



JUDICIARY OF
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SPEECH BY LORD JUSTICE GROSS
DISCLOSURE - AGAIN
CBA DISCLOSURE EVENT - JUNE 2018¹

INTRODUCTION

1. I am grateful to the CBA Education and Training Committee for the invitation to be here tonight and to participate in this event together with Richard Horwell QC. As the title of my talk “Disclosure – Again” indicates, this is not the first time this topic has arisen for consideration. It is not altogether unlike the characters in Anthony Powell’s *“A Dance to the Music of Time”*, who meet, part and re-meet in changing circumstances, though Powell did not have to deal (as we do) with the stubborn persistence of familiar problems.
 2. I should make one matter clear at the outset: the views I express are my own.
 3. My theme tonight can be summarised in a number of propositions:
 - (i) The law is satisfactory; the application of the law is not.
 - (ii) Disclosure must be seen as integral to the criminal justice process – not as a tiresome add-on.
 - (iii) The police need an “investigative mindset”.
 - (iv) Terminology needs to change, differentiating where appropriate between “complainants” and “victims”, while treating all with respect.
 - (v) There is no place for lingering fallacies.
 - (vi) Resources must be addressed.
 - (vii) Robust case management is and remains essential.
 - (viii) Technology created some of today’s problems; technology/ AI will very likely solve them but not imminently.
- I will take each of these propositions in turn but, first, let me recap on some recent history.

¹ I wish to thank Alyson Sprawson, Legal and Policy Adviser to the Senior Presiding Judge, for all her help in preparing this lecture.

DISCLOSURE REVIEWS

4. There has been no shortage of Disclosure Reviews. In my first Review, now almost 7 years ago², I concluded that there was no “quick fix” or instant solution but expressed the view that there was room for “significant, if incremental, improvement on the part of all concerned with the criminal justice system”.
5. I further concluded that there was neither a need for further legislative intervention nor a need to change the *Criminal Procedure and Investigations Act* (“CPIA”) test for prosecution disclosure. That test³, requiring the disclosure of material “which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused...” appeared (and appears) to me, when properly applied, appropriate and necessary to prevent miscarriages of justice. However, with a view to its proper application, I made a number of recommendations based on the premise that “Improvements in disclosure must be prosecution led or driven, in such a manner as to require the defence to engage-and permit the defence to do with confidence. The entire process must be robustly case managed by the judiciary. The tools are available; they need to be used.” That remains my view.
6. My 2011 Review was welcomed by the Government⁴ and its essential approach now enjoys Court of Appeal authority in the light of the later case of *R v R*⁵. Subsequently, I was again asked (this time with my colleague Lord Justice Treacy) to review Disclosure, focusing on sanctions for disclosure failures. Our report was published in 2012⁶. We recommended, *inter alia*, the swift implementation of the recommendations contained in my earlier Review but did not, in the event, recommend the creation of any additional sanctions.
7. A result of these Reviews was that the Judiciary and Attorney General worked together to produce complementary guidance⁷, in the form of the Attorney General’s Guidelines⁸ and the Judicial Protocol – providing a clear framework for

² *Review of Disclosure in Criminal Proceedings* (September 2011)

³ S.3(1)(a), CPIA

⁴ Written Ministerial Statement of the Lord Chancellor and Secretary of State for Justice on Thursday 26th April 2012- Hansard 26 Apr 2012: Column 47WS

⁵ [2015] EWCA Crim 1941; [2016] 1 WLR 1872

⁶ Gross and Treacy LJJ , “*Further Review of Disclosure in Criminal Proceedings: sanctions for disclosure failure* (Judiciary of England and Wales, November 2012)

⁷ Constitutional reasons prevented the merger of these guidelines into a single version.

⁸ Attorney General’s Guidelines on Disclosure for Investigators, Prosecutors and Defence Practitioners was published in December 2013,

the proper application of the CPIA, with each party to the system knowing what was expected of them.

