment is not necessarily fatal to a deportation order.

## CASE DIGEST—IN DETAIL

**Hamilton** [2007] EWCA Crim 2062

Using a camera hidden in a rucksack, D secretly filmed a number of 'upskirt' videos of women and girls, usually while standing behind them at supermarket check-outs. Only one of his 'subjects' was ever identified: she was a girl aged 14 at the time, and this led to charges under the Child Protection Act 1978, s. 1. He stopped making the videos in 2001, so no question arose of a prosecution under the Sexual Offences Act 2003, s. 67 (but it must in any case be doubtful whether any of them could be said to be 'doing a private act' (as defined in s. 68) at the relevant time).

In respect of the adult subjects, the Crown therefore relied on the common-law offence of outraging public decency, arguing that the requisite elements of that offence were all present: D's conduct was committed in public; it was of such a lewd, obscene and disgusting character as to outrage public decency; and it was at least capable of being seen by those present at the time, had they been more vigilant. The fact that no one actually realised what he was doing did not matter. D however argued that it was necessary for the act to be witnessed by at least one person; and that at least one other person must have been present and capable of witnessing it (relying on *Mayling* [1963] 2 QB 717). As

no one realised what he was doing, no offence was committed.

Having considered *Mayling, Knuller Ltd v DPP* [1973] AC 435 and other authorities dating back to *Sedley's case* (1675) Strange 168, the Court of Appeal concluded that it was necessary to have regard to the purpose of the 'two person' rule. This was concerned only with the necessity for there to be a public element in the sense of more than one person being present and capable of being affected by the offending conduct. In the present case, although no one saw what D was doing, there were indeed others present, and by their verdict the jury must have concluded that D's conduct was capable of being seen by them.

See *Blackstone's Criminal Practice*: B3.280

### R (Donnachie) v Cardiff Magistrates' Court

[2007] EWHC 1846 (Admin)

This case concerns two important procedural points under the Trade Descriptions Act 1968.

First, for the purposes of s. 19(1), the 'prosecutor' is the local authority, and not the individual officer of the authority who institutes the proceedings on the authority's behalf. Time begins to run against the authority as soon as it can be imputed by its officers or employees with knowledge of the alleged offence, whereas the individual who instigates the prosecution on its behalf almost certainly learns about the offence at a much later stage.

The Divisional Court also distinguished between offences under the Trade Descriptions Act 1968, s. 1(1)(a) and offences under s. 1(1)(b) in the context of the sale of a taxi with a falsified odometer:

Section 1(1)(a) and 1(1)(b) create two separate absolute liability offences under the Trade Descriptions Act 1968. The use of the word 'applies' in 1(1)(a) and 'supplies' in 1(1)(b) marks the difference between the two offences. A false trade description can be applied to goods even before they are sold. This section is clearly designed to make it an offence to turn back the odometer and to supply or offer to supply a vehicle with an altered odometer. It may well be that in some cases it is only on sale or offer for sale that the altered reading is discovered but this does not affect the fact that to alter an odometer in itself is to apply a false trade description to a car, namely that it has been driven a lesser number of miles than it has in fact been driven.'

See *Blackstone's Criminal Practice*: B6.95 and B6.98

### Archbold [2007] EWCA Crim 2137

D was in bed when C started to throw stones at his house and car, in breach of an ASBO. D called the police and then armed himself with a knife for protection before going out to confront C and await the arrival of the police. C attacked him with a crow bar, upon which D stabbed and injured C with the knife. He was acquitted of unlawful wounding, to which he pleaded self-defence, but convicted of having an offensive weapon in public on the basis of the judge's direction that D could have had no lawful authority or reasonable excuse for carrying the knife even if he had only intended to use it defensively.

Reasonable apprehension of imminent attack may be a lawful excuse for carrying a weapon (*Evans v Hughes* [1972] 1 WLR 1452) but on appeal the Crown sought to support the judge's ruling by arguing that D had not faced such a threat because he could have locked himself indoors to await the police. In other words, D brought about the risk by going out to meet C (cf. *Malnik v DPP* [1989] Crim LR 451). This argument seems to have met with some sympathy in the Court of Appeal; but the court ultimately took the view that the judge had usurped the jury's role by withdrawing the issue from their consideration. It ought to have been left to the jury, and D's conviction was unsafe.

With respect a citizen is surely entitled to confront any person attacking his property, without thereby being held responsible for 'creating' a dangerous situation. There is something very unattractive in the argument that a person who sees his car or other property attacked by vandals, who may well become dangerous when confronted, must either cower inside his house to await the police (who may or may not come in time) or go out unarmed. In such a case, the jury must of course decide whether D went out looking for trouble or whether he meant only to defend himself if attacked. In the latter case, it is submitted that he may indeed have a reasonable excuse for arming himself, and a jury should be directed accordingly.

See *Blackstone's Criminal Practice*: B12.130

### Banton [2007] EWCA Crim 1847

D was alleged to have deliberately smashed a bottle in V's face after V had stepped on her toes while dancing. D claimed that she had merely thrown a bottle in V's direction after V and her friends had attacked her, but had not meant to cause any injury. Clearly the jury did not believe her. D was convicted on a single count of

wounding with intent to do GBH, contrary to the OAPA 1961, s. 18. The jury was not directed as to any alternative verdict, although a verdict of malicious wounding under s. 20 was certainly available to them as a matter of law. In the trial judge's words, prosecuting counsel 'nailed his colours to the s. 18 mast'—if D hit V in the face as alleged, she must, said counsel, have intended to cause serious injury. The prosecution would have no truck with alternative theories as to the bottle being recklessly thrown in V's direction.

On that basis, the Court of Appeal concluded that this was one of the exceptional cases posited in *Coutts* [2006] 1 WLR 2154 in which directing the jury as to the alternative charge would have infringed D's right to a fair trial. The prosecution was right not to seek to add an alternative s. 20 count to the indictment and the judge was right not to order it.

This may well have been correct if the only possible factual basis of a s. 20 verdict was the 'recklessly thrown bottle' scenario expressly rejected by the prosecution, but (with respect) some jurors might surely have wondered whether D really intended to cause such serious injuries, even if she did strike V with the bottle in precisely the manner alleged by the prosecution. Not everyone struck with a bottle suffers serious injury. In what sense would D's right to a fair trial have been infringed if the judge had invited the jury to consider the possibility that she did indeed hit V deliberately, as the prosecution alleged, but only with the intention of causing some lesser kind of injury, or perhaps without considering the consequences at all? Counsel may have been reluctant to leave the jury with this 'soft option' to fall back on, but according to *Coutts* that would not have been a valid reason for the judge to leave the jury without guidance on that issue.

See *Blackstone's Criminal Practice*: B2.53 and D18.58

## LEGISLATION

### **Criminal Justice and Court Services Act 2000 (Amendment) Order 2007 (SI 2007 No. 2171)**

This Order corrects omissions in the consequential amendments made by the Fraud Act 2006 to the Criminal Justice and Courts Services Act 2000, sch. 6 (trigger offences for the purposes of drug testing under the PACE 1984, s. 63B).

