Judicial College

The Crown Court Compendium

Part I: Jury and Trial Management and Summing Up

June 2023

Edited by: Picton – Ormerod – Goose – Tayton – Shetty – Cooper – Hatton – Aubrey – Dickinson – Smith – Thomas – Harris – Quirk

Originally written by: Maddison – Ormerod – Tonking – Wait

Introduction (June 2023)

This edition of the Compendium, and its sentencing companion, is the eighth to be issued since the retirement of Sir David Maddison, Judge Simon Tonking and Judge John Wait, three quarters of the original writing team. Happily, Professor David Ormerod KC (Hon) remains as an invaluable part of the editorial board.

The team tasked with keeping the content up to date has, until now, comprised: myself (lead editor), HHJ Lynn Tayton KC, HHJ Raj Shetty and HHJ Jonathan Cooper (principal editors) as well as Mrs Justice McGowan, HHJ David Aubrey KC, HH Greg Dickinson KC, HHJ Hatton, HHJ Andrew Smith KC, Professor Cheryl Thomas KC (Hon), Dr Hannah Quirk, and David Ormerod. Mrs Justice McGowan has decided to relinquish her editorial role and she has been replaced by Mr Justice Goose, to whom we owe a debt of gratitude for agreeing to come on board.

So far as sentencing is concerned HHJ Cooper and Lyndon Harris (editor of Current Sentencing Practice) took the lead in carrying out a substantial revision of much of the content of Part II consequent upon the Sentencing Act 2020 coming into force. Work on the last two revisions has been shared between Lyndon Harris and myself.

The intention is to keep the Compendium up to date with regular revisions. It is best used as an online resource. Printing and thereafter using a hard copy creates the risk of the reader relying upon out of date material. Each new edition will clearly identify the date when it was issued and users who elect to download the book(s) should ensure that they replace any saved versions with the new one as soon as possible after publication.

We are indebted to Samantha Livsey and Alexandra Timms, the members of the Judicial College Publications staff burdened with converting our revisions into the version that eventually comes to be published. Their painstaking and very careful editorial work is simply invaluable.

The Compendium has been referenced in a number of Court of Appeal judgments. In *AG*[1] Lord Justice Simon stated:

> "First, the Crown Court Compendium, which is freely available to practitioners who appear in the Crown Court and to Judges who sit there, provides guidance and draft directions in relation to points of law and practice that may arise in trials and in relation to which juries may need to be directed. Each direction has been carefully considered and provides judges with an invaluable resource which, when adapted to the facts of a particular case, will provide an appropriate framework for a legally correct direction. Those who do not avail themselves of these draft directions are at risk of introducing error in the summing-up."

There is an important reminder in *BHV*,[2] however, that the guidance as to the law contained in the Compendium is by way of a summary and that resort should also be had to the cases cited in the text as well as the relevant textbooks that cover a particular topic.

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1 [2018] EWCA Crim 1393
2 [2022] EWCA Crim 1690

As the use of written directions and 'routes to verdict' has come to be the norm in criminal trials the Compendium provides a valuable resource for those who have to craft them. As was stated in *Atta-Dankwa*:[3]

> "Criminal Procedure Rule 25.14(4) states that jury directions, questions or other assistance may be given in writing. Research has shown that jurors are assisted by having written directions. The research is well known. It is conveniently summarised by the learned authors of the Crown Court Compendium, to which reference was made in the course of this trial, at paragraph 1.6 of their 2017 edition and the authors there conclude that the argument in favour of providing written directions is "overwhelming"."

In *N*[4] the court gave detailed consideration to the issue of written directions and the advantage that such may represent. One of the grounds of appeal sought to argue that the conviction was unsafe simply because the judge failed to provide the jury with directions in writing. The court emphasised the benefits that can arise from writing the directions and inviting input from the advocates on drafts before directing the jury. The court stated at [19]:

> "In circumstances in which an oral direction only is provided a conviction will, in normal circumstances, be quashed because that oral direction was wrong or materially confusing, etc. It will not be because of the mere omission of written directions. It might be that the exercise of crafting written directions would have led to the errors being avoided but the errors remain those embedded in the oral directions and not in the mere fact that no written equivalent was given. We do not however rule out the possibility that, exceptionally, a direction might be so complex that absent an exposition in writing a jury would be at a high risk of being confused and misled in a material manner. And nor do we address the situation that occasionally occurs where the judge gives an oral direction which differs in a material respect from the written direction which is also provided."

Since *N* the issue has been further considered in *AB*,[5] *Mills*[6] and *Grant & Ors*.[7] The CrimPR 25.14, as recently revised, states that the court should give legal directions "orally and, as a general rule, in writing as well".

In *White*[8] the judge had provided the jury with written directions but did not read one of the directions out to them. The court concluded that the direction was, for that reason deficient.

Rowe[9] provides important guidance on the consideration of separate routes to verdict for each defendant. *KC*[10] emphasises the need to discuss written directions with counsel.

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3 [2018] EWCA Crim 320
4 [2019] EWCA Crim 2280
5 [2019] EWCA Crim 875 and in particular para 56
6 [2021] EWCA Crim 985
7 [2021] EWCA Crim 1243 and in particular para 50
8 [2021] EWCA Crim 1423
9 [2022] EWCA Crim 27
10 [2022] EWCA Crim 1378

The importance of a judge not entering the arena has featured in some appeals of late and guidance on this topic can be found in *Beresford*.[11]

As we strive to keep the Compendium up to date, contributions from judges, Recorders and practitioners are not just welcome but are a vital part of maintaining and improving the quality of the content. Suggestions as to how, for example, a route to verdict might be better constructed or a pointer to a case that could assist on a topic that is covered (or should feature) in the Compendium are greatly appreciated. Please feel free to email your thoughts and suggestions to any member of the editorial team.

Forewords from previous editions, and in particular the foreword from the original version published in 2016, are now to be found in the new Appendix I, along with a tribute to Sir David Maddison. There is much there that merits attention but it seemed more appropriate to have that historical material at the end of this work rather than the beginning.

We are very grateful to Lord Justice Dingemans for the foreword to this edition.

In terms of new material featuring in this reissue, the following merit highlighting:

- *White*[12] (above) on the need for directions to not just be provided to the jury in writing but also read out to the jury in their entirety;
- *Skeete*[13] and *Lajevarti*[14] in which the court had to consider the options available to a judge faced with the potential need to discharge a juror who had been a victim of an offence related to the subject matter of the trial – 2-4;
- Reporting Restriction Guidance 2022 – 3-1;
- *Johnson*[15] on the care needed in respect of a plea being entered by a potentially unfit defendant – 3-2;
- PCSCA 2022 on remote hearings and appearances as well as *Kadir*[16] on the use of WhatsApp for the receipt of evidence – 3-3;
- *Hill*[17] on the admissions of the co-accused's convictions under s.74(3) PACE – 3-4;
- *Desir*[18] on dealing with 'beyond a reasonable doubt' – 5-1;
- CrimPR on procedural requirements and form of the indictment as well as *P*[19] – 6-1 and *W*[20] on multiple incident counts – 6-3;

11 [2020] EWCA Crim 1674
12 [2021] EWCA Crim 1423
13 [2022] EWCA Crim 1511
14 [2023] EWCA Crim 615
15 [2021] EWCA Crim 790
16 [2022] EWCA Crim 1244
17 [2021] EWCA Crim 587
18 [2022] EWCA Crim 1071
19 [2022] EWCA Crim 690
20 [2022] EWCA Crim 1438

- *BHV*[21] on a secondary party's liability for murder when the principal offender has killed someone other than the intended victim (and see also *Hussain and Ors*[22] on the topic of joint enterprise generally) – 7-4;
- *Smith and Smith*[23] on overwhelming supervening event in manslaughter – 7-4;
- *Andrews v CC Suffolk*[24] on the definition of attempts – 7-8;
- *Datson*[25] on mistakes of fact and law – 8-5 and 8-7;
- *Olive*[26] on circumstantial evidence and scientific evidence from firearms discharge residue – 10-1;
- The Forensic Science Regulator's Code of Practice on the experts' obligations which comes into force in October 2023 – 10-3;
- *Heslop*[27] on the use of s.98(a) CJA 2003 in gang cases – 12-1;
- *McGowan*[28] on where the prosecution seek to introduce bad character evidence under more than one heading;
- *Richards*[29] on historic convictions as bad character under s.101(1)(d) CJA 2003 and *Ellis Cloud*[30] on propensity from single previous conduct – 12-6;
- *Khan*[31] on where evidence may not just be relevant to propensity but also to some other relevant issue in the case – 12-6;
- *Molliere*[32] on s.101(1)(g) CJA 2003- 12-9;
- *Roe*[33] acknowledging that where evidence has been admitted by agreement it will be difficult to argue on appeal that it was wrongly received; *Portman*[34] on the situation where it is contended that a witness has been disbelieved after making a similar accusation in the past, and the particular care must be taken in deciding whether this provides evidence that false evidence has been deliberately given (there may be other reasons for the outcome of the proceedings); *W*[35] as to care needed in respect of the danger of myths and stereotypes in assessing bad character evidence – 12-10;

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21 [2022] EWCA Crim 1690 and see further *Rowe and Ors* [2022] EWCA Crim 27 where the court considered proof of encouragement in a case of alleged joint participation.
22 [2023] EWCA Crim 697
23 [2022] EWCA Crim 1808
24 [2022] EWHC 3162 (Admin)
25 [2022] EWCA Crim 1248
26 [2022] EWCA Crim 1141
27 [2022] EWCA Crim 897
28 [2023] EWCA Crim 247
29 [2022] EWCA Crim 1490
30 [2022] EWCA Crim 1668
31 [2022] EWCA Crim 1592 and se also *P* [2022] EWCA Crim 1582
32 [2023] EWCA Crim 247
33 [2023] EWCA Crim 316
34 [2022] EWCA Crim 1200
35 [2022] EWCA Crim 1438

- *Andrews*[36] on substantial probative value under s.100 CJA 2003 – 12-10;
- *Ellis Cloud*[37] on directions where the prosecution do not rely on cross admissibility – 13;
- *W*[38] on hearsay from deceased witnesses – 14-2;
- *Da Costa*[39] on uses of s.114(1)(c) to adduce an agreed account of an unavailable witness (otherwise admissible under s. 116) - the jury should be reminded that it has not been possible to cross-examine that witness – 14-4;
- *A'Hearne*[40] on the use the factors in s.114(2) as a guide to potential reliability – 14-16;
- *Long*[41] on avoiding dock identifications – 15-1;
- *Ozger*[42] on uses of CCTV comparison for identification of the defendant – 15-2;
- *Ulas*[43] on CCTV identification from a police officer – 15-4;
- *Olive*[44] on exculpatory statements and confessions – 16-2;
- *Molliere*[45] on the use of a lies direction rather than s 34 – 17-1;
- *Magson*[46] on the householder self-defence – 18-1;
- *Johnson*[47] on duress and immediacy of the threat and *Phair*[48] on duress and voluntary association with criminal wrongdoing – 18-3;
- Cases on modern slavery recently decided in this ever developing field: *AFU*,[49] *AGM*,[50] *NHF*,[51] *BYA*,[52] and *BLS*[53] – 18-6;
- A new section on the defence to a charge of strangulation – 18-7;
- *APJ*[54] on intoxication in diminished responsibility – 19-2;

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36 [2022] EWCA Crim 1252
37 [2022] EWCA Crim 1668
38 [2022] EWCA Crim 1438
39 [2022] EWCA Crim 1262
40 [2022] EWCA Crim 1784
41 [2022] EWCA Crim 444
42 [2022] EWCA Crim 1238
43 [2023] EWCA Crim 82
44 [2022] EWCA Crim 1141
45 [2023] EWCA Crim 228
46 [2022] EWCA Crim 1064
47 [2022] EWCA 832
48 [2002] NICA 66
49 [2023] EWCA Crim 23
50 [2022] EWCA Crim 920
51 [2022] EWCA Crim 859
52 [2022] EWCA Crim 1326
53 [2022] EWCA Crim 1079
54 [2022] EWCA Crim 942

- *KC*[55] on written directions on evidence and *Bhatt*[56] on myths and stereotype directions – 20-1;
- The removal of what was previously Appendix V (guidance on s.28) consequent upon the introduction of the new CrimPD 2023.

It is not anticipated that there will be a need to carry out any further major revision of the text until 2024.

HHJ Martin Picton
June 2023

[55] [2022] EWCA Crim 1378
[56] [2022] EWCA Crim 926

Foreword to the June 2023 edition of the Crown Court Compendium: Parts I and II by Lord Justice Dingemans, Vice President of the King's Bench Division

It is a great privilege to have been asked to write the foreword to the June 2023 Edition of Parts I and II of the Crown Court Compendium. The Compendium is as important to judges as are Archbold and Blackstone to the practitioners appearing before us. It is an excellent publication which repays reading on any topic which the trial and sentencing judge has to address.

I hope that I will be forgiven for setting out some of the history of the Compendium to share how we got here. The Compendium started life as the Crown Court Bench Book as long ago as May 1991 (some 34 years ago, and 4 years after I was called to the Bar!). It was a loose-leaf hardback red folder published by the then Judicial Studies Board (now the Judicial College). It contained "specimen directions". When I became a Recorder in the Crown Courts in 2002, the Crown Court Bench Book was a vital resource in helping me to try and stay on the straight and narrow path of giving accurate and fair legal directions. It was, even then, that rare publication which commanded respect from even the most experienced Crown Court judges that I was lucky enough to share my sandwiches with (Lewes Crown Court was ahead of the game in not having a judicial dining room!). Updates were sent out in environmentally unfriendly polythene wrappers so that the old page could be taken out from the folder and the new and updated page inserted in its place. One criticism of this old Bench Book was that it led judges simply to parrot the specimen directions, without making attempts to tailor the directions to the particular case being tried. Lord Judge wrote that "sometimes specimen directions have been incanted mechanistically".

All that changed in March 2010 when the Judicial Studies Board published an A4 sized paper back Crown Court Bench Book. This was drafted by Lord Justice Pitchford and Professor David Ormerod KC. This attempted to meet the problem of slavish copying of specimen directions by giving more high level "illustrations" based on hypothetical facts. It was intended to ensure that judges focussed on the needs of jurors so that the jury could come to fair decisions. This picked up concerns highlighted by the research carried out by Professor Cheryl Thomas KC, who had identified that only 31 per cent of jurors were able to identify the two legal questions to address when deciding an issue of self defence following an oral summing up. This 2010 publication of the Crown Court Bench Book (and I still have my copy) provides the foundation for much of the excellent work in the Compendium.

Some judges had, however, become used to the more detailed assistance provided by the specimen directions, and some kept their old copies of the red folder Bench Book containing specimen directions. In an attempt to address this the Judicial College produced a "Companion" to the Bench Book, which set out the required elements of directions. As Professor Ormerod pointed out in 2022 in a lecture in Middle Temple, by 2015 the position was not ideal. This was because many judges

had retained their specimen directions from the original red folder Bench Book, there was the 2010 Bench Book and there was the Companion.

As a result, it was decided to pull all of the guidance into one place. In 2016 the team of Professor Ormerod, Sir David Maddison, HHJ Simon Tonking and HHJ John Wait drafted the first edition of the Compendium. It provided strong encouragement to the provision of written routes to verdicts, now reflected in the terms of the Criminal Practice Directions.

A new edition of the Compendium was published in 2018, and a further edition in December 2020 when Part II was published for the first time, to coincide with the Sentencing Code which applies to persons convicted after 1 December 2020.

The last edition of Part I of the Compendium was published in August 2021, and the last edition of Part II was published in June 2022, although there have been online updates from time to time where the law has developed in a way which impacts the previous guidance.

Part I of the Compendium “Jury and Trial Management and Summing up” now generally takes the form of a legal summary of the offence or defence; a summary of the elements of the offence or defence; then an analysis of each element; before suggested directions are set out.

Part II of the Compendium starts off with guidance that, if followed, would avoid some of the sentence appeals to the Court of Appeal Criminal Division. It does not take long to read and should be required reading for every judge before sentencing. It gives one of the clearest explanations of the extension period required to be given for those being disqualified and imprisoned that I have read.

The exceptional public service of HHJ Martin Picton and Professor David Ormerod (I have seen them over the last month walking past my room in the Royal Courts of Justice, heads down in earnest conversation, as they discussed changes for this latest edition), and all of the other editors and contributors, has produced an immensely useful guide and book.

Lord Justice Dingemans

June 2023

Contents

1. PRELIMINARIES

1-1 Style and abbreviations

Unless the context indicates otherwise: any reference to a 'Judge' includes 'Recorder'.

Cases are usually referred to by the name of the defendant only, and by neutral citations.