8. Thus far, we had not dealt with Disclosure in the magistrates' court but, under my auspices as SPJ, such a Review was conducted.⁹ Once again there was no call for legislative changes but the list of recommendations required a change in emphasis with a heavy "front loading" burden placed on the police and CPS; a more responsive burden on the defence to communicate; and robust case management by the judiciary to ensure cases are progressed. This Review, in effect, foreshadowed the introduction of *Transforming Summary Justice* ("TSJ").
9. Early in 2017, Her Majesty's Inspectorate of Constabulary ("HMIC") and Her Majesty's CPS Inspectorate ("HMCSI") conducted a joint assessment of disclosure in "volume" Crown Court cases.¹⁰ The report made for uncomfortable reading and advanced various recommendations in respect of the police and CPS, spanning the breadth of the disclosure process.
10. Around the same time (July 2017) Richard Horwell QC published his report into the *Mouncher Investigation*¹¹- but I shall leave that to him.
11. Finally, the Attorney General has instigated a still further review, this time considering:¹²
 - a) Processes within 'volume' cases (within the Crown Courts and Magistrates' Courts) and complex cases including economic crime;
 - b) Guidance, including any Codes of Practice, Protocols or Guidelines and legislation;
 - c) Case management, including initiatives such as TSJ, *Better Case Management* ("BCM") and *Digital Casework*; and
 - d) Capabilities across the criminal justice system including staffing, training, existing tools and digital technology.
12. I am sure that the CBA and some of you individually will have contributed to this review. We all look forward with interest to its conclusions.

⁹ HHJ Kinch QC, Howard Riddle (Chief Magistrate) and Sara Carnegie, *Magistrates' court disclosure review* (Judiciary of England and Wales, May 2014)

¹⁰ "[Making it Fair – a Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases](#)" (18 July 2017).

¹¹ "*Mouncher investigation report*", Richard Horwell QC

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629725/mouncher_report_web_accessible_july_2017.pdf

¹² Note from the Attorney General's Office, dated 23rd February, 2018, for the Bar Council meeting on 3rd March, 2018

THE CURRENT WAVE OF PROBLEMS

13. Recurrent Disclosure problems have an impact on complainants, victims and defendants – and the CJS as a whole. Significant public criticism has followed the collapse of the trials of Liam Allan and others¹³.
14. These recent highly publicised failures also resulted in the DPP, together with the police¹⁴, looking to improve the handling of Disclosure. The upshot was that I and others from across the CJS (including defence representatives) attended a Disclosure seminar in January – leading to continuing work through the National Disclosure Forum. The propositions I advance tonight are essentially those I expressed at that seminar. I now turn to them.

The Law

15. It is correct that the CPIA regime pre-dates the enormous expansion in electronic communication and social media; however, I remain of the view expressed in my 2011 Review, that it is fit for purpose. It would be a distraction to reinvent the wheel and there is no need to do so. The test is clear and sensible. The CPIA has been supported by the *Criminal Procedure Rules* (“the Crim PR”), together with the Code, Guidelines and Protocols already mentioned and various manuals.
16. Whilst a “proportionality” qualification to cope with the often vast quantities of material and data seized in ever more complex criminal investigations has long been tempting, the risk of miscarriages of justice outweighs the likely benefits of such a change. Given the current state of play, that is emphatically so.
17. Similarly, I am strongly opposed to the “keys to the warehouse” approach. It would increase the pressures on limited resources and result in the duplication of effort. Any diligent prosecutor would want to look at the material before handing it over to assess its impact on their case. The “keys to the warehouse” in an overstretched system is simply not viable. At most, it transfers the problem without solving it.
18. Recent, well-publicised and damaging Disclosure failures have not occurred because of the law. They have occurred because of a failure to apply the law, in line with the duties on all participants in the CJS, which are now and have for some time been very clear. It is that which must change. Together with the matters to which I shall come under other headings later, the need is to build on the cultural changes encouraged through the principles of TSJ and BCM, namely:

¹³ See, the coverage in *The Guardian* and *The Evening Standard* on 5th June, 2018, relating to the halting of 47 rape or other sexual offence cases attributable to Disclosure failures.

¹⁴ Through Chief Constable Nick Ephgrave, the National Police Chiefs’ Council (“NPCC”) CJ lead.

- Getting it right first time¹⁵;
 - Case ownership;
 - Duty of direct engagement;
 - Consistent judicial case management.
19. The BCM procedure aims to bring early focus on disclosure and sets dates (termed Stages 2, 3 and 4) to ensure that disclosure issues are addressed prior to the trial date. Proactive communication and engagement between all the parties is the key to Disclosure being handled properly. It is time that this process was adhered to.
20. With a view to adopting good practice from larger cases more generally, the Disclosure Management Document (DMD) is being trialed for 3 months from 26th March for RASSO Crown Court cases and all cases dealt with by the CPS Complex Casework Units. The form has been adapted from that used by the CPS in complex fraud cases and sets out the prosecution approach to non-sensitive material by explaining the rationale for the identification and scheduling of relevant material based on reasonable lines of enquiry. It sets out what electronic devices have been seized; their method of examination; and the social media accounts considered. Finally, it sets out the Third Party material which may be available. The information provides the defence with the opportunity to challenge and make representations on the prosecution approach. The defence have a critical role in ensuring that the prosecution is directed to material which meets the Disclosure test.
21. The DMD will in future be uploaded to the *Digital Case System* (“DCS”) so that judges can access it in order to help case management. Feedback so far has been positive and if it remains so then the aim is to roll out it to all Crown Court cases.