See *Blackstone's Criminal Practice*: D1.71

### **The Companies Act 2006 (Commencement No. 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007 (SI 2007 No. 2194)**

This Order brings various provisions of the Act into force on 1 October 2007, 1 November 2007, 15 December 2007 and 1 October 2008. The provision of particular interest to criminal practitioners is s. 993 (fraudulent trading), which is in force from 1 October 2007. A wide range of other offence provisions, and offence-creating provisions which support them, have been brought into force as follows:

- ss. 29 and 30 (resolutions and agreements affecting a company's constitution);

- ss. 116 to 119 (inspection of register of members);
- ss. 145 to 153 (exercise of members' rights);
- s. 154 (companies required to have directors);
- s. 160 (appointment of directors of public company to be voted on individually);
- s. 161 (validity of acts of directors);
- ss. 168 and 169 (removal of directors);
- ss. 170 to 174 and 178 to 181 (general duties of directors);
- ss. 188 to 226 (transactions with directors requiring approval of members);
- ss. 227 to 230 (directors' service contracts);
- s. 231 (contract with sole member who is also a director);
- ss. 232 to 239 (directors' liabilities);
- ss. 247 to 259 (supplementary provisions);
- ss. 260 to 269 (derivative claims and proceedings by members);
- ss. 281 to 287 (general provisions about resolutions);
- ss. 288 to 300 (written resolutions);
- ss. 301 to 307, 310 to 326, 327(1), (2)(a) and (b) and (3), 328, 329, 330(1) to (5), (6)(a) and (b) and (7), 331, 332, 334 and 335 (resolutions at meetings);

- ss. 336 to 340 (public companies: additional requirements for AGMs);
- ss. 341 to 354 (additional requirements for quoted companies);
- ss. 355 to 359 (records of resolutions and meetings);
- ss. 360 and 361 (supplementary provisions);
- s. 417 (contents of directors' report: business review);
- ss. 485 to 488 (appointment of auditors of private companies);
- s. 993 (fraudulent trading);
- ss. 994 to 999 (protection of members against unfair prejudice);
- ss. 1035 to 1039 and 1124 and sch. 3 (company investigations: amendments);
- ss. 1121 to 1123 and 1125 to 1133 (general supplementary provisions relating to offences), as they apply to offences under part 14 or 15 of the 1985 Act.

It should also be noted that ss. 362 to 379 (control of political donations and expenditure) are brought into force and these provisions include certain allied offences; they are in force from 1 October 2007 except in relation to independent candidates (in respect of whom they come into force on 1 October 2008). Further provisions are brought into force in part (i.e. so far as necessary for the implementation of the provisions listed).

See *Blackstone's Criminal Practice*: B7.2, B7.5 and B7.11

#### **Regulation of Investigatory Powers Act 2000 (Commencement No. 4) Order 2007 (SI 2007 No. 2196)**

This Order brings part 3 of the Act (ss. 49 to 56 and sch. 2) into force on 1 October 2007. Part 3 concerns the investigation of electronic data protected by encryption. The Order also brings into force those parts of part 4 which concern the scrutiny of the powers in part 3 and the issue of relevant codes of practice.

See *Blackstone's Criminal Practice*: D1.103

#### **Regulation of Investigatory Powers (Acquisition and Control of Communications Data: Code of Practice) Order 2007 (SI 2007 No. 2197)**

This Order provides that the Code of Practice in question is to come into force on 1 October 2007.

See *Blackstone's Criminal Practice*: D1.103

#### **Regulation of Investigatory Powers (Investigation of Protected Electronic Information: Code of Practice) Order 2007 (SI 2007 No. 2200)**

This Order provides that the Code of Practice in question is to come into force on 1 October 2007.

See *Blackstone's Criminal Practice*: D1.103

#### **Criminal Procedure (Amendment No. 2) Rules 2007 (SI 2007 No. 2317)**

These Rules add the following new provisions to the CrimPR, with effect from 1 October 2007. A fully consolidated version of the rules as amended is available on the *Blackstone's Criminal Practice* companion website.

- r. 37.6 (application to change a plea of guilty in summary proceedings);
- r. 39.3 (application to change a plea of guilty in a trial on indictment);
- part 65 (appeal to the Court of Appeal: general rules);
- part 66 (appeal to the Court of Appeal against ruling at preparatory hearing);
- part 67 (appeal to the Court of Appeal against ruling adverse to prosecution);
- part 68 (appeal to the Court of Appeal about conviction or sentence);
- part 69 (appeal to the Court of Appeal regarding reporting or public access restriction);
- part 70 (reference to the Court of Appeal of point of law or unduly lenient sentencing).

In addition, the following amendments are made:

- r. 2.2 (definitions) is amended to provide definitions of 'business day', 'live link' and 'public interest ruling';
- part 63 (appeal to the Crown Court against conviction or sentence) is amended to extend the ambit of those rules to an appeal by a prosecutor under s. 14A(5A) of the Football Spectators Act 1989 (failure to make a football banning order) and to provide that the Crown Court may, in certain circumstances, enter on an appeal with the judge sitting with a single justice when hearing an appeal from a magistrates' court;
- part 74 (appeal to the House of Lords) is amended in consequence of differences between the new parts 67 and 70 and the provisions which they replace.

**Road Safety Act 2006 (Commencement No. 2) Order 2007 (SI 2007 No. 2472)**

This Order brings the following provisions of the Act into force on 24 September 2007: ss. 14, 23 to 25, 27 to 33 (but s. 30 is in force only insofar as the RTA 1988, s. 3ZA has effect for the purposes of ss. 3 and 3A of that Act), 41, 43 and (for certain limited purposes) 59 and sch. 7, paras. 5 and 13.

See *Blackstone's Criminal Practice*: C2.12, C2.14, C3.19, C3.20, C6.5, C6.9, C6.8 and C7.17

**Racial and Religious Hatred Act 2006 (Commencement No. 1) Order 2007 (SI 2007 No. 2490)**

This Order brings the Act into force on 1 October 2007, except insofar as it inserts new ss. 29B(3) and certain provisions of application only in Scotland.

See *Blackstone's Criminal Practice*: B11.187 et seq.

**Electronic Commerce Directive (Racial and Religious Hatred Act 2006) Regulations 2007 (SI 2007 No. 2497)**

These Regulations make provision for the application of the 2006 Act to information society services and particularly to Internet Service providers and the like. They ensure that offences under part 3A of the Public Order Act 1986 (which are created by the 2006 Act) apply on a country of origin basis and create exceptions from liability in respect of the offences for intermediary providers of information society services where their role is limited to that of a mere conduit or they merely provide caching or hosting services.

## COMMENT AND ANALYSIS

**Sentencing Police Officers for Computer Misuse**

The statutory offences applicable in cases involving misuse of computers are the Computer Misuse Act 1990, s. 1 and the Data Protection Act 1998, s. 55 (see B18). One drawback in relation to these offences is that their low maximum penalties (six months in the first case and a fine in the second case) are not suitable for the most serious cases, such as when there is substantial breach of trust. The penalty problem will be reduced, but not eliminated, when the amendments to the 1990 Act are brought into force and computer hacking becomes triable either way with a maximum penalty of two years. A batch of recent reported and unreported sentencing decisions shows that prosecutors are making use of the common-law offence of misconduct in public office to cater for such cases. The penalty for this offence is at large, and it is much less precisely defined than the statutory crimes. The elements of the offence are that a public officer, acting in that capacity, and acting without justification or legal excuse, wilfully misconducts himself to such a degree as to amount to an abuse of the public trust (*A-G's Ref (No. 3 of 2003)* [2005] QB 73).