The following abbreviations are sometimes used:

AJA	Administration of Justice Act 1970
BWV	Body worn video
CDA	Crime and Disorder Act 1998
CAJA	Coroners and Justice Act 2009
CCA	Crime and Courts Act 2013
CJA	Criminal Justice Act 2003
CJPOA	Criminal Justice and Public Order Act 1994
CJIA	Criminal Justice and Immigration Act 2008
CJPA	Criminal Justice and Police Act 2001
CTBSA	Counter Terrorism and Border Security Act 2019
CrimPD	Criminal Practice Directions 2023*
CrimPR	Criminal Procedure Rules 2020*
D	The defendant
DAA	Domestic Abuse Act 2021
E	The/an expert witness
JRCA	Judicial Review and Courts Act 2022
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
MDA	Misuse of Drugs Act 1971
OWA	Offensive Weapons Act 2019
P	The/a principal offender
PACE	Police and Criminal Evidence Act 1984
PC	Police Constable
PCC(S)A	Powers of Criminal Courts (Sentencing) Act 2000
PCSCA	Police, Crime, Sentencing and Courts Act 2022
PoCA	Proceeds of Crime Act 2002
SA	Sentencing Act 2020
SOA	Sexual Offences Act 2003
W	The/a complainant/witness
YJCEA	Youth Justice and Criminal Evidence Act 1999

***NOTE:**

CrimPR and Crim PD are available on Gov.uk.

1-2 The purpose and structure of the Compendium

The main aim of this Compendium is to provide guidance on directing the jury in Crown Court trials and when sentencing, though it contains some practical suggestions in other areas, for example jury management, which it is hoped will be helpful.

The Compendium is intended to replace all of the guidance previously provided by the Judicial College and its predecessor the Judicial Studies Board namely: the 'Specimen Directions to the Jury' in the Crown Court Bench Book published in March 2010; the Companion to the Bench Book published in October 2011; and part II of the Companion, dealing with sentencing, published in January 2013. This Compendium seeks to combine the perceived strengths of all these previous publications, so that further reference to them is not necessary.

The Compendium consists of two separate parts. Part I deals with jury and trial management and summing up. Part II deals with sentencing in the Crown Court.

Subject to occasional variations, the format of each section within each chapter of Part I is broadly the same. There is first a section headed ‘Legal summary’. These summaries are intended as no more than brief introductions to or reminders of the areas of law concerned. References will be found to the relevant passages in Archbold and Blackstone’s and in any case of complexity the law must be researched through these works. In Part II (Sentencing) references will also be found to the Sentencing Referencer.

There is then a section headed ‘Directions’ which is intended to serve as a checklist of the points that will or, depending on the facts and issues in the particular case, may need to be covered when summing up in the subject area concerned. Occasionally this section is headed ‘Procedure’ when particular steps need to be taken in managing the trial. Finally, in shaded areas, there are one or more ‘Example Directions’ and/or ‘Routes to Verdict’, sometimes generic in nature and sometimes based on specific hypothetical facts. These are intended to provide a useful starting point for framing legal and evidential directions, but they must be tailored to each particular case and should not be simply cut and pasted indiscriminately and inappropriately into summings-up.

The language of the model directions is intended to avoid an unduly legalistic tone. We have endeavoured to make the terminology readily comprehensible by juries. Professor Cheryl Thomas has been of great assistance in commenting upon the structure and wording of many ‘Examples’.

1-3 Timing of directions of law

Traditionally, directions of law were given to the jury for the first time in the summing-up. This traditional approach meant that the jury would be directed that their task was to evaluate the evidence at a stage when the evidence had concluded; and they would be directed to exercise caution in relation to various parts of the evidence such as identification evidence long after the evidence had been given. Recognition of the disadvantage of such an approach has resulted in the provision of some directions at earlier stages of the trial.

Such an approach was encouraged by Sir Brian Leveson P in his 'Review of Efficiency in Criminal Proceedings'. He encouraged (a) identification for the jury of the issues in the case, by both prosecution and defence, **before** the evidence is called; and (b) the giving of directions of law at a point or points in the trial when they are of most use to the jury. In his words: "I know of no reason why it should not be open to the judge to provide appropriate directions at whatever stage of the trial he or she considers it appropriate to do so."[57] This approach was formally adopted in CrimPR Rule 25.14. This requires the judge at a jury trial (i) to give the jury directions about the law at any time at which that will help the jurors to evaluate the evidence that they hear, and (ii) when summing up the evidence for them, to do so only to such extent as is directly relevant and necessary. As mentioned earlier the Rules now explicitly recognise the advantage of giving legal directions in writing – that such should be the practice "**as a general rule**".

CrimPD Chapter 8: Juries: Directions, Written Materials and Summing Up requires judges and Recorders to give careful thought to the timing of their legal directions. Some of these might usefully be given before the prosecution's opening speech. Examples would be directions about the different roles of the judge and jury; the burden and standard of proof; and the definition of the offence(s) charged. Directions about the use of special measures and/or ground rules that restrict the manner and scope of questioning of a witness should be given just before the evidence of the witness(es) for whom such measures are to be used. CrimPD 8 gives examples of issues that may merit early directions. Where identification is in issue it may be helpful to provide an early *Turnbull* direction and provide the jury with a written checklist of issues they need to consider before an identifying witness gives evidence. The CPD suggests that a jury may be assisted by early directions on the following issues:

- Expert witnesses.
- Evidence of bad character.
- Hearsay.
- Interviews of co-defendants.
- Evidence involving legal concepts such as knowledge, dishonesty, consent, recklessness, conspiracy, joint enterprise, attempt, self-defence, excessive force, voluntary intoxication and duress.

[57] Paragraph 238 of the Review

It will be wise to forewarn the advocates in the absence of the jury if it is intended to give some directions before the summing up, to indicate what the proposed directions are, and to ask for any submissions the advocates may have. It will be important to keep any such directions under review after they have been given, in case they are affected by any subsequent developments in the trial; and, if they are, to expand on those directions as necessary during the summing-up.

There is no reason why such directions cannot be provided to the jury in writing at the time that they are given,[58] but this must not be undertaken without discussion with the advocates.

Written directions should be uploaded to the digital case file or attached to a paper file. If directions are given before the summing up they should be referred to during the summing up so that, if the matter goes to appeal, it is clear to the Court of Appeal what directions have been given.

[58] See *Atta-Dankwa* [2018] EWCA Crim 320 where the Court of Appeal identified very clearly the desirability of providing directions in writing even in relatively short or simple cases. See further *PP* [2018] EWCA Crim 1300 where the court underlined the desirability of a judge providing draft written directions to advocates to consider in advance.

1-4 Written directions and Routes to verdict

The research[59] of Professor Cheryl Thomas has demonstrated the value to jurors of having written directions of law. She has conducted systematic assessments of jurors' comprehension of oral and written judicial directions, and explored jurors' perceptions of the comprehensibility of judges' oral directions and the value of written directions.

In a study of 797 jurors at three courts around the country where all jurors saw a simulated trial and heard exactly the same judicial direction on the law, most jurors felt the judge's oral directions were easy to understand but less than a third actually understood the directions fully in the same legal terms used by the judge. However, when the jurors were presented with a brief, bullet-point summary of the legal direction during the judge's oral directions juror comprehension of the law increased significantly.

A further study explored jurors' view of the value of written directions through a post-verdict survey at court with 239 jurors serving on 20 different trials in the Greater London area. Among the 70% of jurors that received written directions from the judge, every single juror (100%) said they found the written directions helpful in reaching a verdict. For the remaining 30% of jurors that did not receive written directions from the judge, 85% said that they would have liked written direction to consult during deliberations.

The provision of written materials to jurors has two main benefits. First, and most importantly, there is now clear evidence that juror understanding and recollection of the legal directions during deliberations increases significantly if they are given written directions alongside the oral directions. Secondly, the provision of written materials is likely to reduce the scope for any meritorious appeal in the event of any conviction.

Unsurprisingly, the Court of Appeal (Criminal Division) has encouraged the provision of written directions. This approach also received the backing of Sir Brian Leveson, when he was President of the Queen's Bench Division, in his 'Review of Efficiency in Criminal Proceedings'[60] and is reflected in CrimPR and CrimPD. In *N*[61] the court emphasised the value of written directions and also considered that, in a complex case, the failure to provide the jury with the relevant assistance in writing **could** have the potential to undermine the safety of the conviction.[62]

The argument in favour of providing juries with written directions is now overwhelming. Recent surveys with judges at Judicial College courses have revealed that over 90% judges now use written directions some of the time, although there are differing views about how often, when and what form written directions should take. CPD 8.5 provides that, save where the case is so straightforward that it would be superfluous to do so, the judge should provide a written route to verdict. It may be presented (on paper or digitally) in the form of text, bullet points, a flowchart

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59 C. Thomas, *Are Juries Fair?* MoJ Research Series 01/10 (2010), C. Thomas, "Avoiding the Perfect Storm of Juror Contempt" *Criminal Law Review* (2013)

60 Review of Efficiency in Criminal Proceedings paras 284 and 288

61 [2019] EWCA Crim 2280

62 See *Grant and Ors* [2021] EWCA Crim 1243 and in particular para 50.

or other graphic.[63] The authors of this work very much hope that the Compendium will provide some of the tools to assist judges in using written directions.

Forms of written directions

There is no required or agreed form of written directions for juries, and judges are known to use a variety of different approaches to written directions, including:

1. Brief bullet point summaries of the law.
2. Longer narrative summaries of the law.
3. A full transcript of judge's legal directions.
4. Routes to verdicts in the form of questions and answers.
5. Diagrammatic routes to verdicts.
6. Charts showing permissible combinations of verdicts.

Examples of the different forms in which written directions might be given in any one case appear in Appendix II.

At present there is no definitive answer as to which approach is most effective in aiding juror comprehension (and in which types of cases), although Professor Thomas is currently conducting further research with jurors at courts exploring this question.

Routes to verdict

When a jury is faced with more than one issue in a case, judicial experience suggests that jurors can be assisted by having a written sequential list of questions, or what is often referred to as a 'Route to verdict'. Such a document can help focus jury deliberations and provide them with a logical route to verdict/s. In more complicated cases, some judges have a practice of providing a chart showing the jury the permissible combinations of verdicts.

Where there are multiple accused care needs to be taken to tailor the route to verdict to the individual case that the jury has to consider in respect of each defendant. *Rowe*[64] is an example of where the failure to do this resulted in an unsafe conviction.

This Compendium provides numerous examples of written directions and routes to verdict/s. Some of them are generic; others are fact specific. A route to verdict should relate to the evidence in the trial and be confined to the matters in issue: e.g. on a count of s.18 wounding if a stabbing is admitted but intention is in dispute: "When D stabbed W did D intend to cause W really serious injury?"

In his report, Sir Brian Leveson P recommended the use of routes to verdicts in all cases:

> "The Judge should devise and put to the jury a series of written factual questions, the answers to which logically lead to an appropriate verdict in the case. Each question should be tailored to the law as the Judge understands it to be and to the issues and evidence in the case. These questions – the 'route

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63 See also *Atta Dankwa* [2018] EWCA Crim 320. See further *PP* [2018] EWCA Crim 1300 where the court underlined the desirability of a judge providing draft written directions to the advocates to consider in advance.

64 [2022] EWCA Crim 27 para 76

> to verdict' – should be clear enough that the defendant (and the public) may understand the basis for the verdict that has been reached."[65]

The provision of written legal directions and/or a route to verdict in writing remains a matter for judicial discretion but CrimPR 25.14(3)(b) states that the court should "**give those directions orally and, as a general rule, in writing as well**".

Discussion with advocates

All written directions for the jury must be discussed, and preferably agreed,[66] with the advocates well before they are provided to the jury. Written directions provided to the jury should be discussed with advocates no later than the point at which the giving of evidence ends and before the advocates' speeches begin. Proceeding by way of a split summing up – legal directions (or at least the principal ones) followed by advocate's closing address and then the reminder of the evidence – has become prevalent if not the norm in many courts.

Keeping a record

A copy of any written directions, routes to verdict or other materials which the judge has provided to the jury and with which they retire must be initialled by the judge and put in the court file to ensure that in the event of an appeal it is that version which comes to be considered by the Court of Appeal or, in the case of a digital file, uploaded onto the DCS.

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65 *Review of Efficiency in Criminal Proceedings* paras 307 and 308

66 See *KC* [2022] EWCA Crim 1378 and in particular para 50

2. JURY MANAGEMENT

2-1 Empanelling the jury

ARCHBOLD 4-292; BLACKSTONE'S D13.17; CrimPR 25.6; CrimPD Chapter 8

Legal summary

1. There should be a consultation with the advocates as to the questions, if any, it may be appropriate to ask potential jurors. Topics to be considered include:
   (1) the availability of jurors for the duration of a trial that is likely to run beyond the usual period for which jurors are summoned;
   (2) whether any juror knows the defendant or parties to the case;
   (3) whether potential jurors are so familiar with any locations that feature in the case that they may have, or come to have, access to information not in evidence;
   (4) in cases where there has been any significant local or national publicity, whether any questions should be asked of potential jurors.
2. At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving, but this discretion can only be exercised to prevent an individual juror who is not competent from serving. It does not include a discretion to discharge a jury drawn from particular sections of the community or otherwise to influence the overall composition of the jury. However, if there is a risk that there is widespread local knowledge of the defendant or a witness in a particular case, the judge may, after hearing submissions from the advocates, decide to exclude jurors from particular areas to avoid the risk of jurors having or acquiring personal knowledge of the defendant or a witness. On this topic, see CrimPD 8.2. Exceptionally, if there are insufficient potential jurors to make up a panel for a case, additional potential jurors can be sought in the vicinity of the court and added to the panel, see s.6 Juries Act 1974.

Length of trial

3. Where the length of the trial is estimated to be significantly longer than the normal period of jury service, it is good practice for the trial judge to enquire whether the potential jurors on the jury panel foresee any difficulties with the length and if the judge is satisfied that the jurors' concerns are justified, he/she may say that they are not required for that particular jury.[67] This does not mean that the judge must excuse the juror from sitting at that court altogether, as it may well be possible for the juror to sit on a shorter trial at the same court – see CrimPD 8.2.

[67] CrimPR 26.4

4. The jury to try an issue (including a trial of the facts[68] for a defendant found unfit) is selected from the panel by ballot in open court. It is normal practice to read out the jurors' names, selected at random, in open court.[69] Where, exceptionally, there is a risk of juror interference, jurors may be called by number.[70]
5. Following the ballot and any challenges the jury members are then each sworn, following the guidance in CrimPD 8.3.1.

Procedure

In a case not expected to last significantly longer than the normal period of jury service

6. Before the jury panel enters the court the judge should consult the advocates as to any questions to be asked of the panel, about any personal connection or knowledge they may have in relation to any aspect of the case such as:
   (1) Personal connection with or knowledge of anyone involved in the case whether as a witness (either prosecution or defence) or as someone who will be named (e.g. a deceased person, a co-defendant not before the jury or a person who was arrested but not charged). The defence advocate/s should be asked to identify any other significant names that might be referred to during the case or confirm that there are none.
   (2) Personal connection with or knowledge of any place or organisation connected with the case (e.g. the location of the incident, D's home address, a public house or a business).
   (3) Awareness of any publicity that the case has received in the local or national media.
7. It is important not to exceed judicial discretion and whilst it is permissible to exclude a juror who comes from, or has personal knowledge of, a particular area in order to avoid the risk of a juror having, or acquiring, personal knowledge of D or a witness, it is not permissible to exclude a jury panel drawn from a particular section of the community or otherwise to influence the overall composition of the jury.
8. It is not normally necessary to ask any questions of the panel before the panel comes into the courtroom.
9. When the jury panel has entered it is advisable to:
   (1) apologise for any delay, giving an explanation if it is possible to do so without prejudice to the case which is to be tried;
   (2) give the panel, in neutral terms, brief details about the case that they are going to try e.g. the date, location and general nature of the incident;

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68 Criminal Procedure (Insanity) Act 1964, s.4A

69 Where names are read out, it is not necessary that the names should be called in the order in which they stand in the panel: *Mansell v R* (1857) Dears & B 375, Ex Ch

70 *Comerford* [1997] EWCA Crim 2697. Balloting by number is not justified simply as a matter of local practice; *Baybasin* [2014] 1 Cr.App.R.19, CA

(3) explain that the jurors who are to try the case will do so on evidence that will be presented to them in court and that, for this reason, it is essential that none of them has any personal connection with it. To this end:

(a) Tell the panel D's name and ask them to look at D to ensure that no one knows him/her personally. Allow them time, and ensure that all members of the panel can actually see D.

(b) Tell the panel that they are about to hear a list of names of all potential witnesses and any other person connected with the case including, in the case of police or expert witnesses, their occupations, and ask the panel whether any of them knows anyone on the list.

(c) Ask the prosecution advocate to read the list: prosecution and defence witnesses should all be in a single list, already agreed by the advocates and approved by the judge.

(d) Ask the panel if any of them recognise any of the names which have been given.

(e) Explain that if, at any later stage of the case, a juror recognises someone connected with it, for example a witness, notwithstanding that the juror did not recognise a name at this stage, the juror should write a note and hand it to the usher or the clerk.

(f) If applicable, ask the panel if any of them has any connection with a particular place, business or organisation (as previously identified in discussion with the advocates).

(g) If applicable, ask the panel if any of them are aware of any publicity that the case has received in the local or national media (as previously identified in discussion with the advocates).