Disclosure must be integral to the criminal justice process

22. As it seems to me, there is unfinished business under this heading. A change in culture/mindset is required so that the prosecution and, in particular the police, do not view Disclosure as an ancillary activity after preparing the case. Disclosure must not become an “afterthought”. If ignored, it tends to bite.
23. Properly prioritising disclosure requires an appropriate “audit trail” of work done by investigators – not just hastily prepared schedules after the defendant has been charged. It also requires a close working relationship between the disclosure officer and the crown prosecutor so that there can be a proper exercise of

¹⁵See, *passim*, *Review of Efficiency in Criminal Proceedings*, by the Rt Hon Sir Brian Leveson, President of the Queen’s Bench Division (Judiciary of England and Wales, January 2015)

judgment. It is to be underlined that the role of the police does not finish at the arrest or charge stage.

Investigative mindset

24. One of the finest Police Officers it has been my privilege to meet¹⁶ introduced me to the fundamental importance of the investigating officer having an “investigative mindset”¹⁷. As described by ACPO this means “an inquiring, open-minded approach, capable of sensing what might be material from the defence perspective”.
25. Police training is essential to the development of this “investigative mindset” and to ensure that officers “think” their way through the process – rather than box ticking or blindly following one line of thought to the detriment of all others.
26. In that regard, it is gratifying that police training is now being reviewed by the College of Policing. Very recently, the College released a new online package for officers called ‘*Disclosure and Relevancy – Conducting Fair Investigations*’ to replace the current training. The new products address the significant increase in the use of digital media, particularly in cases where the parties involved had been known to each other over a period of time. The College is also promoting “disclosure champions” in every force in England. It must be hoped that this training and personal support will deliver the necessary cultural changes.

Terminology

27. Historically, the CJS paid too little attention to the needs of witnesses, complainants and victims. It is entirely right that such past failings should be redressed. All concerned should be treated with dignity and respect. It does not at all follow that “complainants” are necessarily to be identified with “victims”. Where there is no doubt that a crime has been committed and the only issue is the identity of the perpetrator, the complainant is necessarily a victim. Where, however, the issue is whether a crime has been committed, the complainant remains a complainant and is not a victim unless or until there is a plea or verdict of guilty. This is not pedantry or semantics. It is the starting point for clear thinking, conducive to the maintenance of an open mind, the investigative mindset already discussed. This was indeed the view of Sir Richard Henriques, who conducted an independent review of the Metropolitan Police investigation of allegations of non-recent sexual offences said to have been conducted by

¹⁶ Jim Barker-McCardle, former Chief Constable of Essex

¹⁷ Practice Advice on Core Investigative Doctrine (National Centre for Policing Excellence, ACPO, 2005)p.58 and following

prominent public individuals¹⁸ and I agree with him.

28. Problems with terminology were exacerbated by the starting point adopted for a time by police forces of believing the complainant's account. For my part, if I may say so, I entirely agree with the public statement of the Commissioner of the Metropolitan Police, Cressida Dick that "I arrived saying very clearly that we should have an open mind when a person walks in and we should treat them with dignity and respect and we should listen to them and we should record what they say. From that moment on, we are investigators"¹⁹. Confusion in terminology betrays a confusion in approach; it is a simple point and one we should put right without more ado.

Fallacies

29. Somewhat to my surprise I have encountered a fallacy even, with respect, affecting the approach adopted by experienced counsel, leading to the erroneous position being taken that material is not disclosable. The fallacy is to suppose that material is not disclosable if it goes to an issue on which counsel believe that the Crown will ultimately prevail. Material is disclosable if it satisfies the CPIA test (or, in various situations, the common law test). No more, no less. Like investigators, prosecuting counsel need to keep an open mind and should resist the temptation to see issues solely from the Crown's vantage point.