Police officers have been prosecuted for this crime in a range of circumstances, from failure to intervene in a serious crime (*Dytham* [1979] 1 QB 723), tipping off criminals about telephone intercepts (*W* [2003] EWCA Crim 1632), destroying a parking ticket issued to a friend by another officer (*Nazir* [2003] 2 Cr App R (S) 671), and having sexual intercourse on duty with a vulnerable victim of crime (*Witcher and Lang* (unreported, Guildford Crown Court, March 2005)). The offence has also proved attractive for prosecutors when dealing with officers who pass on confidential details from police computers.

An example is *Kassim* [2006] 1 Cr App R (S) 12, where the offender appealed unsuccessfully against a sentence of two-and-a-half years' imprisonment. Kassim, aged 53, had joined the police in 1998 and was serving as a constable working in a youth offending team. He became friends with a man employed as a diplomat in a foreign embassy. The offender accessed data on police computers to obtain background information on private individuals on behalf of the diplomat, and was paid for passing on the information. It was estimated by the prosecution that the offender had received about £14,000 from the diplomat. The case posed a challenge for the sentencing judge since,

alongside the serious and prolonged nature of the offences and their inherent breach of trust, there was substantial personal mitigation. Kassim was a man previously of good character who had pleaded guilty straight away and shown genuine remorse. As a result of his conviction he had inevitably been dismissed from the police, and had forfeited most of his police pension. Any prison sentence to be served by a police officer is likely to be more than normally stressful and unpleasant. The Court of Appeal concluded that the sentence was appropriate, being 'proportionate to [the offender's] prolonged course of offending for monetary gain'. The appeal was dismissed.

In the course of argument on sentence, the Court in *Kassim* was referred to the case of *Keyte* [1998] 2 Cr App R (S) 165, where the offender was a 42-year-old police officer. He was convicted after a trial of conspiracy to commit misconduct in a public office and was sentenced to two years' imprisonment. Over a period of about 12 months the offender accessed the PNC on almost 200 occasions using force request reason codes. He obtained information on the registered keepers of motor vehicles, and on two occasions the PNC was used by him to check the names and details of named individuals. All information was passed on, for payment, to his co-accused Gibbons, who ran a private investigation company and was a friend of the offender and a former police officer. The sums involved were described by the judge as 'not particularly large', but he went on to say that this was 'an entirely improper and impermissible use of the police national computer and you both knew it'. Very similar sentencing issues arose in this case as did in *Kassim*, with the main difference that *Keyte* forfeited the reduction in sentence he would have received had he not contested the case at trial. Another case cited in *Kassim*, and near the bottom end of the scale is *Pike-Williams* [2004] EWCA Crim 186. There, a woman police constable had viewed confidential information on secure terminals out of curiosity, but had not passed any information on and did not have any intention of doing so. The initial sentence of two months' imprisonment was reduced on appeal to a conditional discharge for 12 months. This case should surely have been prosecuted under the 1990 or 1998 Acts, bearing in mind the Crown Prosecution Services guidelines, which indicate that the offence of misconduct in a public office 'should be reserved for cases of serious misconduct' and that prosecutors should always 'consider whether the acts complained of can properly be dealt with by any available statutory offence' (CPS, Misconduct in Public Office, to be

found at: <[http://www.cps.gov.uk/legal/section22/chapter\\_c.html](http://www.cps.gov.uk/legal/section22/chapter_c.html)>).

Two 2007 cases complete this group. In *O'Leary* [2007] 2 Cr App R (S) 51, a sentence of three-and-a-half years' imprisonment was upheld in the case of a serving police officer who admitted six counts of misconduct in public office. For payment of about £1,000 he passed sensitive information to an intermediary, a former police officer, who then provided it to criminals. No police operations were in fact prejudiced by the offender's actions. The offender used a police station computer terminal. He was not authorised to carry out identity checks himself, so he used the passwords of other officers to gain access. On other occasions he asked other officers to make checks on his behalf. Finally, *A-G's Ref (No. 1 of 2007)(Hardy)* [2007] EWCA Crim 760 is a case where the prosecution successfully appealed to the Court of Appeal on the basis that the original sentence was unduly lenient. The offender, a police constable for eight years, had pleaded guilty, at the first reasonable opportunity, to one offence of misconduct in a public office. He was charged, together with a co-defendant, Jolley, who pleaded guilty to counselling and procuring the offence. The offenders had been friends for some years, despite Jolley being a man of bad character and having a number of convictions, including assault. Hardy had been reprimanded by the police in 2004 for continuing to associate with Jolley and for having looked at intelligence relating to Jolley on the police computer. Despite this specific warning he continued to see Jolley on a regular basis. The charge to which Hardy pleaded guilty related to his providing Jolley with information from the police computer relating to men suspected of having assaulted Jolley. Jolley had requested this information from Hardy, the obvious implication being that Jolley would exact private revenge on the two individuals. The offender sought no reward for providing this information, and seems to have done it as a favour for a friend, and out of a 'lingering sense of resentment that service in the police force was not what he had expected it to be'. The judge imposed on Hardy a prison sentence of 28 weeks suspended for two years, together with a condition that he complete 300 hours of unpaid work in the community. The Court of Appeal found that the sentence was wrong in principle, the case required a sentence of immediate imprisonment, and that the correct term would have been one of at least 18 months.

**Martin Wasik** LLB, MA, Barrister; Recorder of the Crown Court; Professor of Criminal Justice, Keele University

### Bad Character and Credibility: Directing the Jury

Where the prosecution is permitted to prove an accused's bad character under the Criminal Justice Act 2003, it is clear that the jury may use their knowledge of this bad character for any purpose to which it is logically relevant. If for example D's previous convictions for offences of violence are disclosed under s. 101(1)(g), on the basis that D has attacked another person's character, the jury may be allowed to deduce from this that he has a propensity to violence, just as if the evidence had been disclosed under ss. 101(1)(d) and 103(1)(a). This may be so even if the judge would never have admitted the evidence under s. 101(1)(d) itself. This principle, which represents a radical departure from the pre-Act position, was established in *Highton* [2005] 1 WLR 3472 and, although criticised by some commentators (notably Munday, 'The Purposes of Gateway (g)' [2006] Crim LR 300), it has subsequently been confirmed in a number of cases, including *Campbell* [2007] EWCA Crim 1472.

#### Campbell

The facts of *Campbell* were unremarkable, but the converse of those considered in *Highton*. D appealed against his convictions for false imprisonment of a woman and for assaulting her, occasioning actual bodily harm. The jury had been told of D's two previous convictions for violence against women, each of which followed a guilty plea. The ground upon which permission was given to adduce this evidence was that it showed a propensity to commit acts of violence against women, but the judge also directed the jury that they could take D's convictions into account in deciding whether or not his evidence was truthful. They were told:

A person with a bad character may be less likely to tell the truth, but it does not follow that he is incapable of doing so. You must decide to what extent, if at all, his character helps you when judging his evidence.