10. If any member of the panel gives an affirmative answer, or one which is equivocal (e.g. the person is not sure whether he/she knows one or more of the names which have been read out) it will usually be necessary to find out more from this person. This should be done carefully to ensure that nothing is revealed that might prejudice the rest of the panel or the trial itself. A safe course is to get the person to provide details in writing (e.g. as to how the person knows/thinks they know a particular named individual) if necessary in the absence of the rest of the panel. This process can be cumbersome but is likely to save time in the long run if the alternative is to start again from the very beginning.

11. If a member of the panel is unsure about their knowledge of a witness, steps should be taken to identify the witness, either by description or if practicable by asking the witness to come into the courtroom. Depending on the answer/s given by any member of the panel, the judge may have to exercise his/her discretion to exclude the person from serving on the jury, and possibly from serving on any jury until the case has been concluded.

Example

NOTE: This example is not intended to cover every matter that may need to be raised with the jury panel in any particular case, as to which see Procedure above, but it provides a method of canvassing the jury panel for association with witnesses and locations. If panellists have to be excluded from the ballot, consider the additional directions at Chapter 2-2 below as to non-communication with those panellists who are selected as jurors, and, if necessary, discharge from jury service as a whole.

Good morning. You are members of a jury panel and from your panel, twelve of you will be selected as jurors to try the case in this court today. There are several guarantees of the fairness and independence of any jury. One of them is that no-one on the jury should have any connection with the person being tried or anyone who is a witness in the case, [or in some cases any particular location that features in the case].

This case involves {specify e.g. 'an incident'} which happened at {location} on {date}. Because a jury must decide the case only on the evidence given in court, it is essential that no one on the jury has any personal connection with, or personal knowledge of, the case or anyone associated with it.

I am now going to give you some information about the case. If you know any of the people personally, or you know anything about the case, please indicate that by raising your hand/write a note explaining this and hand it to the usher.

The defendant's name is X. X is the person standing {e.g. nearer to you} in the dock.

Next {e.g. Ms. Jones}, who is prosecuting this case, will read out the names of the people who may be called as witnesses or who are connected with the case. Please listen carefully to the names and think about whether you recognise any of them. [List is read – confirm if there are additional defence witnesses who might be called.]

One particular {place/business/organisation} which will feature in this case is {specify}. Please think about whether you have any personal connection with that {place/business/organisation}, such as being an employee, regular customer or visitor.

If you think that you have any personal knowledge about any person connected with the case, including the D or the {place/business/organisation} involved, please indicate that by raising your hand/write a note explaining this and hand it to the usher.

EITHER: I see that three of you raised your hands in relation to that last question. Would you step into the jury box for a moment, where you will see there is paper and pen. Would you write me a short note to say why you raised your hand, and please put your name on the paper?

- I see you (panel member 1) drive past the location on your way to work but have never spent time there. I don't suppose that will be a concern for anyone (check with the advocates). Would you please re-join the panel.

- I see you (panel member 2) are a family member of one of the witnesses. In those circumstances (check with the advocates) you should not sit on this particular jury. Please stand to one side. [Ensure the panellist's card is removed from the ballot.]
- I see you (panel member 3) have raised a different matter [note – where the point raised could potentially be prejudicial or distracting for remaining jurors do not give the reason in open court]. I will now ask all the panel members (including panel member 3) to withdraw from court briefly while I discuss this with the advocates. Please do not talk amongst yourselves about this case at all, or talk about any of the points that have just been raised. Panel member 3, please do not talk to anyone while you are waiting.

  [After discussing with the advocates] Members of the jury panel, thank you for your patience. Panel member 3, you were correct to write me a note. It does not raise any issue to prevent you being a member of this jury if selected. We can now move to the next stage.

[**Note:** If there is a need to remove a jury panel member from the ballot, consider the additional directions as to non-communication given in Chapter 2-2]

OR: I see no-one is indicating any familiarity with any of those persons or places. Thank you. We can move on to the next stage.

Another guarantee of a jury's fairness and independence is that each member of the jury is selected at random. You will see that the Clerk in front of me is shuffling the cards that have your names. That is the process called the ballot. The Clerk will now call out the first 12 names. If your name is called, please say 'Yes' and then take your place in the jury box.

[Once sworn] Sometimes we only know someone by their first name or a nickname. So, if at any stage during the case you realise that you do in fact know someone involved it is important you let me know straightaway. Please do this by immediately writing a note and handing it to the usher.

In a case expected to last significantly longer than the normal period of jury service

12. Such a case will have been identified in advance and an enlarged jury panel will have been summoned. Assessment of a juror's availability for a long trial is covered by CrimPR 26.4.

13. In some courts, two weeks before the trial date, the jury summoning officer sends a standard questionnaire to the panel informing them of the potential length of the trial, reminding them of their public duty to serve on a jury but asking if they have any pre-booked and paid-for holidays, if they or any member of their immediate family have any anticipated hospital admissions or on-going long-term medical treatment or if they have any other reason which would make it impossible for them to sit on a long trial.

14. If the procedure in the paragraph above is followed:

    (1) potential jurors are told to bring the completed questionnaire to court on the day of the trial, together with any written evidence if they are seeking to be excused. In light of such information the jury summoning officer, exercising

the discretion provided by s.9(2) Juries Act 1974, may withdraw any name/s from the panel list; and

(2) thereafter a panel of appropriate size may be selected at random by a computer at the court centre and it is from this panel that the jury will ultimately be selected by ballot: ss.5 and 11 Juries Act 1974.

15. It is essential that any judge embarking on a long trial is familiar with the practice of the court centre at which the trial is to take place.

16. On the day of the trial, the following process should be followed:

(1) A jury panel questionnaire should be prepared, usually by the advocates, (if necessary having consulted the judge in open court) and thereafter approved by the judge in advance of the trial (see the Example in Appendix III below). It should include:

(a) information about the case, in particular the expected date on which it will be concluded, the names of the defendant(s), witnesses and other persons (and possibly organisations) involved including, in the case of police or expert witnesses, their occupations; and

(b) questions which may have a bearing on an individual member of the panel's ability to serve on the jury.

(2) Best practice requires the jury panel to be provided with the questionnaire in open court and not in advance of doing so.

(3) The judge should explain the questionnaire and its purpose to the panel before they leave the courtroom and go to the jury area to fill out the questionnaire.

(4) The panel should be asked to look at D(s) and be asked if they recognise D(s)/any of them at this stage.

(5) Before they leave court, the panel should be specifically directed not to use the list of names or other details to make any enquiries over the internet or elsewhere into anyone that might be connected with the case. They should be warned of the consequences of doing so.

(6) Time must then be given for the panel to consider the questionnaire and to make any necessary enquiries. Save in very exceptional circumstances they should not be sent away overnight to do this. Usually, depending on the length of the questionnaire, an hour or less should provide enough time.

(7) The judge should ask for the questionnaires to be returned in batches, as they are completed, so that the judge can read them and so be informed of potential issues which members of the jury panel may have.

(8) In some courts the judge will decide, from the information provided on questionnaires, which jurors are to be excused and will tell the advocates of his/her decision and the generality of the reasons, without identifying particular jurors and without calling the jury panel into court. In other courts the judge will ask the jury panel to return to court to excuse jurors, giving the advocates a summary of the reason(s) for excusing them. Where the explanation may embarrass a juror, the judge will have to be circumspect with the information revealed.

(9) If there is any ambiguity or doubt about a particular answer given by a member of the panel, or if the judge, having read the reason put forward on the questionnaire, feels he/she is unlikely to accept it, this must be clarified. This should be done in open court, by the potential juror either writing a note in answer to a question from the judge or coming forward to address the judge privately. It will be for the judge to decide what to say about the explanation given by the potential juror: it must be sufficient for the advocates and the defendant to understand the basis on which the judge's decision has been made but must not embarrass the potential juror. In very exceptional circumstances, it may be necessary to sit in court as chambers (in court and with the defendant(s) present but with the public and the rest of the jury panel excluded).

(10) In Bermingham[71] the trial judge received information from a potential juror as to a possible connection with the subject matter of the trial but did not share that information with the parties. The court gave guidance on what the judge should have done:

> "…we are of the view, first, that the matters raised by Juror A as to why he should not serve on this jury were paradigmatic of the circumstances when the judge should have discussed with counsel the significance of what had been revealed by a potential juror, in the absence of the panel and before the jury were sworn. This might add slightly to what is in any event something of a cumbersome exercise, but it will serve to ensure that the risk is avoided that the entire proceedings are vitiated because, for instance, unbeknown to the judge the prospective juror had special knowledge either of the individuals involved or the facts of the case. These remarks, we stress, do not apply to the answers to questions one to five which are strictly personal to the juror, and ordinarily the judge will be able to resolve them without seeking the assistance of counsel."

The court went on to give important new guidance as to what should happen to the jury questionnaires after the jury had been selected:

> "…whenever questionnaires are given to the jury panel, those completed by the individuals selected to serve (including any "shadow jurors") should be uploaded onto the relevant private section of DCS (they should not be shared with the parties without judicial approval) and retained at least until the completion of any appeal against conviction or the 28-day period for submitting grounds of appeal has expired. Otherwise, the handling of these forms should be governed by the applicable data retention policy."

(11) In some cases it will be appropriate to give the remaining potential jurors some further time, either until after lunch or, until the next morning, to reflect on whether there is any reason which they had forgotten about or did not know about as to why they cannot sit on the jury. Whilst the judge may not wish to encourage it, or say anything to encourage it, this gives potential jurors a chance to obtain a letter from an employer or to find out, for example, that a friend or family member has organised a surprise holiday.

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[71] [2020] EWCA Crim 1662 and in particular paragraphs 61 and 62

Example

NOTE: This example is not intended to cover every matter that may need to be raised with the jury panel in any particular case, as to which see Procedure above. Further, the practice by which a panel of jurors who are able to sit for the anticipated duration of the trial, and from whom the jury of 12/14 may be selected, does vary at different court centres. Some judges select but postpone swearing the jury until the following day so that they have time to reflect upon the time they will be required to serve.

STAGE 1:

We are going to select a jury to try a case which will last up to {number} months. That means that we will need jurors who can sit on this case until {specify} although everyone hopes and intends that the case will finish before then. We will normally be sitting each day from {specify times}.

Before the jury is selected for this trial, I want to explain several things to you about how we go about selecting a jury for a longer trial like this and about the questionnaire you have been given on your way into court.

It is not unusual for trials to last this length of time. Because it is a fundamental principle of our justice system that someone accused of a serious offence is tried by a jury selected at random, it is necessary to have 12 jurors who are able to try this case for this length of time.

I fully appreciate that sitting on a jury for this length of time may cause difficulties because you will be away from work or interfere with your other commitments, but it is your public duty to be available to sit on a jury. And if you are selected to sit on this jury, you will be performing an important public service, and I hope and expect that you will find the experience interesting and rewarding.

A little later today I shall be selecting approximately {number} of you to form a panel from which the final jury will be chosen. Once {number} have been identified, I shall be sending those potential jurors away until {e.g. after lunch/tomorrow} to give them time to think. This is to make sure that there is no information that you did not know, or may have overlooked, when you were asked whether you could sit on a jury for this length of time.

You were given a questionnaire as you came into court. When you leave court shortly, you will be given time to complete this questionnaire back in the jury area. The completed questionnaires will help me decide who is able – and who is unable – to sit on the jury in this case. I accept that some of you may not be able to sit on the jury in this case.

It is my duty to find a jury to try this case. So the reasons I can accept for someone not sitting on the jury in this case are very limited. But anyone who has a very good reason for not sitting on a jury for this length of time will not be selected to serve on in this particular case. These jurors will still be on jury service and may be selected to serve on other cases due to start shortly.

Please look at the questionnaire that you have been given. [At this point take the jury through the questionnaire, adding any further comments by way of explanation which you think may be helpful, for instance giving examples of what sort of

employment issue may lead to the member being excused and what is unlikely to do so.]

If you need to check with your family, with your employer or with anyone else about any dates or other matters before you can answer a question, please do so.

In about {time} I hope you will have completed the questionnaires. I will ask all of you to come back into court and we will begin the process of identifying a jury panel and then selecting a jury.

Before you leave the courtroom to complete the questionnaire, let me give you some information about this case which will help to decide whether you can serve on the jury in this case or not. This case involves {specify e.g. 'an incident'} which happened at {specify location} on {specify date}. Because a jury must decide the case only on the evidence given in court, it is essential that no one on the jury has any personal connection with, or personal knowledge of, the case or anyone associated with it.

The defendant's name is X. X is the person standing {e.g. nearer to you} in the dock. If you think you know X personally, please raise your hand. [Allow time.]

Finally, I need to give you some important directions about what you must not do once you leave this courtroom. I have given all of you some information about this case. You must not use that information to do any research at all into this case. This applies to all of you, whether or not you are chosen to serve on this jury. If you are chosen to try this case you will be given all the information you will need in this courtroom.

*An example questionnaire is at Appendix III. It is appreciated that different forms of questionnaire are used at different courts to meet local needs.

STAGE 2 (after an adjournment)

Thank you for coming into court again. You are all part of a jury panel and have confirmed you are able to sit on this jury if selected. Let me first check with you that nothing has changed. [Allow time]. Thank you. In that case we are now ready to select and swear the jury. If your name is called then please say 'Yes' and go into the jury box. The usher will show you where to go, and you will then be asked to take the oath or affirmation.

See also Chapter 2-3 if there are to be any alternate jurors.

2-2 Challenge and stand down of a juror

ARCHBOLD 4-293 to 4-305; BLACKSTONE'S D13.22; CrimPR 25.8; CrimPD 8.2

Legal summary

1. Challenges **for cause** to the array[72] or the polls may be made by either party.[73] The challenge should be made before the juror is sworn.[74] In practice, the discretion to stand down a juror by agreement obviates the need for further inquiry into the challenge in most cases.
2. The Attorney-General has issued guidelines revised in 2012 on the use by the prosecution of the right of stand down.[75] The Crown should assert its right to stand down only on the basis of clearly defined and restricted criteria: (1) where a jury check reveals information justifying the exercise of that right and its exercise is personally authorised by the Attorney General; or (2) where someone is manifestly unsuitable and the defence agrees that the exercise by the Crown of the right to stand down is appropriate.
3. The judge has the discretion to stand down jurors who are not competent to serve by reason of a personal disability.[76] In *Lally*,[77] the court considered the position of a juror who expressed concern as to the potential impact of her autism. The judge's decision not to discharge the juror was upheld. Judges must not use that discretionary power to stand jurors by in an attempt to reject jurors from particular sections of the community or otherwise influence the overall composition of the jury: CrimPD 8.1.1.[78]
4. A judge should always be made aware at the stage of jury selection if any juror in waiting is a serving police officer, prison officer or prosecution service employee. Guidance on how judges should approach jury selection of such individuals is provided in CrimPD 8.1[79] and in *Gordon.*[80] The test to apply is well established: "Whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[81]

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72 Challenges to the array no longer occur in practice. A challenge to the array cannot be used to challenge the racial composition of the jury: *Ford* [1989] QB 868; *Smith* [2003] EWCA Crim 283. Nor can the fact that the Attorney General has vetted the panel, in accordance with the guidelines, afford grounds for a challenge to the array: *McCann* (1991) 92 Cr App Rep 239

73 Juries Act 1825, s.29 (Crown); Juries Act 1974, s.12(1), (4) (defence)

74 Juries Act 1974, s.12(3)

75 AG's Guidelines 2012

76 See s.196 PCSCA 2022 as to the position of deaf jurors assisted by a signer (in force from 28 June 2022)

77 [2021] EWCA Crim 1372 and in particular at para 34

78 *Ford* [1989] QB 868

79 *Abdroikov* [2007] UKHL 37; *Hanif v UK* [2011] ECHR 2247; *L* [2011] EWCA Crim 65

80 [2021] EWCA Crim 1684 emphasising the need for courts to ensure that a system is in place for recording when a juror has revealed their membership of a relevant profession.

81 *Abdroikov* para 15

Example 1: Matter disclosed by a juror

{Name of juror}: Thank you for telling me {specify}. I am afraid that this means you cannot serve on the jury for this particular case. This is not a reflection on you personally, and you did the right thing in letting me know.

In a moment, I will release you to go with the usher. Once you are back in the jury assembly area you will receive further instructions about your jury service at this court.

Also consider, as appropriate:

Either: You will not have to serve on any jury until this trial is over. The Jury Manager will make arrangements with you to let you know when you will be needed again.

Or: You will no longer need to come to court for the remaining period of your jury service. Thank you very much for coming here today.

{In all cases}

However, before I release you I must give you a direction that you must follow: it is very important that you do not attempt to communicate with anyone about this case, including other jurors. They, likewise, will be under the same direction not to communicate with you. You must have nothing further to do with this case or anyone connected with it.

Example 2: Matter not disclosed by a juror

{Name of juror}: I am afraid that you cannot serve on the jury for this trial.

Please now go with the usher. Once you are back in the jury assembly area you will receive further instructions about your jury service at this court.

(Consider warning as to communication as above.)

NOTE: Care must be taken not to give the impression that the person concerned will never be required to do jury service again, unless the person is disqualified or permanently incapable of serving as a juror.