Resources

30. It would be remiss of me if I did not raise the topic of resources, even while observing the obvious constraints on serving Judges in this area. Self-evidently, police and CPS resources will impact on the performance of their respective disclosure obligations, a matter recently addressed in the Defence Practitioners' submission to the Justice Select Committee²⁰.
31. Similarly, and without straying into matters of current controversy, the rates, packages and structuring of remuneration for solicitors and barristers cannot be ignored in any discussion on Disclosure.²¹ Therefore, it is highly desirable that the Legal Aid Agency should be actively involved in the work of the National Disclosure Forum.

¹⁸ An independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence by Sir Richard Henriques published 31st October 2016. See, especially, pp. 7 and 8.

¹⁹ Evening Standard – 2nd April 2017.

²⁰ Defence Practitioners' Working Group- Submission to the Justice Select Committee Inquiry on Disclosure of Evidence in Criminal Case , 5th February, 2018.

²¹ See the Defence Practitioners' Submission, *supra*.

32. My concern as to resources and remuneration can be simply expressed. On the police and prosecution side, the need is for sufficient training and the time to conduct disclosure in a thinking manner, engaging as appropriate with the defence. Disclosure can involve trawling through vast quantities of material (not least given the quantities of material generated on social media), hence a similar concern as to defence remuneration and engagement with the Court and the Crown. Resources and remuneration cannot be permitted to become a catch-all excuse for disclosure failures but no discussion on Disclosure can be complete or fair without addressing the topic.
33. Policy decisions as to the allocation of scarce resources are never easy. In this regard, however, it would be wise to take into account that the cost of skewed investigations attributable to Disclosure failures can be high: in terms of reputational damage and the undermining of confidence in the CJS; in terms of individual defendants subjected to unwarranted stress or, still worse, detention; and in terms of complainants, subjected to an emotional roller-coaster by the last-minute abandonment of proceedings.

Robust judicial case management

34. The Judiciary has its part to play in holding both prosecution and defence to their respective obligations. The trial of the DMD form (mentioned earlier) should assist. But in order for the DMD to be truly effective judges will need to consider it at the PTPH, to ensure it has been effectively completed following adequate dialogue between the parties – and to grip any issues which arise, including compliance by all parties with their Disclosure obligations.
35. While, in general, I am not an enthusiast for “standard directions” (too likely to encourage box ticking), Judges may well give consideration to obvious areas for exploration at an early stage in particular cases – for example, interrogating the mobile phones or social media accounts of the complainant and defendant within the relevant time frame of the alleged complaint.

Technology

36. The explosion of electronic and social media communications is now a major feature of CPIA disclosure. There are often vast amounts of digital data available even in minor “volume” crime cases stretching both prosecution and defence resources to or (in some instances) beyond their limits.
37. By way of example of the enormity of the issue, the Metropolitan Police recently explained that in one complicated rape case, involving multiple complainants, it took 630 hours for the police disclosure team to review the content of the 3 complainants’ mobile phones and their Face book accounts. That figure does not

include the time taken to actually download the phones at the lab, or the time taken to collate, review and schedule the products of the various reviews.

38. In another and more straightforward rape case, where complainant and defendant met on Tinder and there were only 2 mobile phones to consider, 150 officer hours were required to examine 20,000 items of data.

39. It can fairly be said that technology has created many of our current Disclosure problems. I am confident²² that technology, including AI, will ultimately – if not imminently – go a long way to solving them; I do not say all the way because trust and confidence in the process will remain essential ingredients. As to technology, please consider, by way of examples: advanced search methods; using technology to sort/list/group material; automatic rejection of poorly completed schedules and signposting to help the prosecution make the right decisions; true AI – computers learning from feedback to make accurate decisions.

Conclusion

40. As recent public debate shows and as we know, Disclosure failures are a serious issue. We cannot afford to be complacent and it would be entirely wrong to minimise them. They should not happen. That said, it would be wrong to lose a sense of proportion. Like the “*secret barrister*”, I believe there is “much that is fundamentally good about our justice system”²³. The commitment of all participants in our CJS to fair trials is one such feature. The correct approach to Disclosure goes to the fairness of the trial process, albeit (to state the obvious) not every disclosure failure means that the trial has been unfair. There are no quick fixes but, at least pending the further advance of technology, a resolute focus on the application of existing law, using the tools available and in accordance with now well-established duties, provides the best way of minimising Disclosure failures, so damaging to individuals and the CJS when they occur. It is that focus I have sought to encapsulate in the propositions I have advanced tonight.

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²² See too, the cogent observations of Sara Thornton, Chair of the NPCC, *The Guardian*, 8th February, 2018.

²³ *The Secret Barrister* (Macmillan, 2018), at p.341