This was consistent with the JSB's specimen directions on bad character, assuming that this kind of bad character was indeed relevant to D's credibility; *but was it relevant?* Clearly, a jury ought not to use evidence of bad character for purposes to which it is logically irrelevant, as the Court of Appeal acknowledged in *Campbell* at [40].

On appeal, it was argued that D's criminal record had no bearing whatever on his propensity to tell the truth.

The judge's direction to the jury was therefore unwarranted and D's conviction was unsafe.

#### Convictions and credibility

Where D testifies in his own defence, is a previous conviction for an offence that did not involve lies or deception, and in respect of which D did not give or call evidence that was disbelieved, capable of casting any doubt on the credibility of his current testimony? Opinions on this question have differed. On one view, unless such convictions reveal a history of lies or deceit, they are logically irrelevant in that context. This view derives from *Hanson* [2005] 1 WLR 3169 and is well illustrated in *McDonald* [2007] EWCA Crim 1194, in which the trial judge admitted evidence of D's previous convictions for offences of violence of the same kind as those with which he was now charged. They were rightly admitted as demonstrating a propensity to violence; but in summing up the judge suggested (as did the judge in *Campbell*) that the convictions might also be relevant to D's credibility. Quashing D's convictions, the Court of Appeal held that:

The judge admitted these convictions for the purpose which we have indicated. He did not admit them as being relevant to any question of propensity to be untruthful; that is to say, he admitted them under section 103(1)(a), rather than 103(1)(b) of the Act. Nor, in our judgment, did they have any relevance to the issue of untruthfulness. They were offences of violence, including dishonesty in the case of the robbery conviction, but that is not the same as untruthfulness, as is apparent from *Hanson* . . . The appellant had pleaded guilty to both and had not sought to deceive the court on either of those prior occasions.

*McDonald* was not cited in *Campbell*, but in my submission its logic is not compelling. Admittedly, convictions of this kind do not demonstrate any 'propensity to be untruthful' on D's part. But that merely means that we cannot use the s. 101(1)(d) / 103(1)(b) gateway. One might still argue that an accused—or indeed any other witness—who has a string of convictions for a range of serious offences (or even for offences involving, say, prostitution) is less worthy of belief than one of previously impeccable character. Do we really suppose that a drug dealer, bank robber or prostitute would hesitate to lie on oath if he thought he could get away with it? Is such a person a more credible witness than he would have been if, instead, he had one previous conviction for perverting the course of justice, as a result of a misguided attempt to take the blame for a minor traffic offence committed by his spouse?

This logic has been recognised in other contexts. In *Stephenson* [2006] EWCA Crim 2325 the court held that evidence of previous convictions that demonstrate no 'propensity for untruthfulness' might nevertheless be relevant to the credibility of a witness under s. 100 or to an important issue of credibility arising between co-defendants under s. 101(1)(e). Distinguishing *Hanson*, 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 section 100, or for that matter of a co-accused where the application is made by him under section 101(1)(e) . . . 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 an accused's right to deploy relevant material to defend himself against a criminal charge.

The approach taken by the Court of Appeal in *Campbell* was much more radical. Dismissing D's appeal, Lord Phillips CJ said:

28. In considering the inference to be drawn from bad character the courts have in the past drawn a distinction between propensity to offend and credibility. This distinction is usually unrealistic. If the jury learn that a defendant has shown a propensity to commit criminal acts they may well at one and the same time conclude that it is more likely that he is guilty and that he is less likely to be telling the truth when he says that he is not.

30. The question of whether a defendant has a propensity for being untruthful will not normally be capable of being described as an important matter in issue between the defendant and the prosecution. A propensity for untruthfulness will not, of itself, go very far to establishing the committal of criminal offence. To suggest that a propensity for untruthfulness makes it more likely that a defendant has lied to the jury is not likely to help them. If they apply common sense they will conclude that a defendant who has committed a criminal offence may well be prepared to lie about it, even if he has not shown a propensity for lying whereas a defendant who has not committed the offence charged will be likely to tell the truth, even if he has shown a propensity for telling lies. In short, whether or not a defendant is telling the truth to the jury is likely to depend simply on whether or not he committed the offence charged. The jury should focus on the latter question rather than on whether or not he has a propensity for telling lies.

31. For these reasons, the only circumstance in which there is likely to be an important issue as to whether a defendant has a propensity to tell lies is where telling lies is an element of the offence charged. Even then, the propensity to tell lies is only likely to be significant if the lying is in the context of committing criminal offences, in which case the evidence is likely to be admissible under section 103(1)(a).

Not everyone will agree, but in my submission the reasoning here is compelling, except where the offence is relatively minor and of a kind to which a guilty defendant of good character might be expected to plead guilty rather than commit perjury. Anyone guilty of murder may be expected to lie about it, if he has a plausible lie to tell, but one would not expect a High Court judge to perjure himself over a charge of dangerous driving.

### Specimen directions and departures from them

Lord Phillips was not yet finished, however. In another significant departure from previous decisions of the court, he warned that a trial judge's failure to provide a jury direction in accordance with a relevant specimen direction should no longer automatically be treated as a ground of appeal, let alone as a reason to allow an appeal. One should ask instead whether a jury would have reached the same conclusion by the application of common sense to the evidence, whether or not the specimen direction was given.

This suggestion was quickly noted in *Saleem* [2007] EWCA Crim 1923, where the court cited *Campbell* and concluded:

Although the judge should have given the jury much more help than he did, we do not consider that his failure to do so rendered the conviction unsafe, as the jury would have appreciated the relevance of the evidence.

See also *Wallace* [2007] EWCA Crim 1760. *Campbell* may thus herald a radical new approach to appeals based on allegedly inadequate directions. But how many specimen directions can be said to deal with matters that might instead be left to the common sense of the jury? Directions as to the possible relevance of D's good character perhaps—at least insofar as they deal with the supposed link between good character and credibility.

On the other hand, the common sense of the jury clearly cannot be relied upon to compensate for inadequate directions concerning matters of great difficulty or complexity or where the judge's directions are positively misleading (see for example *Lamb* [2007] EWCA Crim 1766).

Finally, Lord Phillips criticised the form of the JSB specimen directions then in force concerning evidence of an accused's bad character. These have since been withdrawn for reconsideration in light of the ruling.

### A certified question

For various reasons, the fallout from *Campbell* may take some time to settle. In the meantime, the Court of Appeal has certified the following question for possible consideration by the House of Lords:

Whether, and in what circumstances, a jury may have regard to evidence of a person's bad character that has been admitted under a gateway in Chapter 1 to Part 2 of the Criminal Justice Act 2003, other than the one(s) for which that gateway rendered it admissible.

It is time that the House of Lords examined the operation of the new gateways. This would provide them with a good opportunity to do so.