2-3 Alternate jurors

ARCHBOLD 4-265e and 292; BLACKSTONE'S D13.19; CrimPR 25.6(6) and (7)

Legal summary and Directions

1. The power to select extra jurors has been acknowledged by the Court of Appeal in *M*.[82] CrimPR 25 now governs this procedure;

25.6

(6) The jury the court selects—

(a) must comprise no fewer than 12 jurors;

(b) may comprise as many as 14 jurors to begin with, where the court expects the trial to last for more than 4 weeks.

(7) Where the court selects a jury comprising more than 12 jurors, the court must explain to them that—

(a) the purpose of selecting more than 12 jurors to begin with is to fill any vacancy or vacancies caused by the discharge of any of the first 12 before the prosecution evidence begins;

(b) any such vacancy or vacancies will be filled by the extra jurors in order of their selection from the panel;

(c) the court will discharge any extra juror or jurors remaining by no later than the beginning of the prosecution evidence; and

(d) any juror who is discharged for that reason then will be available to be selected for service on another jury, during the period for which that juror has been summoned.

(8) Each of the 12 or more jurors the court selects –

(a) must take an oath or affirm and

(b) becomes a full jury member until discharged.

Discharging jurors

25.7(1) The court may exercise its power to discharge a juror at any time—

(a) after the juror completes the oath or affirmation; and

(b) before the court discharges the jury.

(2) No later than the beginning of the prosecution evidence, if the jury then comprises more than 12 jurors the court must discharge any in excess of 12 in reverse order of their selection from the panel.

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82 *M* [2012] EWCA Crim 2056

Example 1: At the point of empanelling the jury

We are now going to empanel a jury. As you know a jury is usually made up of 12 people. However, in this case, 14 names will be chosen at random. If your name is in the first 12 to be called please take your place in the jury box. If your name is number 13 or 14 the usher will ask you to sit {specify}.

All 14 will be asked to take the oath or affirm as jurors in the case. We are asking 14 of you to serve as jurors at the outset in case anything happens during the prosecution's explanation of what the case is about [if appropriate: and any explanation of the defence case] which makes it impossible for any one of you to continue to try the case.

If that happens then juror 13 or 14 would take the place of the juror unable to continue in this case. If nothing happens by the end of the prosecution's [if appropriate: and defence] explanation, then jurors 13 and 14 will be released from this jury/further jury service.

So that you all know the position, the final 12 jurors are likely to be confirmed no later than […e.g. Friday of this week].

NOTE: In the jury directions at the start of the trial, it is necessary to explain that none of the jurors should discuss the case with a fellow juror during the course of the opening. This is because the case will be tried on the evidence by 12 jurors and it is only those 12 jurors whose views should influence the verdict.

Example 2: If a substitute is required

It is not possible for one of the first 12 jurors to continue to serve on the jury in this trial. So {specifically addressing juror 13} could I ask you to go into the jury box and take his/her place.

Example 3: When a substitute is not required

We have now reached the point in the trial where we will move ahead with only 12 jurors. From now on we can no longer substitute one juror for another.

Thank you very much for the time that you have spent listening to this case. I realise it may be frustrating for you not to be serving on this jury now. But by acting as an additional juror at the start of this case you have ensured that the trial can now go ahead without delay. This has been very helpful. You will now be taken back to the jury assembly area where you could be selected for service on another jury during the period for which you were summonsed. Now that you are no longer serving on this jury, it is very important for the fairness of the trial that you do not speak about this case to any of the remaining 12 jurors until it is over. And the same applies to the remaining 12 jurors – you must not speak about the case with the substitute jurors who are now leaving the jury.

2-4 Discharging a juror or jury

ARCHBOLD 4-307; BLACKSTONE'S D13.50; CrimPR 25.7; CrimPD 8.4

Legal summary

Discharging individual jurors

1. The judge has a power to discharge a juror or jurors but the jury must never fall below 9 in number. A juror should only be discharged where there is a high degree of need.[83]
2. Section 16[84] Juries Act 1974 sets out the consequences of discharge, but the extent of the jurisdiction to discharge a juror is a matter of common law; s.16 merely sets out the consequences of exercising it.[85] Discharge of jurors is not dependent on the consent of the parties. In a case where the jury has to consider more than one verdict, the judge retains the power to discharge a juror even after one or more of the verdicts have been given: *Wood*.[86] *Skeete*[87] is an example of a judge having to deal with the suggestion that a juror had personal experience of the sort of crime under consideration. The judge's approach to the issue was upheld. See also *Lajevarti*[88] where a similar issue arose and the judge's approach to resolution was upheld.
3. Examples of situations in which it may be necessary to discharge a juror include: illness, misconduct or a juror having an unavoidable personal commitment. For an example of a situation where a judge had to deal with jurors feeling intimidated by people in court see *Maciejewski.*[89] The court underlined the significance of the judge checking with the relevant jurors as to their ability to return verdicts in accordance with their oath.
4. CrimPD 8.4 contains guidance as to the approach to be adopted where a jury matter has come to light which may interfere with the course of the trial.
5. In the event of a juror or jurors being discharged, the remaining jurors will deserve an explanation as to why that person is absent. In cases in which the juror is suspected of engaging in misconduct, care will be needed. In cases where the juror has been discharged for other reasons, few difficulties will arise.

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83 Erle CJ's judgment in *Winsor* (1866) LR 1 QB 390

84 Juries Act 1974, s.16(1) "Where in the course of a trial of any person for an offence on indictment any member of the jury dies or is discharged by the court whether as being through illness incapable of continuing to act or for any other reason, but the number of its members is not reduced below nine, the jury shall nevertheless… be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly."

85 *Hambery* [1977] QB 924

86 [1997] Crim LR 229

87 [2022] EWCA Crim 1511

88 [2023] EWCA Crim 615

89 [2022] EWCA Crim 151

6. The remaining jurors may also need an explanation as to what if any regard they are to have to the comments and views expressed by the discharged juror(s). In *Carter*,[90] Lord Judge CJ explained:

> [19] … "It would therefore be wholly unrealistic for a direction to be given to the remaining members of the jury to ignore the views expressed on any subject by the departed jurors. What matters is that the discussion between the remaining jurors will continue to ebb and flow and, on reflection, the views expressed by the departing juror (or jurors) would have been examined and either accepted wholly or in part, or rejected wholly or in part, or treated as irrelevant by the remaining jurors in the course of reaching the decisions to which their conscience impels them. The eventual verdict, however, is no more than that of the jurors who have been party to it as a result of the process of discussion in the privacy of the jury room. The views expressed by the departed jurors will only be relevant to the extent that the remaining jurors will have adopted or assimilated those views as their own."

Discharging the entire jury

7. A judge has the discretion to discharge the jury.[91] Once a jury has been discharged it is *functus officio* and cannot be reconvened. In exceptional circumstances it may be possible to set aside an order to discharge.[92]

8. The reasons for discharging a jury will depend on the circumstances of the case. The judge's overriding duty in this context is to ensure that proceedings are fair and to do justice in the particular case. Examples of situations in which it may be necessary to discharge the jury include: where inadmissible material has become known to the jury or there is a risk that improper information known to one juror has been shared with others. Sometimes it may be necessary to discharge a jury for other reasons but where a juror has heard some evidence in the case (as opposed to a prosecution opening) it is not appropriate for that juror to form part of a new jury panel.[93] Care will need to be exercised if a juror or jurors have to be discharged but the trial is going to continue or be immediately restarted. Directions may have to be given in order to ensure that the risk of contamination as between the sitting jury and those that have been discharged is addressed.

Investigating alleged wrongdoing

9. The Criminal Practice Direction contains comprehensive guidance on the approach to take where there is alleged wrongdoing by one or more jurors: CrimPD 8.7: Juries: Jury irregularity.

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90 [2010] EWCA Crim 201
91 *Weaver* [1968] 1 QB 353
92 *S* [2005] EWCA Crim 1987; *F* [2009] EWCA Crim 805
93 *Leon* [2017] EWCA Crim 414

10. In *KK*[94] the Court of Appeal examined the correct approach to be adopted in a case where there was apparent jury irregularity and at para 93 considered the legitimacy of questioning a juror:

> "In circumstances such as these, it is the obligation of the judge to establish the "basic facts" of the jury irregularity: as Step 4 of the (now superseded) Practice Direction enjoins. That, in an appropriate case, may involve some direct and blunt questioning. Any concerns as to the risk of self-incrimination necessarily, therefore, are subordinated to the need to establish the basic facts. Besides, if it be said that potential unfairness for the future could arise by reason of the risk of self-incrimination then that can be accommodated, in an appropriate case, by a subsequent court's powers of exclusion."

11. Whilst a judge is required to take account of the CrimPD Chapter 8, he/she has to decide what to do where a jury irregularity occurs, and has to do so by reference to the context and to circumstances which arise in the particular case. If the judge considers that the trial should continue, then under CrimPD 8.7.20 the judge should consider what, if anything, to say to the jury. For example, the judge may reassure the jury nothing untoward has happened or remind them their verdict is a decision of the whole jury and that they should try to work together. Anything said should be tailored to the circumstances of the case.[95]
12. The discharged juror(s) must be warned not to discuss the circumstances with anyone and it may be necessary to discharge the juror(s) from current jury service.
13. In the event that a jury is discharged and the trial relisted, the jury should be warned not to discuss the circumstances with anyone.
14. If information about a jury irregularity comes to light during an adjournment after verdict but before sentence, then the trial judge should be considered *functus officio* in relation to the jury matter, not least because the jury will have been discharged. See CrimPD 8.7.36 et seq for the procedure to follow and see *Davey*.[96]

Procedure

Discharge of a juror for personal reasons

15. A request will normally be brought to the attention of the judge either by a note or message from the juror via an usher.
16. The first priority is to ensure that all relevant information has been provided. This can be done by the usher asking any necessary further questions of the juror and writing down the answers.

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94 [2019] EWCA Crim 1634 and see also *Eaton* [2020] EWCA Crim 595

95 See also *Gabriel* [2020] EWCA Crim 998 where the Court of Appeal held it was reasonable for a trial judge to question six jurors collectively rather than individually after they had been told matters by an errant juror. Furthermore, it was reasonable for the remaining jurors to be on the same equivalence of knowledge as the six that had been questioned.

96 [2017] EWCA Crim 1062

17. The advocates should be informed. In most cases they may be shown the note or told in detail of the juror's difficulty. If the juror's problem is very personal it is appropriate to indicate to the advocates the general nature of the problem without going into detail.
18. Alternatives to discharge should be considered particularly in longer trials e.g. an adjournment to permit the juror to attend a hospital appointment or an adjournment for one or two days for a juror to recover from temporary illness.
19. A judge may be assisted by submissions from the advocates but whether a juror is discharged or not is a matter for the discretion of the judge.
20. If a juror is discharged part way through the trial, the juror's discharge should be from current jury service altogether or until the case the juror has been trying is complete; the juror should be given a clear warning not to speak to the remaining jurors about this case.
21. If the juror is at court rather than absent through illness or other cause, the juror should be asked to come into court without the other jurors, told that the request has been considered, and either indicate the arrangements to be made to enable him/her to continue sitting or thank the juror for his/her services to date, formally discharge the juror and give instructions as to future service (see above).

Discharge of whole jury for irregularity within the trial process

22. If the discharge is as a result of something that has happened within the trial e.g. a witness or advocate referring to matters that are not admissible in evidence and are seriously prejudicial, the matter will be subject to submissions from the advocates.
23. The decision whether or not to discharge will take into account the nature and seriousness of the irregularity and also that juries are expected to abide by their oath/affirmation to try the case according to the evidence.
24. If the decision is not to discharge, consideration must be given to what, if anything, the jury are to be told. In many cases, a rehearsal of the inadmissible material draws unnecessary attention to a matter which may have appeared insignificant to the jury.
25. If the jury have to be discharged, consideration must be given to what they should be told. If the matter is to be retried before another jury, it is generally prudent to tell them no more than that something has arisen which makes it impossible for the case to proceed. They should be thanked for their work to date and if a retrial is to commence immediately, consideration must be given to releasing the jurors from further service until the trial is complete.

Discharge of a juror or jury for irregularity reported in the course of the trial

Example 1: Juror released for personal reasons

I have received your message about {specify}. I accept that it is impossible for you to continue to serve as a juror in this trial and so I am discharging you from serving any further on this jury. The trial will continue with the other 11 jurors.

Until this case is over, you must not speak about it to anyone at all, including the remaining jurors, your family, friends or anyone else. This is very important to make sure the trial is fair.

Thank you very much for the work you have done on this case. I am sorry that you cannot continue.

Example 2: Jury discharged

Something has happened that means that this trial cannot continue and I must discharge you. This means that your work in this case is at an end. It is very rare for a jury to have to be discharged before it can consider its verdict(s).

Because the case may now have to be tried by another jury, I cannot explain the reasons for the fact that the trial has ended in this way.

I realise that it must be very frustrating for you not to be able to finish the job you started. I do thank you very much for the work that you have done on this case. I am sorry that you cannot continue.

At the outset of the case I gave you a direction not to speak to anyone about this case or allow anyone to speak to you. Because the case may now be tried by another jury, you the first jury must continue not to speak to anyone about this case or allow anyone to speak to you about until all further proceedings have ended. At the moment I cannot tell you when that will be.

[If appropriate: Also, you will not have to serve on another jury until {e.g. until this case is over}]

NOTE: In every case it is important to thank the jury properly for the work that they have done on the case.

2-5 Conducting a view

ARCHBOLD 4-323 and 4-111; BLACKSTONE'S F8.50

Legal summary

1. The court may take a 'view' out of court by inspecting a particular location or inspecting any object which it is inconvenient or impossible to bring to court. This may be useful where maps, photographs, videos or diagrams will not suffice.
2. The view may take place in any case in which the judge thinks that it would be of service to the jury. It may be at the request of any party. A view may only take place before the jury has retired.[97]
3. Before any court embarks upon a view, the judge must make clear precisely what is to happen, including where various individuals will be permitted to stand, what actions can be performed at the scene of the view etc.[98] If witnesses are to be present it must be agreed what demonstrations, if any, they will be permitted to perform.
4. The following is a distillation from the relevant case law and the points set out below are suggested to be worthy of consideration when preparing for a view:

   In each case in which it is necessary for the jury to view a location, the judge should produce ground rules for the view, after discussion with the advocates. The rules should contain details of what the jury will be shown and in what order and who, if anyone, will be permitted to speak and what will be said. The rules should also make provision for the jury to ask questions and receive a response from the judge, following submissions from the advocates, while the view is taking place.

   All parties should attend: the judge,[99] all members of the jury,[100] the parties, the advocates, a shorthand writer/logger, any witnesses and/or dock officers directed to attend, and the ushers. The jury should remain in the company of the ushers. D is not bound to attend but his/her presence may be important to allow an opportunity to identify for his/her legal representatives ways in which the locus has changed since the alleged crime.

   The view itself should be conducted without discussion unless necessary. The judge should take precautions to prevent any witnesses present from communicating, except by way of demonstration, with the jury.[101] A shorthand writer/logger should record all communications between the judge and the advocates and or the jury.

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97 *Lawrence* [1968] 1 WLR 341, distinguished in *Nixon* [1968] 1WLR 577, where the defence requested the inspection.

98 *M v DPP* [2009] EWHC 752 (Admin)

99 *Hunter* [1985] 1 WLR 613. However, if the judge is absent, a conviction will not necessarily be quashed: *Turay* [2007] EWCA Crim 2821

100 It is improper for one juror to attend a view and report back to the others: *Gurney* [1976] Crim LR 567

101 *Martin* (1872) LR 1 CCR 378; *Karamat* [1955] UKPC 38

Procedure

5. Planning:
   (1) If the judge decides that a view is to be held, careful arrangements must be made and all those attending the view must know precisely what procedure is to be adopted: the judge must produce clear ground rules.
   (2) When on a view the court is still sitting and proper procedures must be followed throughout.
   (3) If any particular place or other specific feature of the scene is to be identified and viewed, the procedure for doing so must be agreed in advance. It may be helpful to discuss and agree with the advocates a list describing what the jury should look at. This can then be given to the jury and explained to them before leaving court. In an appropriate case this can be supplemented with an annotated plan setting out, for example, a route and/or features that they should look at. Such preparation should reduce the need for anyone to have to communicate with the jury during the view.
   (4) The jury should be told to take any relevant plans and photographs with them.
   (5) When it is suggested that a D, particularly one who is in custody, is to attend the view great care must be taken. It may be that one or more dock officers will be needed to escort the defendant/s but care needs to be taken with regard to the use of handcuffs. Account must be taken of any risk of escape.
6. Travel:
   (1) Travel to and from the location must be very carefully regulated. It should start and finish at the court for everyone involved. It is important to ensure that there is no risk of contamination at any stage of the travelling process.
   (2) Usually travel is by a single coach. It is important that different parties, in particular the jury, the D and any witness/es are kept apart and go to and remain in appropriate seats.
   (3) Talking en route is permitted but on no account may anyone at all talk about the case.
   (4) If D is to travel to the location, a dock officer/s will escort him/her as appropriate.
7. At the view:
   (1) Any communications between the judge and the advocates, any witness/es and/or the jury must be recorded (usually on a portable recorder held by the court clerk).
   (2) Apart from communicating with his/her advocate, any D must remain silent.
   (3) If any evidence is taken this must be done in the same way as in court: it must be recorded and audible to the judge, advocates, D/s if present and all members of the jury.