**Michael Hirst** LLB, LL.M  
Professor of Criminal Justice  
De Montfort University, Leicester

### The Corporate Manslaughter and Corporate Homicide Act 2007

The Corporate Manslaughter and Corporate Homicide Act 2007 took over a decade from its origins as a proposal in a Law Commission Report (Law Com 237) in 1996 before it finally gained the Royal Assent on 26 July 2007. See *Blackstone's Criminal Practice*, B1.128 et seq. for the principal provisions of the Act. Even after that long period of gestation it only eventually saw the light of day after a prolonged period of 'ping-pong' between the two Houses of Parliament because of a dispute about whether the new statutory offence should apply to deaths in custody.

#### The Replacement for the identification principle

As far as England and Wales (and Northern Ireland) is concerned, it is the 'Corporate Manslaughter' part of the title of the Act which is applicable; corporate homicide is the new equivalent offence for Scotland. Once the bulk of the Act is brought into force, which is expected to be in April 2008, the common-law offence of manslaughter by gross negligence, as it applies to corporations and other organisations covered by the Act, will be abolished (s. 20) and will be replaced by the new offence of corporate manslaughter. The new offence will not depend on the identification principle, which had been confirmed, in a case arising out of the Southall Rail crash (*A-G's Ref (No. 2 of 1999)* [2000] QB 796), as the only way of rendering a company liable for manslaughter at common law. This principle

required there to be an individual at a high level in the company who could be identified with the company as its directing mind and will and who individually fulfilled the fault and other requirements for the offence. The identification principle and the difficulty of proving the necessary requirements against a single individual at a senior level in large companies meant that it had not been possible to pursue viable manslaughter prosecutions against companies in any of the large scale disasters causing multiple loss of life such as the Southall, Paddington, Hatfield and Potters Bar Rail crashes, the Zeebrugge (Herald of Free Enterprise) and Marchioness shipping disasters, and the Piper Alpha and Kings Cross Fires. The only successful prosecutions against companies have been in relation to small companies (e.g., in *Mark* [2004] EWCA Crim 2490, where no separate penalty was imposed on the company convicted of manslaughter), where there is more likely to be a single person directly and immediately responsible for the death and who is senior enough to be regarded as the directing mind and will of the company (but who will normally in any event be convicted as an individual).

Instead of the identification principle the new offence focuses on whether:

- the way in which the [organisation's] activities are managed or organised—
- causes a person's death and
  - amounts to a gross breach of a relevant duty of care owned by the organisation to the deceased (s. 1(1))

#### Extension beyond companies

Section 1(1) refers to an 'organisation' rather than a company or corporation and this is because s. 1(2) extends the scope of the offence not only to corporations but also to government departments and bodies listed in sch. 1 to the Act, also to police forces, and 'to a partnership, or a trade union or employer's association, that is an employer'. Thus the offence on the face of it applies to public authorities and government departments (and Crown Immunity is removed by s. 11) but, as will be seen, there are a number of respects in which that liability is later qualified. The offence also applies to partnerships. This will be of relatively little significance when one is dealing with a two-partner firm where one of the two individuals would have been likely to be individually responsible anyway, but the change is more significant insofar as it applies to larger partnerships such as the bigger firms of accountants and lawyers.

### The management and organisation test

Returning to the basic test of liability, the way in which the organisation's activities are managed and organised, this seems a very significant widening from the previous identification test and sounds like a broad aggregation test whereby the failings of a wide variety of individuals within the organisation can be aggregated to show that collectively the organisation is culpable to the degree required. However a glance at s1(3) shows that it does not necessarily go quite this far since the offence is committed only 'if the way in which its activities are managed and organised *by its senior management* is a substantial element in the breach referred to in subsection (1)'. Thus we are back to the senior management of the organisation being required to be involved (albeit only as a substantial element in the breach). Nevertheless, this is still significantly wider than the identification principle in that 'senior management' (defined in s. 1(4)(c)) may well go wider than those who could be the directing mind and will. Perhaps more importantly, it is no longer necessary to show that there is an individual who had the necessary fault and was individually responsible for the death; it is sufficient that there was collective fault by a number of senior managers as a substantial element of the breach of duty. It is therefore a limited or qualified aggregation principle but still significantly wider than the old identification principle.

### Elements beyond senior management activity

The structure of s. 1 (which changed significantly during the passage of the Bill) also now implies that the faults and failings of individuals outside the 'senior management' can be taken into account since the senior management aspect need only be a 'substantial element' in the breach of duty and thus it follows that the way in which the activities are managed or organised by those outside the senior management can also be an element in the breach. Furthermore, the fact that the senior management aspect is required to be a substantial element does not necessarily mean that it has to be the dominant or preponderant element and it is in principle perfectly possible for the contribution of the non-senior management to be 'substantial' alongside a 'substantial' contribution from senior management. That is not to say that the company would be responsible for the rogue actions of individual employees acting totally outside company policy and procedures since the expression 'the way in which its activities are organised or managed' suggests and

requires something done consistently with the organisation's way of doing things (unless perhaps in the exceptional case where the company is in an anarchic state and the death is the result of that very anarchy).

That the fault of the company can be found, partially at least, beyond the circle of senior management is further supported by s. 8, which deals with factors to be taken into account by the jury (the offence is only triable on indictment). Section 8(2) provides that the jury 'must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach ...' The jury is directed to consider whether the 'organisation' complied, not whether its senior management complied. Not too much should perhaps be read into this subsection alone but s. 8(3) goes on to say that the jury:

*may also—*

- (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it . . .

Again, much or all of this subsection (which is borrowed from Australian legislation) may most naturally refer to the senior management, especially perhaps the references to policies and systems, but it is not expressly limited to them and it might equally be applicable, especially in relation to 'attitudes' or 'accepted practices', outside the senior management circle. Of course these wider attitudes and practices are themselves likely to be evidence of the way the organisation's activities were organised and managed by senior management which is no doubt going to be the principal focus of enquiry, but s. 8(3) underlines the fact that the enquiry is not going to be arbitrarily limited to the 'substantial' contribution of senior management but can encompass wider aspects of how the organisation's activities are 'managed and organised'.

### No individual liability

Whilst discussing the way in which different individuals, at whatever level, may contribute to the breach of duty which makes the company or organisation liable, it is important to remember that the Act imposes criminal liability *only* on the organisation and not on any individual. The Home Office Consultation Paper in 2000 had suggested that there should be responsibility for corporate manslaughter placed on individual directors in appropriate cases but this attracted strong

opposition, not least from those in the corporate and commercial world who might potentially be affected. The government in any event changed its mind and individual responsibility formed no part of the Bill eventually introduced into Parliament. Neither is there any possibility of an individual director or manager being held responsible as an accessory to the company's offence since s.18 expressly excludes any such potential liability. Of course, if an individual director or manager can be shown to be responsible as an individual under common-law gross negligence manslaughter, he can, as under the current law, be prosecuted for that common-law offence in his own individual capacity but he cannot be criminally liable as an individual simply on the basis of the company's (aggregate) liability for the new statutory offence. It should also be noted that the company cannot be prosecuted for corporate manslaughter without the consent of the DPP (s. 17).

#### Gross breach of a relevant duty of care

Having jettisoned the identification principle in favour of a qualified aggregate approach, the new offence (subject to another important qualification) largely reflects the common law of manslaughter in its other major criterion of responsibility, the 'gross breach of a relevant duty of care' (s. 1(1)(b)). This reflects the duty of care approach now clearly established at common law since *Adomako* [1995] 1 AC 171 and s. 1(4)(b) also reflects the current law in stating that there is a gross breach of the duty of care if the conduct alleged to be a breach 'falls far below what can reasonably be expected of the organisation in the circumstances'. The important qualification to the duty of care approach however is contained in the word 'relevant', which operates as a controlling device on the ambit of the duty of care and on the scope of the new offence.

#### Relevant duty of care

The primary meaning of 'relevant duty of care' is to be found in s. 2 of the Act but that meaning is also subject to further limitations in ss. 3 to 7. Section 2(1)(a) to (c) will be applicable when the bulk of the Act is brought into force in April 2008; s. 2(1)(d) is concerned with deaths in custody and is not expected to be brought into force for another three years or more (see below). The three types of relevant duty identified in s. 2(1)(a) to (c) (all of which must be duties 'under the law of negligence' rather than stricter statutory duties) are as follows:

- (a) a duty owed to [the organisation's] employees or to others working for the organisation or performing services for it;
- (b) a duty owed as occupier of premises;
- (c) a duty owed in connection with—
  - (i) the supply by the organisation of goods or services (whether for consideration or not);
  - (ii) the carrying on by the organisation of any construction or maintenance operations;
  - (iii) the carrying on by the organisation of any other activity on a commercial basis; or
  - (iv) the use or keeping by the organisation of any plant, vehicle or other thing.

The limitation of 'relevant' duty of care to these three paragraphs is not in itself particularly restrictive given the breadth of the situations covered, especially in s. 2(1)(c); most situations which have given cause for concern in the past and where one would expect a company to have a potential liability for corporate manslaughter will be covered. Furthermore, s. 2(6) makes it clear that the duty of care will not be excluded for these purposes on the basis of the victim being jointly engaged in unlawful conduct or as having accepted a risk (formerly more succinctly known as the *ex turpi causa* and *volenti* doctrines) in line with the decision in *Wacker* [2003] QB 1203 (the deceased being illegal immigrants did not preclude conviction of their lorry driver). It is also made clear in s. 2(5) that whether a duty of care is owed to a particular individual is a question of law and that 'the judge must make any findings of fact necessary to decide that question'. This latter provision about the judge finding facts is highly unusual and should be contrasted with the common-law position on gross negligence manslaughter as outlined in *Willoughby* [2005] 1 WLR 1880, where it was said that 'whether a duty of care exists is a matter for the jury once the judge has decided that there is evidence capable of establishing a duty.' Precisely how *Willoughby* should be interpreted is a matter of some debate (see Herring and Palser, 'The Duty of Care in Gross Negligence Manslaughter' [2007] Crim LR 24), especially as to whether it gives the jury some legal policy or evaluative role as well as a role in determining the facts, but that the facts are exclusively for the jury and not for the judge in common-law manslaughter is not in doubt, so s. 2(5) clearly marks a difference for the statutory offence.

#### 'Under the law of negligence'

Although any duty of care under s. 2(1) has to be 'under the law of negligence, s. 2(4) specifically includes a duty that would be owed 'under the law of

negligence but for any statutory provision under which liability is imposed in place of liability under that law'. It applies so as to preserve a (fault-based) duty of care for these purposes in cases where the law of negligence has been superseded by statutory provision imposing strict liability, as for example with the liability of carriers now governed by the Carriage of Air Act 1961.

#### Further limitations on the relevant duty of care

The really significant limitations on whether there is a 'relevant duty of care' come in ss. 3 to 7. Sections 4, 5, 6 and 7 provide that there is no relevant duty of care in certain specific areas of activity, i.e. military activities (s. 4), policing and law enforcement (s. 5), responses to emergencies by specified services (s. 6), and child protection and probation functions (s. 7). The precise ambit of the exclusions from the concept of a relevant duty of care can be found in the relevant section but two distinct methods of exclusion can be seen at work. Firstly, duties in relation to certain activities are simply excluded as in the case of certain types of military activities or operations within s. 4. Secondly, duties as to certain other activities are not a relevant duty of care unless the duty falls within s. 2(1)(a) or (b) (i.e. unless they are duties owed to employees etc. or as occupier). This technique is used in s. 6 in relation to responses to emergency situations so that, for example, a fire and rescue authority will not be liable (e.g., to those being rescued or to bystanders) for the way it responds to an emergency but it can be liable to its own employees for breach of its duty towards them or to visitors for breach of its duty as an occupier of premises. The same applies to an NHS body responding to an emergency, although s. 6(3) and s. 6(4) further qualify this by saying that they can nevertheless be liable for the way in which medical treatment is carried out or is decided to be carried out but not for decisions as to the order in which persons are to be given such treatment.

Both of the techniques of exclusion referred to above are used in s. 5 whereby some police operations are simply excluded (essentially where they deal with terrorism, civil unrest or serious disorder and officers come under attack or threat of attack or violent resistance). Other activities can give rise to a relevant duty of care but only under s. 2(1)(a) or (b) (as employer or occupier) (or under s. 2(1)(d) in relation to safety in custody once that is brought into force).

#### 'Public policy' and 'exclusively public function' limitations

Whilst ss. 4 to 7 limit the meaning of 'relevant duty of care' in relation to certain specific types of activity, s. 3 is of potentially more general application.

The broadest exclusion comes in s. 3(1), which excludes 'any duty of care owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests)'. Arguments that a person's death is due to a government decision not to allocate appropriate resources to a particular service carried out by a public authority are thus not to be countenanced.

A second exclusion comes in s. 3(2) in relation to things done 'in the exercise of an exclusively public function', although in this instance the duty of care as employer or occupier under s. 2(1)(a) or (b) still survives. The term 'exclusively public function' is defined in s. 3(4) as referring to a function falling under the Crown prerogative or by nature exercisable only with authority conferred by the exercise of the prerogative or by or under a statutory provision. This exclusion is not limited to public authorities but might include a private sector organisation given statutory powers (e.g., licensing powers or power to detain in custody as in the case of privatised prisons). More naturally it will apply to public authorities, including the Prison Service (see the discussion below of deaths in custody).

The third exclusion is in s. 3(3). This case is applicable only to public authorities and is 'in respect of inspections carried out in the exercise of a statutory function' but again there can still be a relevant duty of care under s. 2(1)(a) or (b) (as employer or occupier).

Overall the provisions of ss. 3 to 7 significantly limit the effect of the expansion in s. 1(1) of the scope of the offence beyond corporations to government departments and other public bodies. To a large extent they also reflect some of the policy issues that at common law would come into play in deciding against a duty of care in tort, and answer the question fairly directly as to how and to what extent the duty of care for the purposes of the criminal law should be limited by analogous considerations even though their precise scope and interpretation will no doubt provide plenty of scope for argument.