(4) Jurors may ask questions but only by writing a note, not orally. The note should be handed to the judge who should discuss the question with the advocates, if appropriate without the jury (as it would be in court). In some cases it may be possible to deal with the question at the view; in others it may not be possible to deal with it until the court has reassembled in the courtroom in which event this should be explained to the jury.

Example

NOTES:

1. These instructions should be given in court before the view takes place.
2. This example does not contain all possible instructions that may have to be given: other instructions will be case-specific, depending on the location and the purpose of the view.
3. Consideration should be given to providing the jury with the instructions in writing so that they can remind themselves of what they can and cannot do without having to ask questions during the view.

Members of the jury, you have asked if you can go to the scene of the incident. I have discussed this with the advocates and have decided that this should be done. Arrangements are being made so that we can all go to the scene together.

There are specific rules that have to be followed for this visit and I'm going to explain them to you now.

At 10 o'clock tomorrow morning, we will all meet in this courtroom [add if appropriate: and I will give you directions about what you should look at when you get to the scene and tell you what documents you should take with you]. The ushers will then take you to {specify location e.g. the car park}. From there a coach will take us to the scene.

{If the D and lawyers are all travelling on the same coach – which may be problematic}

We will all get onto the coach in a particular order. The defendant will get on first and sit at the back {in the company of the dock officer}. Then the lawyers will get on, [if applicable: the witness, W, with an usher], followed by me and the court clerk. Finally, you and your ushers (who will stay with you throughout the journey and at the scene) will get on. You will sit at the front of the coach but you do not need to sit in any specific order.

While you are on the coach to and from the scene you must not talk about the case, even to each other. You may speak about things other than the case, but only to each other and your ushers. You must not speak to anyone else.

We are effectively taking the court to the scene, so you must follow all the rules that you do in court. That includes not using any mobile phones or electronic devices either in the coach or at the scene.

When we get to the scene you must stay together as a jury in one group and in a place where you can all hear everything that is said. The only time you may not hear everything said is if I need to discuss a particular point privately with the advocates. You must not talk at the scene. You must simply observe {and listen if

any evidence is given}. You are free to take notes if you wish. If you want to ask a question, write it down and hand it to the usher.

When the visit is over we will return to court on the coach. We will get on the coach in the same order as before. So you will get on last and sit in exactly the same places as before. Again, when you are on the coach you must not speak about the case at all. When we get back to court you will be taken to the jury area first before we all come back into the courtroom.

It is very important that everyone follows these instructions. I will remind you of them again when we meet in court tomorrow morning.

3. TRIAL MANAGEMENT

3-1 Opening remarks to the jury

ARCHBOLD 4-325; BLACKSTONE'S D13.21;

[See Appendix VI for a homily checklist.]

Legal summary

1. Judges should give initial directions at the beginning of the trial. By the end of the judge's direction to the jury, each member of the jury **must** be provided with a copy of the notice 'Your Legal Responsibilities as a Juror' which outlines what is required of the juror during and after their time on the jury. The current guidance provided as to the use of the juror notice is at Appendix IV and the notice itself is available on the Gov.uk website.

2. Research with juries at court[102] determined that these instructions given to the jury at the outset reduce the risk of jurors engaging in behaviour which may jeopardise the fairness of the trial and lead to them being discharged. The instructions will repeat some of the information that has been provided on the jury video and in the address given by the jury manager. Nevertheless, it is important that the jury once sworn is directed on these issues by the judge for the following reasons:

   (1) to make sure that all sworn jurors understand what is and is not permitted and what their legal responsibilities are;

   (2) so that the defendant and members of the public gain confidence from hearing the instruction in open court that the jury is to try the case on the evidence;

   (3) so that all sworn jurors have received a court order that, in the event that they do ignore the directions and engage in improper conduct, that breach will be a contempt of court: *AG v Dallas*[103] and a criminal offence under the Criminal Justice and Courts Act 2015;

   (4) in the event of challenges on appeal it is clear what instruction the jurors have received.

At the start of the trial

3. Trial judges should instruct the jury on general matters which will include the time estimate for the trial and normal sitting hours. The jury will always need clear guidance on the following:

   (1) The need to try the case only on the evidence and to remain faithful to their oath or affirmation;

   (2) The prohibition on internet searches for matters related to the trial, issues arising or the parties;

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[102] See C. Thomas, 'The 21st Century Jury: contempt, bias and the impact of jury service'. Criminal Law Review (2020) (11) pp. 987-1011.

[103] *AG v Beard and Davey* [2013] EWHC 2317 (Admin)

(3) The importance of not discussing or revealing any aspect of the case with anyone outside their own number or allowing anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way;

(4) The importance of taking no account of any media reports about the case;[104]

(5) The collective responsibility of the jury. As the Lord Chief Justice made clear in *Thompson and Others*:[105]

> "[T]here is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed…. The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself."

(6) The need to bring any concerns, including concerns about the conduct of other jurors, to the attention of the judge immediately, and not to wait until the case is concluded. The point should be made that, unless that is done while the case is continuing, it may not be possible to deal with the problem at all.

Subsequent reminder of the jury instructions

4. Judges should consider reminding jurors of these instructions as appropriate at the end of each day and in particular when they separate after retirement.

5. Jurors should be provided with the notice Your Legal Responsibilities as a Juror. This should always be given to the jury at the time of the judge's opening remarks and at the latest at the end of the initial directions. Jurors should be told to keep it with their jury summons for future reference. (NB. The judge should remind jurors, at the end of the trial, of their continuing responsibilities. See section 21-7.)

Directions

6. The jury should be informed of the estimated length of the trial; of the normal court sitting hours; of the short breaks, if any, which it is intended to take if the evidence allows for this; and of any variation to those hours on any particular day(s) of which the court is aware at the outset. The jury should be kept informed of changes to the trial schedule.

7. The jury may be informed of the stages of the trial – prosecution opening, evidence, closing speeches, summing up, deliberations and verdict(s).

8. [Optional]. The jury may be given a brief introductory summary of the issues in the case (whether orally and/or in a short document), emphasising that it is intended as no more than that. Any doubts about whether such a summary should be given, or about the terms in which it should be given, should be discussed in advance with the advocates in the absence of the jury.

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[104] On which topic see the latest Reporting Restriction Guidance (2022)
[105] [2010] EWCA Crim 1623, [2011] 1 W.L.R. 200, [2010] 2 Cr. App. R. 27

9. The judge's tasks during the trial are to see that it is conducted fairly, to rule on any legal arguments that arise, and to sum up the case at the end. Because the judge alone is responsible for legal decisions, he/she will hear and rule on any legal arguments in the absence of the jury. This is standard practice in criminal trials.

The jury's responsibilities

10. The jury's tasks are to weigh up the evidence, decide what has been proved and what has not and return a verdict/s based of their view of the facts and what the judge will tell them about the law.
11. Any juror should indicate immediately if he/she is not able to hear any of the evidence.
12. If a juror realises at any stage that he/she recognises someone connected with the case, notwithstanding that he/she did not do so when the names were read over before the jury were sworn, the juror should write a note immediately and pass it to the usher who will give it to the judge.
13. The jury must try the case only on the evidence and arguments they hear in court. From this it follows that throughout the trial each juror:
    (1) must disregard any media reports on the case;
    (2) must not discuss the case at all with anyone who is not on the jury, for example with friends or relatives, whether by face-to-face conversation, telephone, text messages, or social networking sites such as Facebook or Twitter;
    (3) must not carry out any private research of their own with a view to finding information which is or might be relevant to the case, for example by referring to books, the internet or search engines such as Google, or by going to look at places referred to in the evidence;
    (4) must not share any information with other members of the jury which is or might be relevant to the case and which has not been provided by the court; and
    (5) must not give anyone the impression that he/she does not intend to try the case on the basis of the evidence presented.
14. These instructions are given for good reasons:
    (1) they aim to prevent the jury being influenced by opinions expressed by people who have not heard the evidence;
    (2) the prosecution and the defence are entitled to know on what evidence the jury have reached their verdict(s); otherwise the trial cannot be fair;
    (3) information obtained from outside sources may not be accurate and may mislead the jury.
15. It is vital in the interests of justice and in the jury's own interests that they should follow these instructions strictly. If they do not, it may be necessary to halt the trial and start again with a new jury, causing a great deal of delay, anxiety and expense. In fairness to the jury they should be aware from the beginning that if

they do not follow the instructions they may be guilty of a criminal offence and at risk of a sentence of imprisonment.

16. Although the jury must not discuss the case with anyone outside their own number they are allowed to talk amongst themselves about the case, as it progresses. However, they should not do so in the jury assembly area (where there is always a potential to be overheard) but only when they are all together in the privacy of their jury room: they should not discuss the case in 'twos and threes'. The jury should wait until they have heard all of the evidence before forming any final views. This issue was considered in *Edwards*[106] where one of the points taken on appeal related to the speed in which the jury returned its verdict. The court considered it likely that the jury would have already discussed the evidence as it was presented in the course of the trial. At paragraph 21 the court stated:

> "In our judgment juries, like any Tribunal deciding facts, are entitled to consider and discuss the case as it goes along, so long as they do so when all members of the jury or Tribunal are present and so long as they keep an open mind until they have heard all of the evidence, the speeches and the directions. For this reason, many trial judges remind the jury that they are entitled to discuss matters among themselves, so long as they are all present and so long as they keep an open mind until they have heard all of the evidence, speeches and directions. In long-running cases juries are sometimes provided with a room so that they can have confidential discussions when they are all present as the case goes along."

17. Each member of the jury is responsible for seeing that all the jurors comply with all these instructions.

18. The jury must be told that if they have any difficulties or problems while serving as jurors, including any problem they may have amongst themselves, they should write a note to the judge immediately and give this to the usher. If any such matter is not reported until after the trial is over it may be too late to do anything about it.[107]

19. These directions apply throughout the trial, even if the judge does not repeat them.

20. When the trial is over jurors may discuss with others their experience of being on a jury and speak about what took place in open court. However, they must never discuss or reveal what took place in the privacy of their jury room, whether by talking or writing about it, for example in a letter, text message or other electronic message such as on Twitter or Facebook. This is absolutely forbidden by Act of Parliament and, if done, would amount to a criminal offence.[108]

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106 [2021] EWCA Crim 1870
107 *Mirza* [2004] UKHL 2
108 Juries Act 1974, s.20(D)

Other information

21. [Optional]. Members of the jury will sit in the same places in the jury box throughout the trial.
22. [Optional]. If any juror needs to ask a question or give any information to the judge during the trial they should write a short note and give it to the usher.[109]
23. Any juror may request a break at any time.
24. [If appropriate]. Describe any arrangements made for smokers during any breaks.
25. [If appropriate]. Notepaper and writing materials have been made available for use by the jury. The jury may take such notes as they find helpful. However, it would be better not to take so many notes that they are unable to observe the manner/demeanour of the witnesses as they give their evidence. The jury are not obliged to take any notes at all if they do not wish to. In any event, the judge will review the evidence when summing up at the end of the trial.
26. [If appropriate]. The jury will be provided with a file/s of documents/photographs. The jury may mark these if they find it helpful.
27. If any witness is giving evidence by special measures, the measures should be described to the jury, who should be told that the use of such measures is common-place in criminal trials, that it is simply to put the witness at ease as far as possible, and that their use in this case should not affect the jury's view of the evidence of the witness concerned and is no reflection on the defendant.
28. If an intermediary will be sitting next to the defendant in the dock, this should be explained to the jury.
29. If any witness or a defendant requires an interpreter, the jury should be told why; from what language the evidence will be interpreted into English; and the extent to which the interpreter will be assisting the witness/defendant.
30. If it is clear that security arrangements are in place in court, or if the judge has authorised security arrangements for the jury, the jury should be told that such arrangements are no reflection on the defendant, and must have no bearing on their consideration of the case.

NOTE: The opening remarks must reflect, as appropriate, the information set out above but are personal to the style of the judge who makes them (subject to the mandatory use of the juror responsibilities notice). Accordingly, no example is given.

[109] Or to adopt such means of communication as is consistent with making reasonable adjustments.

3-1A Early identification of the issues

1. Criminal Procedure Rules now encourage the early identification of the issues at trial, requiring the active assistance of advocates in that endeavour, and the provision of early legal directions whenever it would be helpful to the jury.

   (1) The trial judge may invite the defence advocate(s) to identify the issues immediately following the prosecution opening speech. This is not an invitation to make an alternative opening speech but merely to confirm that any short statement of the issues in the Crown's opening speech is accurate, and if not, to correct it (see CrimPR Rule 25.9). There remains no **right** of the defence to identify the issues at this stage and whether the defence advocate is invited to do so is a matter for the discretion of the trial judge. As a matter of practice, it may be wise for the judge to invite the defence to supply a short list of bullet points in writing in advance so that the limited scope of the exercise is clear to all parties.

   (2) If the defence advocate declines, having been invited to do so, the trial judge may direct that the jury be supplied with the defence statement, suitably edited.

   (3) Once the issues have been identified, the trial judge can consider when to give legal directions to the jury, and in what form. The trial judge must give directions at any stage of the trial whenever it would be helpful to the jury (Rule 25.14), including by setting out the principles involved in a relevant legal concept before evidence is called on that topic. It may therefore be helpful to identify at the outset of the trial any terms in the indictment that require explanation, and to provide an outline of the legal framework for any topic which will be a central matter at trial. The jury may be told whether a direction at that stage is definitive ('grievous bodily harm means really serious harm') or whether a direction simply amounts to an outline description which will be refined at a later stage in the trial. This may also be a stage of the trial when a judge in a sex case might, for example, think it sensible to give the jury directions addressing such issues as delayed complaint, absence of physical resistance or verbal protest, the need to take account of the age of the witness at the stage it is alleged the offending took place, consent and submission, and, in an allegation of historic offending, the general issue of delay and in particular the difficulty that delay may cause an accused. Care will need to be taken in identifying the topics to be flagged up and in crafting the relevant legal direction. This process should involve consultation with the parties.

Example – Self-defence

We have heard that lawful self-defence is likely to be an issue in this trial. It will be helpful if I give you a brief outline now of what this means. I will give you a fuller direction at the end of the trial and before you retire to consider your verdict. At that stage I will also set out for you a series of factual questions that you can ask yourselves and which will lead you to your verdict.

Where the question of lawful self-defence is raised you will have to assess whether the prosecution have proved the defendant acted unlawfully. You are likely to have to consider three areas: what was done, why it was done and in

some circumstances you may have to assess the reasonableness of what was done.

As to the **actions** – that is, what was done, by whom, with what, and in what order – the evidence is very likely to be conflicting. You will need to look at it with care.

As to **why** each person acted as they did, especially the defendant, you will again need to look at the evidence with care. You will ask what the defendant truly thought was happening? What was in the defendant's mind?

Depending on your conclusions about those matters you may have to make an assessment of the **reasonableness** of the defendant's actions. I will tell you more about the framework for doing so later in the trial and nearer to the time you have to make any decisions about the case.

For the moment then, keep an open mind as the evidence is being given. Be aware that the key questions that will help you in your deliberations are not just the obvious ones such as 'who did what?' but also 'why, and with what in mind?' as well as 'what were the circumstances in which all this happened?'.

Example – Identification

You have just heard there is likely to be evidence that the prosecution suggest identifies D as a person involved in this case. D denies that the identification of him/her is correct. Accordingly, the identification evidence is a matter of dispute which you will have to resolve, and that will require special care. I am going to set out in a few words why this is so.

What is the issue?

The experience of the courts shows that honest mistakes in identification are known to occur from time to time. It is important that jurors are alert to the possibility of mistakes right from the start of any trial. This is a direction that deals with the issues relevant to any case where the question of identification has to be considered by a jury.

How might a witness lead a jury into error?

Witnesses do not always tell the truth. You will assess whether witnesses in this case are telling the truth. But even witnesses who are trying to tell the truth are not always reliable. Some may think they are reliable and appear to be reliable even when they are not.

How do you cope with that?

Be cautious when you assess the reliability of the identification evidence by carefully examining the surrounding circumstances, in particular questions like:

- The ability of the witness to observe the person who they say was the D – so, for example, if they normally wear glasses did they have them on?
- What were the circumstances of the observation – were they such as to make identification easier or more difficult?
- [Whether there is relevance in anything happening before or after the observation, like whether the witness knew the person before; or picked the person out in an identity procedure afterwards.]

As well as these things, you will also want to look at the surrounding evidence – does it support or undermine the correctness of the disputed identification. At the end of the case you will want to consider whether you are sure that there is no possibility of an honest mistake being made about who was present.

I hope this explains why this category of evidence has to be looked at with care. The advocates will ask questions of witnesses during the evidence phase of the trial. Keep an open mind until you have heard all the evidence. When all the evidence is complete, the advocates will make comments to you about what they consider to be the strengths and weaknesses of the identification evidence. I too will remind you of the main points as I sum up.

3-2 Defendant unfit to plead and/or stand trial

ARCHBOLD 4-230; BLACKSTONE'S D12.2; CrimPR 25.10

Legal summary

1. If the question arises at the instance of the defence, the prosecution or the court that a D is unfit to plead and stand trial, it is for the judge alone to decide whether the D is fit.[110] Identifying whether this issue arises can be particularly challenging in the case of an unrepresented D when great care needs to be taken to ensure they are capable of engaging meaningfully with the process.[111] The determination of that question may be postponed by the judge until any time until the end of the Crown's case. If the judge[112] concludes the D is fit to plead or stand trial[113] the trial proceeds in the usual way (albeit perhaps with special measures e.g. an intermediary): see *Orr*,[114] *Marcantonio*[115] and *Thomas*.[116]
2. If the judge finds the D unfit, the court has a responsibility to ensure that D is appropriately represented.
3. A jury[117] must then be empanelled to try the issue:

   > "whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence".[118]

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110 Under Criminal Procedure (Insanity) Act 1964, s.4(5) as substituted by Domestic Violence, Crime and Victims Act, 2004, s.22. The burden of proof is on the party alleging unfitness: *Robertson* [1968] 1 WLR 1767

111 See *Johnson* [2021] EWCA Crim 790

112 *Walls* [2011] EWCA Crim 443. *Norman* [2009] 1 Cr App Rep 192. *Taitt v State of Trinidad and Tobago* [2013] 1 Cr App Rep 28, emphasising that it is for the court not the experts to decide the issue.

113 The test for the judge is not one of insanity or mental illness. It is that in *Pritchard* (1836) 7 C & P 303. The modern day iteration of that test is set out in *M* [2003] EWCA Crim 3452: the ability at the time of trial (i) to understand the charges (ii) to understand the plea (iii) to challenge jurors (iv) to instruct legal representatives (v) to understand the course of the trial (vi) to give evidence if he chooses. The judge is entitled to conclude that the defendant is fit without evidence from two registered medical practitioners: *Ghulam* [2009] EWCA Crim 2285

114 [2016] EWCA Crim 889

115 [2016] EWCA Crim 14

116 [2020] EWCA Crim 117

117 If there is more than one defendant the same jury should decide D1's fitness and D2's guilt or innocence: *B* [2008] EWCA Crim 1997

118 Criminal Procedure (Insanity) Act 1964, s.4A(2).

4. If the act or omission is not proved the jury will return a verdict of not guilty. The burden of proof is on the Crown to the criminal standard.[119] Any confession or incriminating statement made by D should not ordinarily be introduced, unless D's unfitness arose after the making of the statement.[120]
5. Juries should not be told what the disposal powers are if they find the D did the act.[121]
6. The case law on what 'act or omission' means is confused.[122] The defences of Loss of Control and Diminished Responsibility cannot be pleaded at a hearing of the trial of the issue under s.4A Criminal Procedure (Insanity) Act 1964.

Directions

If the judge rules that D is unfit

7. Jury selection proceeds in the usual way save that D has no right of challenge.
8. The jurors take an oath or affirm in a form requiring them to determine whether D did the act or made the omission charged as the offence, or is not guilty.
9. As part of their introductory remarks, the judge should explain to the jury the nature of the proceedings, and that although D is not fit to be tried for the offence there is an important public interest in ascertaining whether or not D did the act or made the omission: see the Example below.
10. If, as is likely, D does not give evidence the judge should discuss with the advocates in the absence of the jury before closing speeches whether the jury should be directed that they may or must not draw an adverse inference: see Chapter 17-5.
11. The summing up will be in the conventional form save that the jury is concerned only with whether D did the act or made the omission, and not with D's state of mind. Care will be needed to identify those elements of the offence of which they jury must be sure: see paragraph 6 above.
12. If D is being tried jointly with other defendants who are being tried conventionally, the differences between the issues arising and the verdicts available should be explained clearly to the jury.

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119 *Antoine* [2000] UKHL 20; *Chal* [2007] EWCA Crim 2647

120 *Swinbourne* [2013] EWCA Crim 2329. See also *Wells* [2015] EWCA Crim 2 where Sir Brian Leveson P said that where a defendant's disability impacts on his/her ability to take part in a trial but he/she is not otherwise affected by a psychiatric condition such as renders what is said in interview unreliable …"there is no reason why the jury should not [receive the interview] albeit with an appropriate warning."

121 *Moore* [2009] EWCA Crim 1672

122 *Antoine* [2000] UKHL 20 which holds that the inquiry should not include any assessment of *mens rea* but that the jury can take account of 'objective' elements of defences. *Cf B* [2012] EWCA Crim 770: permitting the jury to inquire into the accused's purpose. See also *Wells* [2015] EWCA Crim 2, where Sir Brian Leveson P said: "What would not fall within the category of objective evidence are the assertions of a defendant who, at the time of speaking, is proved to be suffering from a mental disorder of a type that undermines his or her reliability and which itself has precipitated the finding of unfitness to plead. These assertions need not themselves be obviously delusional...".

13. The verdict will be:
    (1) 'D did the act charged'; or
    (2) 'D made the omission charged'; or
    (3) 'Not Guilty'.

Example

NOTE: This will be in addition to such other opening remarks as are appropriate: see Chapter 3-1 above.

Through no fault of D's own, D is not fit to stand trial. Because of this, there cannot be a trial in the usual way and you do not have to decide whether or not D is guilty. What you have to decide is whether or not D did the act he/she is charged with, namely whether or not D {specify}.

If you are sure that D did this, then your verdict will be 'D did the act charged'. If you are not sure, or sure that D did not do it, your verdict will be 'not guilty'. I will remind you of the verdicts you can return when I sum the case up to you later.

3-3 Trial in the absence of the defendant

ARCHBOLD 3-222; BLACKSTONE'S D15-83

Legal summary

1. In general a defendant has a right to be present throughout their trial. Presence means physical presence in court: see *Louanjli*.[123] However, see now amendments to s.51 Criminal Justice Act 2003 made by s.200 Police, Crime, Sentencing and Courts Act 2022. If, taking account of certain requirements set out in the Act, it is in the interests of justice, the judge can direct that a person may attend criminal proceedings via a live video or audio link.[124] Exceptionally, a trial may start or proceed in the absence of the defendant. This may be as a result of the defendant voluntarily absenting him/herself[125] or being excluded from the court for misbehaving.[126] Where the defendant is too ill to attend it is possible to continue in absence if the defendant consents or there will be no prejudice arising from absence.[127]
2. The court's discretion to commence or continue a trial in the defendant's absence must be exercised with the utmost care and caution and with close regard to the overall fairness of the proceedings.[128] The relevant principles to be applied by a judge in deciding whether to continue in the defendant's absence are set out by the House of Lords in *Jones*.[129]
3. In exercising the Court's discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including in particular:
   (1) the nature and circumstances of the defendant's behaviour in absenting him/herself from the trial or disrupting it as the case may be and, in particular, whether the defendant's behaviour was deliberate, voluntary and such as plainly waived his/her right to appear;
   (2) whether an adjournment might resolve the problem;
   (3) the likely length of such an adjournment;

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123 [2021] EWCA Crim 819 but see also s.198 PCSCA 2022

124 See further the guidance from the Lord Chief Justice: Live links in criminal courts guidance and also *Kadir* [2022] EWCA Crim 1244 which addressed the potential for the use of WhatsApp as a means of receiving evidence.

125 e.g *Carter* [2020] EWCA Crim 105; the fact that the defendant had autism did not prevent his absence being voluntary.

126 A defendant should only be handcuffed in the dock if there is a real risk of violence or escape and there is no alternative to visible restraint: *Horden* [2009] EWCA Crim 388

127 See *Welland* [2018] EWCA Crim 2036 (proceeding in absence of D too unwell to attend trial unfair) and *F* [2018] EWCA Crim 2693 (fair trial despite D being absent for part of the proceedings by reason of ill health).

128 *Rymarz* [2022] EWCA Crim 773

129 [2002] UKHL 5

(4) whether the defendant, though absent, is or wishes to be legally represented at the trial or has by their conduct waived their right to representation;

(5) whether an absent defendant's legal representatives already have and/or are able to receive instructions from the defendant during the trial and the extent to which they are able to present the defence;

(6) the extent of the disadvantage to the defendant in not being able to give their account of events, having regard to the nature of the evidence against the defendant;

(7) the risk of the jury reaching an improper conclusion about the absence of the defendant;

(8) the general public interest and the particular interest of complainants and witnesses that a trial should take place within a reasonable time;

(9) the effect of further delay on the memories of witnesses;

(10) where there is more than one defendant and not all are absent, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

4. The decision to try a defendant in their absence must be based on a proper foundation, that D has waived their entitlement to attend. Good practice dictates that defendants should be reminded at the plea and trial preparation hearing of their obligation to maintain contact with their lawyers and to be aware of the date of their trial or the period of any relevant warned list and that if they fail to appear for trial not only is that an offence but they may be tried in their absence and their lawyers may have to withdraw.[130] CrimPR 3.21(2)(c)(iii) also requires defendants to be told at the PTPH that if tried in absence the jury can be told the reason for the absence. Unless and until the Court of Appeal say otherwise, it is suggested that the provision of the necessary warning should **not** be equated with the warning given at the close of the prosecution case in accordance with s.35 CJPOA. A jury may be informed as to the circumstances of D's absence, but they may not draw an adverse inference based upon that. These warnings should be recorded on the PTPH form.

5. As soon as the defendant is absent the judge must consider:

(1) Whether any good reason exists for the absence and if so whether it can be given to the jury (in which case it will often be given).

(2) Whether any adverse reason exists for the absence (such as an unjustified refusal to leave a prison cell) and, if so, whether that reason should be given to the jury. In some cases it will be inadvisable to tell the jury that D 'has absented him/herself', even if that appears to be true – see the case of *Barnbrook*[131] decided before the change in the CrimPR. It is always going to be wise to check whether and in what terms any PTPH warning was given before deciding how to direct the jury.

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130 *Lopez* [2013] EWCA Crim 1744; [2014] Crim.L.R. 384, C.A

131 [2015] All ER (D) 107 (Apr)

(3) In any other case, including where there is no, or no sufficient information as to the reason for the absence or the nature of any warning given, warn the jury against speculating about the reason for the absence.

6. The jury should generally be warned that absence, whether justified or not, is not an admission of guilt and absence itself adds nothing to the prosecution case. However, the absence of the defendant has certain consequences which may include the fact that the defendant deprives him/herself (or is deprived) of the opportunity to give evidence and that the prosecution case will therefore go unanswered by the defendant. These warnings should be repeated in summing up.

Directions – at the outset of the trial or the first time of absence

7. Point out to the jury that the defendant is absent.

8. If it is appropriate to tell the jury there is a good reason for the absence (e.g. illness), do so and direct them that they must not hold the defendant's absence against him/her.

9. If it is appropriate to tell the jury that no good reason for the D's absence exists (e.g. voluntary absence) do so but not in terms that would equate to a s.35 direction. The change in the Rules allows for a jury to be told why a D is absent but does not engage an adverse inference direction that could arise if D were present but chose not to give evidence. The jury can be told why D is not in the dock and that D's decision not to attend the trial may have practical consequences (loss of opportunity to give evidence etc.) but no more than that.

10. If it is not appropriate to tell the jury any reason why the defendant is absent (e.g. alleged but unproven misbehaviour which would be prejudicial in the context of the trial). Tell the jury that they must not (a) speculate about the reason for the defendant's absence or (b) treat it as providing any support for the prosecution's case.

Directions – when summing up

11. Repeat the earlier directions.

12. If the defendant's absence occurred after the defendant gave evidence, no more is to be said.

13. If the defendant's absence occurred before the time when the defendant could have given evidence (and so no warning about inferences from silence at trial has been given), the jury must be told that they must not draw any conclusion against the defendant because the defendant has not given evidence. They may be told that as a matter of fact the defendant has given no evidence which is capable of explaining or contradicting the evidence given by witnesses called by the prosecution.

14. If the defendant's absence occurred after the defendant had been given an 'inferences' warning and chose not to give evidence, the direction as to the consequences of silence at trial is available: see Chapter 17-5.

Example

[If a reason can be given for D's absence]: D is unable to come (or has decided not to come) to his/her trial because {specify}.

[If no reason can be given (e.g. because the absence is for a reason which would itself be prejudicial for the jury to know)]: D is not here.

[In both instances]:

But D has previously pleaded 'not guilty' [add if appropriate: and D has told his/her lawyers what his/her case is and they will be representing D during the trial.]

The fact that D is not here does not affect your task, which is to decide whether or not D is guilty of the charge(s) against him/her. [Add if appropriate*:* You must not speculate about the reason D is not here]. D's absence is not evidence against D and must not affect your judgment.

But because D is absent you will not have any evidence from D to contradict or explain the prosecution's evidence. [If appropriate: D did answer questions when interviewed by the police and D's answers will be part of the evidence for you to consider. But, you should bear in mind that what D said to the police was not given under oath and D will not be cross-examined.]

3-4 Trial of one defendant in the absence of another/others

ARCHBOLD 1-280 and 9-82; BLACKSTONE'S D11.76 and F12.6

Legal summary

1. In some cases a co-defendant is named on the indictment but will not be taking part in the trial because the co-defendant has already pleaded guilty or is to be tried separately.
2. Reference to the existence of the defendant who is not on trial without reference to their plea or conviction may be necessary if the jury is properly to understand the present proceedings. In such a case the jury need to be warned not to speculate on reasons for their absence but to try the case on the evidence.
3. Reference to the other defendant having been convicted or pleaded guilty may be made:

   (1) by agreement of the parties;

   (2) if adduced by the Crown or a co-defendant on trial in the present proceedings under s.74 PACE subject, in the case of evidence adduced by the Crown, to the discretion in s.78 PACE.

   The absent accused's conduct is relevant because it has to do with the facts of the alleged offence. Section 100 CJA 2003 might be engaged.
4. Where evidence is adduced of the conviction or plea of a defendant who is not present the jury need to be directed on its evidential significance. If it is not evidence against the defendant on trial the jury need to be directed to that effect. The evidence is being adduced for information only. If the evidence of the absent defendant's guilt is admissible as evidence against the present defendant the jury will need to be directed carefully as to the limited use it has.

   > "If the evidence is admitted the trial judge should be careful to direct the jury as to the purpose for which it has been admitted, and—we would add—to ensure that counsel do not seek to use it for any other purpose. Of course it may happen that the judge will either limit or extend that purpose at a later stage of the trial, after hearing submissions from counsel."[132]

   See also Chapter 14-14: Statements in furtherance of a common enterprise.

Directions

5. Where a co-defendant is named on the indictment but is not taking part in the trial, if it is possible to do so without prejudice to the defendant being tried, it will be helpful to make the situation the subject of an agreed fact and put before the jury in this way.
6. Where it is not appropriate for the jury to be given any information about the co-defendant they must be directed that they are not trying the co-defendant, they must not speculate about the co-defendant's position and that it has no bearing on the position of the defendant whom they are trying.

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[132] Per Staughton LJ in *Kempster* [1989] 1 WLR 1125. See more recently *Shirt and Shirt* [2018] EWCA Crim 2486 and *Hill* [2021] EWCA Crim 587

7. Where a co-defendant's plea of guilty has been referred to (not admitted under s.74 PACE) the jury must be directed that whilst this information explains the co-defendant's absence, it is not evidence in the case of the defendant whose case they are trying and that they must try the defendant solely on the basis of the evidence which they have heard.
8. Where evidence of a co-defendant's plea of guilty has been admitted under s.74 PACE, the jury must be directed about the potential relevance of that conviction to the defendant's case. They must also be warned that it must not be used for any other purpose (of which example/s may be given as appropriate to the case).
9. Sometimes there is evidence that persons who are not before the court, other than a co-defendant, have been arrested/charged. This should be the subject of discussion with the advocates before speeches and appropriate directions given to the jury.

Example 1: Where the situation of an absent co-accused or co-defendant is known to the jury but is not evidence in the case against the defendant on trial

You have heard that X has been convicted of/pleaded 'guilty' to/been accused of the offence(s) that D is now charged with in this case. You must decide whether D is guilty or not guilty on the evidence given in this trial. X's position must not influence your decision in any way. X's admission of guilt does not alter the current case against D in any way.

Example 2: Where evidence of a guilty plea/verdict in respect of an absent co-defendant has been admitted in evidence under s.74 PACE

You have heard that X has pleaded 'guilty' to/been convicted of {specify}, the offence D is now charged with in this case. The fact that X has pleaded 'guilty' is evidence that the offence was committed. But it is not evidence that D took part in the offence. Your job is to decide whether or not D is guilty of the offence. And you must do this based only on the other evidence presented in this trial.