### Deaths in custody

The scope for argument and dispute has in fact already been amply demonstrated by the issue which delayed the final passage of the Bill into law and even threatened to scupper it completely. Ultimately, in a campaign led by Lord Ramsbotham (the former Chief Inspector of Prisons), the House of Lords were successful in getting the Act to include s. 2(1) (d), which recognises on the face of the Act a duty owed to a detained person 'for whose safety the organisation is responsible'. The government indicated that it would not be ready to bring this in to force for three years or more and any order bringing it into force is subject to the affirmative resolution procedure (s. 27(2)). However a close reading of the Act and the Parliamentary debates reveals that some deaths in custody may be subject to the Act before then and this reading can be used to illustrate some of the core provisions of the Act relating to a 'relevant duty of care'.

One of the principal concerns relates to preventable suicides and the question of whether the custodial organisation (e.g., the Prison Service) could or should have prevented it. The Prison Service came under the Ministry of Justice as from May 2007 (previously it was under the Home Office so the list of government departments as enacted in sch. 1 already needed amending at the date of enactment and amendments will no doubt be forthcoming under s. 22). Irrespective of s. 2(1)(d) being enacted and whether or not it has been brought into force, a death in custody will not be the result of a breach of a 'relevant duty of care' insofar as the death might only have been attributable to a decision as to a matter of 'public policy' within s. 3(1) (e.g., if the death is alleged ultimately to be attributable to a decision about the level of resources to be given overall to the prison service or a particular aspect of it). Such a duty of care related to a decision on a matter of public policy is totally excluded by s. 3(1). However this is not the typical situation, nor is it the type of case that the House of Lords primarily had in mind when pressing for provision to be made for deaths in custody. The concern was with preventable deaths due to poor management of the resources provided rather than due to public policy decisions, but it was considered that many such instances of preventable deaths would still not be covered because of s. 3(2) (assuming s. 2(1)(d) is not in force). This is because s. 3(2) excludes the duty of care in relation to 'the exercise of an exclusively public function' (such as incarcerating offenders). However this exclusion, even in the original Bill, was not applicable to duties of care falling within s. 2(1)(a)

or (b). Even without what is now s. 2(1)(d) therefore, there could and can still be a relevant duty of care under s. 2(1)(a) or (b). Section 2(1)(a) is not of much use in respect of deaths in custody since it concerns the organisation's duty as employer (e.g. to prison officers), but s. 2(1)(b) is much more interesting, being concerned with the organisation's duty as occupier.

The Parliamentary debates recognised that if a brick fell off a wall because of poor maintenance and killed a prisoner, that would be within the Act since the duty of care was the ordinary one owed by an occupier of premises. Whilst this is clearly a different situation to the preventable suicide, Lord Wedderburn, for one, thought preposterous the government's apparent view that occupiers' liability covered the brick off the wall type of case but not other types of death in custody. The question depends essentially on whether, or the extent to which, the Occupiers' Liability Act 1957 applies to the supervision (by the Prison Service as occupier) of the safety of prisoners; this is not a straightforward issue. The very fact that it was thought necessary to add s. 2(1)(d) suggests that there are some aspects that are not covered by the duty as occupier but clearly the brick off the wall example shows that prisoners are 'visitors' within the Act and are owed a duty by the occupier in relation at the very least to the sorts of risks which would be capable of arising in the context of any occupier of a building. Perhaps a distinction has to be drawn (but not a very satisfying or persuasive one) between these 'normal' occupier duties and those arising from the special problems arising from the fact that the 'visitors' are in custody, are often disturbed or vulnerable, and are subject to special risks such as suicide (or harm from other inmates or mistreatment by their custodians) as a result.

Whether the latter types of risk can be legally excised from the duty as 'occupier' under the 1957 Act is a nice question, especially when one remembers that s. 1(1) of the 1957 Act states that it is 'to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises *or to things done or omitted to be done on them*' (emphasis added). A distinction cannot in any event in practice be drawn between the state of the premises and things done or not done on them. For example, a failure to block up obvious ligature points in a young adult wing (see p. 12 of the 2004-5 Chief Inspector of Prisons Annual report, 2006, HC 883) is an example of something which relates to the state of the premises even if it can also be regarded as something omitted to be done; it is only with some artificiality that one can see

it as not falling within s. 2(1)(b) as part of the duty as occupier and thus as not excluded by s. 3(2) notwithstanding that it falls within 'an exclusively public function'. Apart from excluding it on the basis of the tenuous distinction referred to above (the distinction between the risks any occupier would face and those faced by those running custodial establishments), the only other arguable way of excluding it is to do so under s. 3(1) as relating to a public policy matter. Lord Goldsmith appeared to give s. 3(1) quite a wide interpretation in the House of Lords at Report stage (5 Feb 2007, col. 519):

... it is not the case that, as the Bill stands, cases of deaths in custody as a whole are outside the ambit of the Bill. They are not. The Bill is clear that the responsibilities as occupiers of premises and to employees are relevant duties of care, and they are only excluded to the extent that there is a decision as to matters of public policy under Clause 3(1). Under Clause 3(2):

'Any ... duty owed in respect of things done in the exercise of an exclusively public function is not a "relevant duty of care" unless it falls within',

those duties of occupiers or employers. What does that mean? I do not for a moment suggest that it means that some of the cases of deaths in custody that noble Lords have in mind would be covered, but others would be. For example, the offence will apply where deaths have arisen as a result of failure to have adequate fire precautions or to maintain cells in adequate conditions, of poor hygiene in workshops, or of failures in medical treatment. Those do not fall outside the Bill. I do not want to pretend that the issues in relation to restraint referred to by the noble Lord, Lord Hunt, and decisions about cell-sharing, police custody or arrest techniques or other areas that flow from public policy decisions would be included.

The interesting but rather curious thing about this approach is that on the one hand it suggests that decisions about, say, arrest techniques will not be covered even when s. 2(1)(d) is brought into force (on the basis that they are excluded absolutely under s. 3(1)), but on the other hand a large number of activities (maintenance of cells, poor hygiene, failures in medical treatment etc.) would be covered under the organisation's duty as occupier, even without the enactment or bringing into force of s. 2(1)(d). It is not clear on Lord Goldsmith's view therefore what s. 2(1)(d) adds, but his view seems to be an unduly wide one as to what is excluded on public policy grounds.

Overall, the precise limits of the duty of care owed to prisoners by an organisation as occupier under s. 2(1)(b) and the extent to which any such duty is

subject to the public policy exclusion in s. 3(1) remain matters for debate as does the extent to which s. 2(1)(d), when it is at a later date brought into force, will effectively add to the relevant duty of care already established as owed by an occupier under s. 2(1)(b).