3-5 Defendant in person

ARCHBOLD 4-383, 4-441 and 8-257; BLACKSTONE'S D17.17; CrimPR 23

Pre-trial considerations

1. It is useful to confirm at the outset that the court and prosecution have the correct postal, email and phone details for D and that D is clear about the postal addresses and reference numbers of the court and prosecution for service. The CPS may accept emails from D but their response will not necessarily be by email, as D will not have a secure email address. If D is in custody it will be necessary for the court and the CPS to communicate with him/her there. It may be important to ensure that a record is created by the prison of material sent to D and if necessary for a member of staff to read documents to D and record doing so on BWV.
2. It is suggested that it is helpful to provide an unrepresented D with a document that sets out the nature and order of the proceedings. Where the charges and/or the evidence is complex the document may be quite lengthy. The example below is likely to suffice for most straightforward cases. If it is provided to D as soon as it becomes apparent that D is intending to represent him/herself – and D is then taken through it by the judge – it should assist in ensuring that D understands the implications of their decision. It may even prompt a change of heart and will be a useful document to refer back to if problems arise in the course of the trial.
3. In the case of a D who refuses to attend court, a copy should be sent by post and/or email. If D is in custody it may be necessary to ensure that a member of the prison staff reads the document to D and records the fact of so doing.
4. The case of *Inkster*[133] is a helpful reminder of the care a judge needs to exercise when dealing with an unrepresented D. It is crucial that nothing said by the judge puts pressure on D or could give the impression of so doing.
5. If D is representing him/herself, there is a statutory prohibition on cross-examining certain witnesses in person: s.34 and 35 YJCEA 1999. The restrictions relate to child witnesses and complainants in sexual, kidnapping and false imprisonment cases. The court also has a discretionary power, on application by the prosecution, to prohibit cross-examination by an unrepresented D in other cases where the interests of justice demand it. This commonly arises in cases of domestic violence or harassment: see s.36 YJCEA 1999. The procedure is set out at CrimPD 6.5 and the forms on the MOJ website should be used – see link below. If the situation arises during a trial and the prosecution seek to make an oral application, the form should still be used to ensure that there can be no doubt that D has been given correct and complete information. It is also a useful aide-memoire for the judge. Copies are on the MoJ Forms website.

[133] [2020] EWCA Crim 796

6. If the statutory restriction does not apply, the court is not obliged to allow an unrepresented D to ask whatever questions, at whatever length, he/she wishes: *Brown*.[134]

Example of written explanation for an unrepresented defendant

You said that you plan to represent yourself in this case. That is your right.

- But you may find it helpful to know what the benefits are of being represented by an experienced lawyer.
- You may also find it helpful to know what all your responsibilities will be both before and during your trial if you represent yourself.

This document sets these out for you. It is also designed to help you make your final decision about representing yourself.

What are the benefits of being legally represented?

People who work in and study the criminal courts have found that defendants are better off if they are represented by an experienced lawyer. This is for the following reasons:

1. Lawyers understand the rules that have to be followed in a trial.
   - An experienced lawyer will know the rules that apply to a trial in this court.
   - You are not likely to know these rules, so you may find the rules difficult to follow.
   - You must follow these rules. No exceptions can be made.
2. Lawyers are trained to deal with legal issues.
   - Legal issues will come up in your case. An experienced lawyer will be able to deal with these more easily than you.
3. A lawyer can help you decide whether to give evidence.
   - A criminal trial can involve making difficult decisions. An experienced lawyer will be able to give you helpful advice about how to make these decisions.
   - For instance, you will need to decide whether you should give evidence in the trial.
   - An experienced lawyer will be able to give you helpful advice about that.
4. Lawyers understand how best to ask witnesses questions.
   - You will be able to call witnesses in support of your case. An experienced lawyer will understand which witness are best to call and what to ask them.

[134] [1998] 2 Cr.App.R. 364

5. Lawyers know how to follow the rules about making a speech to the jury.
    - After all the evidence is presented, you have the right to make a final speech to the jury.
    - In the speech, you can comment on the evidence and suggest why you should be found not guilty.
    - But there are strict rules about what can and what cannot be said in this closing speech and you have to follow those rules.
    - An experienced lawyer would discuss with you what was best to say to the jury and understand how to stay within these rules in the closing speech.
6. Lawyers are trained to deal with a complex case like yours [where appropriate].
    - This case is technically complex. There are many documents. There will also be evidence from a large number of witnesses, including experts.
    - It will not be easy for you to deal with all of this if you are representing yourself.
    - An experienced lawyer …[identify any particular matters that arise in the case and about which an experienced lawyer may be able to assist].

Changing your mind about representing yourself

In this hearing today, if you decide to represent yourself at your trial you may not be allowed to change your mind later.

- For example, closer to the start of the trial when the reality of representing yourself is clearer to you, you may want to change your mind and be represented by a lawyer.
- But by then it may be too late to have a lawyer represent you.
- If this happens, you are not allowed to tell the jury that you changed your mind and wanted to be represented by a lawyer, or tell them you think this is unfair.

What happens if you decide to represent yourself?

The following outlines the responsibilities you will have before and during the trial if you decide to represent yourself.

Your responsibilities BEFORE the trial begins if you represent yourself

1. Written material you will receive

If you represent yourself, you will be provided with various documents for the case. These include:

(a) written statements of the prosecution witnesses;

(b) 'exhibits': these are the documents the prosecution will use in the trial as evidence;

(c) the record of your interview(s) with the police;

(d) a list of all the 'unused material': this is all of the statements, reports and other material obtained by the police during their investigation that the prosecution do not intend to use as part of their case against you;

(e) copies of applications that have been made to the court and correspondence.

You will need to be able to understand and determine the importance of all of these documents for your case.

2. Writing a defence statement

Once you have received all the written materials you must give the court and the prosecution a written document called a 'defence statement'.

Your defence statement must explain:

(a) why you say you are not guilty, including the details of any defence you plan to put forward (e.g. alibi or self-defence);

(b) the parts of the prosecution case you disagree with and your reasons why you disagree with them;

(c) any facts you plan to rely on to prove your case and your reasons why you will rely on them;

(d) any legal point that you intend to raise (e.g. whether any of the prosecution evidence should not be given to the jury and why).

3. Submitting a defence statement

(a) You must send this defence statement to both the court and the prosecution so it arrives by {insert date}.

(b) If you do not provide this defence statement to both the court and prosecution by this date but in the trial you raise any issue that should have been in the defence statement, the jury will be told they may hold that against you.

4. Dealing with witnesses before the trial

(a) Prosecution witnesses

- Once you have seen the statements of the prosecution witnesses, you must tell the prosecution and the court which of these witnesses you require to come to court to be questioned.
- If you agree with what is said by someone in their prosecution witness statement and you do not have any questions for that witness, then that person is not required to come to court and their statement can be read to the jury as part of the evidence.
- However, if you disagree with what a prosecution witness says or have some additional questions you want to ask that witness, then you must tell the court and prosecution that you require that witness to come to court so the court can arrange for that to happen.

- You must provide the court with the list of these prosecution witnesses by {specify date}.

(b) Defence witnesses

- If you wish to call any witnesses to give evidence in support of your case (defence witnesses), you must provide the following details in writing to both the court and the prosecution: their name, address and date of birth.
- It is your responsibility to arrange for these witnesses to come to court to give evidence.
- You can ask them questions after the prosecution case is finished. The prosecution lawyer can also ask them questions.

5. Hearings and trial date

- There will not be any other hearing after this one until the trial.
- The trial will start on {insert date}.
- If you do not attend court on the day of your trial then the prosecution may ask the judge for the trial to take place without you. If the judge agrees to this, the jury may be told that you have chosen not to attend your trial. If you do not attend court on the day of your trial you may be arrested. Failing to attend court when required to do so can be a criminal offence and you might be charged and punished (e.g. if there was no good reason for you failing to attend on a date you were told to do so). If for some reason you cannot get to the court when you are required to be there you should get in contact with the court as soon as possible and explain why you cannot come.

Your responsibilities DURING THE TRIAL if you represent yourself

1. On the first day of the trial

(a) Arriving at court:

- You will be told in advance what time the trial will start.
- You must arrive at court early enough so that you are in the courtroom when the trial starts. Remember you will need to go through security and find where the courtroom is located.

(b) In court before the jury is sworn:

- Before jurors come into court to be sworn onto the trial, the judge will check with you and the prosecution to see if everything is ready to start the trial.
- There may be arguments about points of law before the jury come into court, for example whether any particular witness should be called or whether a particular piece of evidence should be given to the jury.

(c) Documents:

- If you have documents you want to show to any witness during the trial, you will need to show them first to the prosecution and the judge.
- You must bring at least 9 copies of each document with you to court: one for the prosecution, one for the judge, one for the witness and 6 for the jury.

2. The jury

(a) Swearing the jury:

- Every member of the jury that tries your case will take an oath or affirm that they will try the case according to the evidence they hear in court.

Information given to jurors at this stage:

- The judge will do his/her best to ensure that no member of the jury knows you or anyone involved in the case or anything about the case.
- To do this, it may be necessary to give jurors a list of witnesses, locations or other information about the case.
- You will need to discuss this list with the prosecutor and judge.

(b) 'Challenging' a juror:

- You have a right to question whether a specific juror should be on the jury.
- But there are strict rules about why you can challenge a juror.
- You can only challenge a juror if there is a good reason why that person should not serve on the jury. For example, if you know the juror personally.

(c) Judge's introduction to the jury:

Once the jury is sworn the judge will explain the following to the jury:

- the expected length of the trial;
- the timetable for the court each day;
- any legal directions to be given at that stage;
- the rules the jury must to obey to ensure that they try the case fairly; and
- that you have chosen to represent yourself in the trial.

3. The start of the case

The case starts when the prosecution lawyer tells the jury what the case is about. This is called the 'prosecution opening'.

- The purpose of the prosecution opening is to explain to the jury why the case is happening and give them a summary of the evidence they will hear.

- What the prosecutor says is not evidence. It is meant to help the jury understand the evidence they will hear from the prosecution witnesses.
- The prosecution will give the jury a copy of the charge sheet (called the 'indictment'), which states the formal charges against you.
- The prosecution may give the jury other documents relevant to the case.
- You will be given copies of any documents given to the jury.

Once the prosecution opening is finished, the judge may also invite you to explain your case, your defence and the main points of the prosecution case that you disagree with. If you decide not to do this at this point, you can also do it after the prosecution has finished its side of the case.

4. Prosecution witnesses

After the opening, the prosecution will start to call their witnesses.

- You should listen carefully to what is said when the prosecution is questioning their witnesses, and you may want to take a note of any important points.
- Witnesses do not always say exactly what they have said in their witness statements.
- You are not allowed to ask the prosecution witnesses any questions until the prosecution lawyer has finished. The judge will tell you when it is your turn.

'Cross-examination' of prosecution witnesses

- When any prosecution witness has finished answering questions from the prosecution you have the right to ask that witness questions you think may help your case. This is called 'cross-examination'.

You are not required to ask a prosecution witness any questions, but if you do you must follow these rules:

(a) If you think that a witness's evidence is incorrect, then you can ask that witness questions you think will show why their evidence is incorrect. For example, if the witness has said something in court that is different from what they said in their witness statement, you can show the witness their statement and ask them questions about the differences.

(b) If you are going to say that the witness is incorrect or telling a lie, you should put that to the witness in the form of a question and give them the opportunity to respond. For example: "Didn't we meet at the station and not at the church as you told the police?" or "Aren't you mistaken about me being in the pub when the fight took place" or "Haven't you told lies about what you say I did when we were in the kitchen because that did not happen?"

(c) You must not make statements or comments when questioning a witness. During the trial there are specific times for you to make statements and to make comments about the evidence. But you **CANNOT** do this during cross-examination. You will be able to **make statements** if you give evidence. You will also be able to **comment** on the evidence when you

make your speech to the jury at the end of the case (see 'closing speeches' below).

[If a restriction on cross-examination is compulsory (s.34 and 35 YJCEA) or discretionary (s.36 YJCEA) then a warning about this should be included at this point and the necessary forms should be explained to D – if possible in an 'Easy Read' version.]

5. End of the prosecution case

At the end of the prosecution case, if you think that the prosecution has not presented enough evidence for the jury to convict you on any of the charges, you may raise this with the judge.

- This is called 'making a submission of no case to answer'.
- You can only make this submission to the judge when the jury is not in court. Tell the judge you want to do this so the judge and send the jury out of court.
- In ruling on your submission, the judge will only say whether there is enough evidence for the case to continue or not; the judge will not say whether he/she believes the evidence.

6. Defence witnesses

(a) Giving evidence yourself

After the prosecution has finished calling its witnesses, you are entitled to give evidence yourself and to call any witnesses.

- You do not have to give evidence.
- But if you do not give evidence, the judge will tell you this may count against you. The judge will say this to you while the jury is in court.
- If you do give evidence the prosecution will be able to cross-examine you.

When it is time for you to decide whether to give evidence, the judge will ask you the following question with the jury in court:

> "Now is your chance to give evidence if you choose to do so. If you do give evidence it will be on oath [or affirmation], and you will be cross-examined like any other witness. If you do not give evidence the jury may draw such inferences as appear proper; that means they may hold it against you. If you do give evidence but refuse without good reason to answer the questions the jury may, as I have just explained, hold that against you. Do you now intend to give evidence?"

(b) Calling defence witnesses

- If you call any witnesses, the prosecution will be able to cross-examine them.

If you intend to call evidence from one or more witnesses in addition to giving evidence yourself, you may 'open your case' in a way similar to the prosecution 'opening' at the start of the trial. That would involve you telling

the jury about the evidence that you and your witnesses are going to give and also to comment upon the prosecution case. You do not have to do so and many defence advocates prefer to keep what they want to say to the jury until all the evidence, including defence evidence, has been given.

7. Judge's directions to the jury

Once all the evidence has been heard, the judge may discuss with you and the prosecution how he/she intends to explain the law to the jury. This will only be done when the jury is not in court.

- The judge may give the jury directions in writing to help them reach their verdict(s).
- If the judge does this, you will be given a copy of this written material in advance.
- You will be able to discuss the written directions with the prosecutor and the judge before it is given to the jury, but the judge has the final say on what is given to the jury.

8. Closing speeches

After all the evidence is heard, both you and the prosecution will be able to make a closing speech to the jury.

- The judge will tell you when you can make your speech.
- The closing speech is your chance to comment on the evidence.
- You can comment on weaknesses in the prosecution case and on the strengths of your case. You may comment on evidence that has been given and remind the jury of the significance of any documents or other exhibits produced.
- But you cannot give any further evidence in your speech.
- And you cannot say to the jury that because you have not been represented you have been at a disadvantage.

[In an appropriate case: If you were to suggest this, the judge would explain to the jury the true position as to how you came to be unrepresented and the opportunity/opportunities that you have been given to be represented.]

9. Judge's summing up to the jury

After the closing speeches, the judge will sum the case up to the jury. In the summing up, the judge will:

(a) give the jury directions about the law; and

(b) review the evidence with the jury.

The judge's directions on the law will include telling the jury:

- that the prosecution must prove their case;
- that you do not have to prove your innocence;

- that the jury must be sure you are guilty before they can convict you of any offence;
- the law about the offence/s you are charged with.

When the judge reviews the evidence he/she will not restate all of the evidence but will remind the jury of the main parts of the evidence.

[In the case of a split summing up]. Before the closing speeches the judge will give the jury some or all of the legal directions. The judge will have discussed these with you and the prosecution in advance. If the judge gives the jury these direction in writing you will also be given a copy. If the summing up is dealt with this way your closing speech will be after the judge's legal directions but before he/she reviews the evidence.

A final chance to review your decision to represent yourself

I have now described what your responsibilities will be in preparing for your trial and for conducting your trial if you represent yourself.

I have also explained what the benefits are of being represented by an experienced lawyer.

I will now give you {specify a time} to think about this again and decide whether you still want to represent yourself.

This must be your final decision about whether to represent yourself or not.

Directions

7. Where a D is unrepresented from the outset, the judge should direct the jury at the start of the trial that D has a right to choose to represent him/herself. The jury should be told to bear in mind the difficulty that that may present D: see *De Oliveira*.[135]

8. By CrimPR 3.8(3)(b) the court is required to take every reasonable step to facilitate the participation of D. Consequently the judge may need to assist D in the conduct of his/her defence. The judge should ask D whether he/she wishes to call any witnesses in his/her defence, see *Carter*,[136] and the judge will also need to warn D about the inferences that may be drawn under the CJPOA 1994 if D does not give evidence.

9. In some cases a short explanation of the reason D has chosen to represent him/herself may be appropriate. This may be particularly desirable if D's representation ceases after the trial has started. For example, in *Hammond*[137] the trial judge directed the jury as follows:

> "Members of the jury, just to let you know what the situation is, the defendant [a co-defendant of Hammond] himself has decided to dispense with the services of his counsel. He was given time to consider and I have refused his

[135] [1997] Crim LR 600, CA
[136] (1960) 44 Cr.App.R. 225
[137] [2013] EWCA Crim 2636

application to have alternative counsel and, therefore, from now on he is going to represent himself.

It has been explained to him that he will be subject to the same rules of evidence and procedure as counsel would have been had they continued to represent him and which apply to all the other defendants and the prosecution in this case. It has also been explained to him that my role in this case is to ensure that the trial is fair, and that there may be some occasions when he needs some guidance so that he complies with those rules, so as to ensure a fair trial not only for himself but also the other defendants and the prosecution.