### Sanctions and conclusions

Since individuals cannot be liable for corporate homicide, the primary penalty is a fine (unlimited). However, ss. 9 and 10 provide in addition for remedial and publicity orders. A remedial order under s.9 is one 'requiring the organisation to take specified steps' to remedy the breach or anything resulting from it which caused death or any deficiency as to health and safety matters of which the breach appears to be an indication. If the organisation fails to comply with a remedial order it commits a further indictable only offence punishable with a fine (and there appears to be nothing to prevent the conviction of a director as an accessory to this offence). A publicity order under s. 10 is one 'requiring the organisation to publicise in a specified manner' its conviction, specified particulars, the amount of any fine and the terms of any remedial order. This latter provision was added to the Bill during its passage in the Lords on the basis *inter alia* that large organisations are often rather more fearful of adverse publicity than of even quite large fines and it is a device which has been used in other jurisdictions. Its first use in this jurisdiction will have to await the bringing into force of the Act in April 2008 and the gross breach of a relevant duty of care taking place exclusively after that date (see s. 27(3)) which causes a person's subsequent death and which leads to a prosecution which itself manages to navigate successfully through the complexities and technicalities of the Act. The complexities are largely to be found in relation to the limitations on the relevant duty of care in relation to public policy, public sector and statutory functions but, in the context of the types of corporate disaster which created the original pressure for reform of the law, it is to be hoped that the replacement of the identification principle by a qualified aggregation test enables the law to work in a more straightforward, and ultimately more satisfactory, manner.

**Richard Taylor** MA, LL.M, Barister  
Professor of English Law  
Lancashire Law School  
University of Central Lancashire

## PUBLISHING NEWS

## NEW EDITIONS—AVAILABLE NOW

**Smith's Law of Theft**

Ninth Edition

**David Ormerod**, Professor of Criminal Justice, Queen Mary's College, University of London, and**David Williams**, Barrister, 18 Red Lion Court, London**'No one who prepares a case for trial on theft should do so without reading this book'***Clare Montgomery QC, Matrix Chambers***'A much-needed and comprehensive update of this leading work. In particular, the chapters on the Fraud Act 2006 offer a valuable analysis of that important new legislation.'***Rt Hon Lord Justice Hooper*

- Updated to take account of the Fraud Act 2006
- Contains full, amended text of relevant legislation including the Theft Acts, the Fraud Act, and the Fraud Protocol
- Includes new chapter on conspiracy to defraud
- Updated to cover *Hinks* in the House of Lords on theft and gifts; new procedural issues arising from the fraud protocol; and the imminent introduction of judge fraud-only trials

c. 560 pp, Paperback, 978-0-19-929989-8, £39.95,

**October 2007****The Law of Extradition and Mutual Assistance**

Second Edition

**Clive Nicholls** QC, Barrister, 3 Raymond Buildings**Clare Montgomery** QC, Barrister, Matrix Chambers**Julian B. Knowles**, Barrister, Matrix Chambers

- Covers both extradition and mutual assistance—combining complete coverage of the substantive law with practical guidance on procedural issues
- Comprehensive one-stop shop: expert narrative plus full text of all relevant legislation
- Detailed chapter on new European Arrest Warrant
- Expanded treatment of law and practice in other jurisdictions

Now in its second edition, *The Law of Extradition and Mutual Assistance* provides a comprehensive and authoritative treatment of the laws covering the extradition arrangements between the UK and other states, as well as international mutual assistance. The new edition has been scrupulously updated and rewritten to take account of the

Extradition Act 2003, The Crime (International Co-operation) Act 2003, the Proceeds of Crime Act 2002, the Police and Justice Act 2006, and the new US extradition treaty. The authors provide an expert commentary and critique of the new legislation and case law together with expanded comparative coverage. The book contains all relevant legislation.

c. 880 pp, Hardback, 978-0-19-929899-0, £145.00,

**September 2007****Health and Safety Enforcement Law and Practice**

Second Edition

**Richard Matthews**, Barrister, 2 Bedford Row, and**James Ageros**, Barrister, 2 Bedford Row

- Portable and authoritative guide to the key issues in health and safety enforcement, written in a practical and comprehensive manner
- The authors have substantially expanded their coverage of judicial review and abuse of process; 'reasonable practicability'; disclosure; case management; funding
- Includes new chapter on defending enforcement actions
- Comprehensive appendices include relevant statutes, the Enforcement Policy Statement, and key Health and Safety regulations
- Includes coverage of the Corporate Manslaughter Act 2007

*Health and Safety Enforcement: Law and Practice* provides a practical and comprehensive guide to the key issues in this growing area of the law. This new edition has been fully updated and contains expanded coverage of judicial review and abuse of process; 'reasonable practicability'; disclosure; case management; funding; and the forthcoming Corporate Manslaughter Act.

c. 760 pp, Hardback, 978-0-19-921286-6, £95.00,

**October 2007**

## BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

Issue 1, October 2007

## RECENTLY PUBLISHED

**The Sexual Offences Referencer**

A Practitioner's Guide to Indictment and Sentencing

**Eleanor Laws**, Barrister, 6 Pump Court, and  
**Patricia Lees**, Barrister, 23 Essex Street Chambers

'This excellent book is a welcome and timely addition . . . practitioners and judges will no longer need to locate old editions of textbooks to discover appropriate sentencing powers. All those who work in this area will be grateful for its easy accessibility'

HHJ Peter Rook QC

- Unique guide incorporating all of the technical information needed by practitioners and judges working on sexual offences cases in a single source

- Sets out the correct indictments and sentencing provisions for all current and historic sexual offences dating back to 1943
- Includes time-saving practical features such as model indictments and timelines
- Contains the definitive SGC guidelines on the SOA 2003, plus relevant case law
- Portable and easily navigable

c.400pp, Paperback, 978-0-19-921348-1, £35.00,

**October 2007**

## AVAILABLE DECEMBER 2007

**Blackstone's Guide to the Corporate Manslaughter Act 2007**

Richard Matthews, Barrister, 2 Bedford Row

- Contains the full text of the Corporate Manslaughter Act 2007
- Explains the ambit and operation of relevant health and safety legislation

- Analyses the relevant common law gross negligence manslaughter decisions relating to this issue—central to future interpretation

This new Blackstone's Guide includes the complete text of the Act together with a commentary on its probable interpretation and its impact upon the remaining common law offence of individual gross negligence manslaughter.

c. 304 pp, Paperback, 978-0-19-920321-5, £34.95,

**December 2007**

## AVAILABLE NOVEMBER 2007

**Criminal Costs: A Practical Guide**

**Peter Hurst**, Senior Costs Judge, Supreme Court Costs Office, Royal Courts of Justice, with a contribution by

**Andrew Keogh**, Partner, Tuckers Solicitors, Manchester

- First dedicated book on this subject
- Written by Senior Costs Judge Peter Hurst, who has been at the heart of decision making on costs, it provides the most authoritative analysis available
- Provides a thorough understanding of the criminal costs regime under the General Criminal Contract and related legislation
- Provides a full statement of the law and practice governing practitioners' fees, including the General Criminal Con-

tract, graduated fees, fees in high cost cases and fees assessed ex post facto for counsel. Also dealt with are the fee schemes for prosecuting advocates and witness expenses

This new work explains the criminal costs regime in a clear and accessible manner. It examines the law and practice governing the award of costs and practitioners' fees, the principles on which fees are assessed, as well as guidance on the assessment process and appeals. The book guides practitioners through applicable procedures in all relevant courts.

c. 416 pp, Paperback, 978-0-19-923624-4, £49.95,

**November 2007****Blackstone's Criminal Practice Bulletin**

Published by Oxford University Press, Great Clarendon Street, Oxford OX2 6DP

Customer services: (01536) 741 727, law.uk@oup.com

Printed by: Legoprint srl, Italy

**OXFORD**  
UNIVERSITY PRESS