He has been provided with all the materials counsel have had on his behalf and will continue to be provided with them throughout the trial.

We are going to adjourn now until tomorrow morning to allow him best to consider how to present his case."

On appeal Laws LJ stated:

23. "It is, it seems to us, quite clear from the learning on this subject (see R. v De Oliveira [1997] Crim. L.R. 600) that the directions to be given to the jury where a defendant chooses to be, or becomes, unrepresented are very much to be tailored to the particular case. No doubt there were different ways of dealing with the matter. …. Although the judge did not spell out in terms the difficulties faced by a defendant acting in person, it is entirely plain that she was at pains to ensure that he was not prejudiced. She invited him to provide her with relevant documents in advance of his cross-examining a co-defendant so that she might warn him of any issues of admissibility. The jury were told that there would be occasions when he would need guidance to comply with proper procedures. They and the judge were, we emphasise, dealing with an intelligent and resourceful defendant…"

10. CrimPD 6 provides:

6.7.4 If the defendant is not represented, the judge shall, at the conclusion of the evidence for the prosecution, in the absence of the jury, indicate what he will say to him in the presence of the jury and ask if he understands and whether he would like a brief adjournment to consider his position.

6.7.5 When appropriate, and in the presence of the jury, the judge should say to the defendant:

"Now is your chance to give evidence if you choose to do so. If you do give evidence it will be on oath [or affirmation], and you will be cross-examined like any other witness. If you do not give evidence the jury may hold it against you If you do give evidence but refuse without good reason to answer the questions the jury may, as I have just explained, hold that against you. Do you now intend to give evidence?"

See also Chapter 17-5: Defendant's silence at trial.

11. Directions may have to be given in respect either of a D who has decided to represent him/herself from the outset of the trial or of a D who has become unrepresented in the course of a trial as a result of their advocate withdrawing or being dismissed.

If the defendant is unrepresented from the outset of the trial

12. Before the jury are sworn, ensure through D and the prosecution that D has all of the papers and a pad of paper and pens with which to take notes.
13. If D has served a defence statement, confirm the issues that are to be resolved in the trial.
14. If D has not served a defence statement explain that it is mandatory and that D is required to notify the court of the nature of their defence and the issues so that you are able to ensure a fair trial. Discuss and take a note for D's agreement of the issues in the case. If D has not provided a defence statement explain that adverse comment may be made about this later in the case.
15. Confirm that, if D intends to call witnesses, D has given notice of their names to the prosecution and has arrangements in place to ensure their attendance.
16. If the case is one in which there is a statutory restriction on cross-examination ensure that arrangements are in place for cross-examination by an appointed advocate.
17. Explain to D the extent of the right to challenge a juror.
18. After the jury have been empanelled explain to them and to D the procedure that will be followed including:
    (1) the order of proceedings prior to the calling of evidence, including the explanation to the jury of their responsibilities and the prosecution opening;
    (2) the calling of witnesses by the prosecution;
    (3) D's right to cross-examine (subject to the limitations of ss.34-39 YJCEA). It is prudent to stress to D at this stage that this right is limited to asking questions of the witness that are relevant to the issues in the trial and that when questioning a witness D must not make statements or comments.
    (4) that at the close of the prosecution case D will be entitled to give evidence and call witnesses;
    (5) that at the close of the evidence D will have an opportunity to address the jury. There are cases where it will be prudent from the outset to indicate the sort of time that might be allowed for a closing address;
    (6) that the court will seek to assist D with procedural matters but will not be able to assist in the presentation of D's defence.
19. It is good practice to give the above directions in writing so that they are understood and there can be no doubt about what D was told.
20. It is also good practice to keep a file of all material provided to D by date, so that there can be no doubt about what material D has been given.

If a defendant becomes unrepresented in the course of the trial

21. Ensure through D and the prosecution that D has all of the papers and a pad of paper and pens with which to take notes.
22. If D has served a defence statement, confirm the issues that are to be subject to question and evidence in the trial.

23. If D has not served a defence statement remind D that it is mandatory and that D is required to notify the court of the nature of the defence and the issues so that you are able to ensure a fair trial. Discuss and take a note for D's agreement of the issues in the case.
24. Explain to the jury that D has dispensed with the services of his/her lawyers or that D is no longer being represented by lawyers.
25. Emphasise that the fact that D is no longer represented is not evidence in the case and that the jury must not speculate about the reasons for it.

In all cases

26. Explain to D (in the presence of the jury) the procedure for the [remaining parts of the] trial, including if appropriate that there are restrictions on D's right to cross-examine and that an advocate will be appointed to carry out such cross-examination.[138]
27. Invite D (in the absence of the jury) to provide materials to be used and questions to be asked in cross-examination, so that D may be advised as to admissibility and warned as to consequences.
28. The prosecution have no general right to a closing speech unless D has called at least one witness or the court permits [CrimPR 25.9(2)(j)].

Example 1: Defendant unrepresented from the start of the trial

The defendant, X, has chosen to represent him/herself in this trial. In our legal system, everyone has a right to represent themselves instead of having a lawyer. But we do not expect someone who is not a lawyer to be familiar with the procedure in court. So I have already given X some guidance on court procedures, and I will explain a few more things about this to X now. [Then go through the matters described at paragraph 18.]

Example 2: Defendant becomes unrepresented during the trial

You will see that A, who has been representing X, is no longer here. This is because X has decided to represent him/herself. X is entitled to do this. The reason X is now representing him/herself has no bearing on your verdict and you must continue to consider the case only on the evidence given in court. From now on, I will explain matters of procedure to X, but X will now present the rest of his/her case him/herself.

NOTE: See also the direction and commentary in the case of *Hammond* at paragraph 7 above.

[138] Section 38 YJCEA and *Abbas v. CPS* [2015] EWHC 579 (Admin)

3-6 Special measures

ARCHBOLD 8-70; BLACKSTONE'S D14.1; CrimPR 18; CrimPD 6

Legal summary

1. Special measures may be available for a witness (other than a defendant) in criminal proceedings. Those eligible are in the following categories:
   (1) all witnesses under 18 at the time of the hearing or video recording;[139]
   (2) vulnerable witnesses affected by a mental or physical impairment;
   (3) witnesses in fear or distress about testifying;
   (4) adult complainants of sexual offences, or trafficking/exploitation offences, or offences where it is alleged that the behaviour of the accused amounted to domestic abuse;[140] and
   (5) a witness to a 'relevant offence', currently defined to include homicide offences and other offences involving a firearm or knife.
2. The special measures available are:
   (1) screening the witness from the accused (YJCEA 1999, s.23);
   (2) giving evidence by live link, accompanied by a supporter (s.24);
   (3) giving evidence in private, available for sex offence or human trafficking cases or where there is a fear that the witness may be intimidated (s.25);
   (4) ordering the removal of wigs and gowns while the witness gives evidence (s.26);
   (5) video recording of evidence-in-chief (s.27);
   (6) video recording of cross-examination and re-examination for child and adult vulnerable witnesses where the evidence in chief of the witness has already been video recorded and they fall within the remit of the s.28 scheme;
   (7) examination through an intermediary in the case of a young or incapacitated witness (s.29);
   (8) provision of aids to communication for a young or incapacitated witness (s.30);
   (9) anonymity (dealt with further in Chapter 3-8 below).[141]
3. Section 32 YJCEA 1999[142] provides:

   "Where on a trial on indictment with a jury evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact

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139 All child witnesses are automatically eligible for special measures, including defence witnesses other than the child defendant. Further guidance on best practice in interviewing vulnerable witness is available on the Gov.uk website.
140 Section 62 Domestic Abuse Act 2021
141 CAJA 2009, Pt 3, Ch 2
142 As amended by Criminal Justice Act 2003, s.331 sch.36, paras. 74 and 75.

that the direction was given in relation to the witness does not prejudice the accused."

4. In *Brown and Grant*[143] the Court of Appeal held that the warning should be given immediately before the witness gives evidence, when it is more likely to impress itself on the jury; it is not important whether the warning is repeated in the summing up. In *YGM*,[144] however, the court indicated that where limitations had been imposed upon cross-examination of a vulnerable witness the warning provided to the jury as to that fact should be repeated in the summing up. Whilst not, the same the issues are perhaps comparable and better practice might be to repeat the warning as to the use of special measures when summing up.
5. The CrimPD makes clear that assisting a vulnerable witness to give their best evidence is not merely a matter of ordering the appropriate special measure.
6. Guidance on further directions, ground rules hearings and intermediaries is given at CrimPD 6 Vulnerable People and Witness Evidence.
7. Care needs to be taken with transcripts:[145]
   (1) The Court in *Popescu*[146] set out the principles governing the provision to the jury of transcripts of Achieving Best Evidence (ABE) interviews.
   (2) The judge is required to give the jury such directions as would be likely effectively to safeguard against the risk of disproportionate weight being given to the transcripts.
   (3) In *Sardar*[147] the court emphasised that the dangers in allowing a jury to have the transcript:

> "Nonetheless, the danger which precludes a jury having copies of the transcript is not merely that the jury might view the evidence-in-chief in the transcript in isolation from the other evidence. There is also a danger that the jury will concentrate upon the written word rather their impression of the witness and their assessment of that witness as she gives her evidence, both in the form of the video recording and during cross-examination. The jury, under our system of oral evidence, is required to assess the truth of a witness's evidence by reference to their assessment of her whilst she is giving that evidence. That is fundamental to the methods by which we expect juries to reach a conclusion as to guilt or innocence."[148]

8. Jury requests for transcripts: In the event that, after retirement to consider their verdict, the jury requests a transcript of the interview this should only be acceded to if they have had the transcript earlier in the case and then only with the agreement of both parties and subject to a clear reminder to the jury of the other evidence and as to the status of the transcript.

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143 [2004] EWCA Crim 1620
144 [2018] EWCA Crim 2458
145 Archbold 8-97; Blackstone's D14.41
146 [2010] EWCA Crim 1230. The court considered *Welstead* [1996] Cr App R 59, CA and *Morris* [1998] Crim LR 416
147 [2012] EWCA Crim 134
148 Per Moses LJ at para.25

9. Jury requests for replay of recorded evidence:
   (1) If, after retirement to consider their verdict, the jury requests that a recording of a witness's evidence in chief be replayed the judge should follow the guidance in *Rawlings; Broadbent*.[149]
   (2) If the recording is replayed the judge should warn the jury that because they are hearing the complainant's evidence in chief a second time they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case. The judge should also remind the jury after the replay, of the relevant parts of cross-examination and re-examination of the witness.
   (3) If the recording is not replayed but the jury are reminded of the evidence, by reference to the transcript, the judge must warn the jury not to give disproportionate weight to the evidence because it is repeated after all the other evidence and to direct them that they should consider it in the context of all the evidence. The judge must also remind them of the relevant parts of cross-examination, re-examination and the defendant's evidence.[150]

Directions

10. In respect of any special measures for witnesses the purpose of a direction is to explain what is to happen or has happened and to ensure that there is no prejudice to the defendant. This should be done before the evidence is presented and a short reminder of this should be given in the summing up.
11. In all special measures cases an explanation should be given about the purpose of presenting evidence with special measures: to permit a witness who may be nervous about giving evidence in open court to give evidence without having to see/be seen by anyone other than those who need to see the witness give evidence (jury, advocates, judge) and to put the witness, so far as is possible, at ease.
12. A transcript of an ABE interview should only be provided to the jury to enable them better to follow the evidence of the witness. If the interview is inaudible, the transcript must not be used as a substitute and the witness may have to give oral evidence at the trial.
13. If the jury are provided with a transcript of an ABE interview, they should be told:
   (1) This is only so that they can more easily follow the interview. However, it is what they see and hear on the recording which is the evidence not what they read on the transcript. For this reason, they must take care to watch the video as it is shown, so that they can assess the manner/demeanour of the witness when giving evidence.
   (2) [If appropriate:] The transcript will be/has been withdrawn after the playing of the recording because there is no transcript of the cross-examination of the witness or any of the evidence of other witnesses and to avoid the danger of concentrating on the transcript, rather than on the evidence as a whole.

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149 [1995] 1 WLR 178
150 *McQuiston* [1998] 1 Cr App R 139

(3) The transcript cannot be revisited and should not be requested during retirement.

14. The transcript should never normally be retained by the jury after the witness has completed their evidence in chief. If, in an exceptional case it is suggested by one or more of the advocates or by the jury themselves that the jury should retain a transcript after the evidence in chief and/or that the recording should be re-played, the judge must hear submissions of the advocates and decide on the appropriate course. Should the judge permit either course, they must always ensure that the cross-examination and re-examination of the witness concerned are fully summed up, and direct the jury that they must base their verdict(s) on the evidence as a whole and must not be over-reliant on the transcript/recording. The case of *R*[151] highlights how much care is called for if a jury are to be given access to transcripts. It is a decision that should never be made without very careful consideration of the relevant authorities and after discussion with the parties.

See also Chapter 10-5: Evidence of children and vulnerable witnesses.

Example 1: Where evidence is to be given by way of ABE followed by live cross-examination

W will give evidence in two parts. First, you will hear the video recorded interview conducted by the police back in […]. This was soon after this alleged behaviour was first reported. One reason things are done this way is so that W does not have to go over that same material in court again. A second reason is that in the video interview you can hear exactly what was said at the beginning of this investigation, and you can also see how the witness was explaining his/her account. This is simply a practical way of presenting evidence in court. And just as with evidence given live in court, it is your job as the jury to decide whether the evidence of any witness is reliable and truthful.

There are two important points for you to bear in mind when watching the interview. First, please pay attention to the evidence in the same way you do with live evidence from the witness box. You are likely to hear it only once and you will not be able to replay the video later in the deliberation room.

{If the jury are to be allowed to have the transcript during the playing of the ABE}

Second, because the interview can sometimes be hard to follow a transcript has been prepared. I have decided that you should have a copy of the transcript to refer to only when the video is playing. It is designed to help you follow the video. But don't let it get in the way of watching the evidence. If you think there may be a mistake in the transcript or the transcript does not reflect what you are seeing or hearing, then what matters is your view of what you see and hear on the video; that takes priority. The evidence is not the transcript; the evidence is the video which you are about to watch. I said that the transcript is just available to you when the video is playing. It will be collected back up when W's evidence is finished. You will not have the transcript when you are in your jury room deciding on the

[151] [2017] EWCA Crim 1487

verdict(s). So, if you want to take notes about the evidence you need to do this using the paper provided.

The second part of W's evidence will happen after the video has been played. W will then be available in court/by a live-link to this court to answer any questions from the prosecution or defence.

Example 2: Where evidence has been given behind screens, through video link and/or with a pre-recorded interview

W gave evidence [insert as appropriate … from behind a screen/by video link/in a recorded interview]. At the start of the case I explained that evidence can be given in various ways. And I want to remind you that you must treat all evidence in exactly the same way, regardless of how it is given. The fact that W gave evidence in this way/these ways has no reflection on D or W, and you must not let it affect your judgement of D or of W's evidence.

Example 3: Where transcripts have been given to the jury

As I have explained earlier, the only reason you had a transcript while you watched and listened to the video of the interview with {witness} was to help you to follow it. What you saw and heard on the video is the evidence; the transcript is not the evidence. You do not have a transcript of what other witnesses said. Those are reasons you cannot keep the transcript. When I review the evidence I will remind you of the main points of what W said.

3-7 Intermediaries

ARCHBOLD 8-100 (witness) and 8.101 (defendant) BLACKSTONE'S D14.3 and 43 (witness) and 14.24 (defendant); CrimPD 6.2

Legal summary

1. One of the special measures that may be available to a witness is the use of an intermediary. As the CrimPD 6.2.1 explains:

   "Intermediaries facilitate communication with witnesses and defendants who have communication needs. Their primary function is to improve the quality of evidence and aid understanding between the court, the advocates and the witness or defendant. Intermediaries are independent of parties and owe their duty to the court."[152]

2. The examination of a witness through an intermediary must take place in accordance with directions made at a ground rules hearing (GRH). The judge and the advocates should be able to see and hear the witness giving evidence: YJCEA 1999, s.29(3).

3. The judge should explain to the jury at the outset that the role of the intermediary is a neutral one to assist the court by allowing the witness to communicate effectively and explain that this has nothing to do with the defendant and should not prejudice them against them. YJCEA 1999 s.32[153] provides:

   "Where on a trial on indictment with a jury evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused."

4. The jury will need an explanation that the intermediary:

   (1) is not an expert;[154]

   (2) is independent;

   (3) is present to assist the court with communication; and

   (4) will only intervene when communication is a problem.

5. The judge should also explain, in neutral terms, any particular health problems of the witness.

6. Defendant's intermediary:

   (1) There is currently no statutory provision in force for intermediaries for Ds.[155] A court may use its inherent powers to appoint an intermediary to assist D's communication at trial (either solely when giving evidence or throughout the

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[152] See Registered Intermediaries Procedural Guidance Manual, Ministry of Justice 2012

[153] As amended by CJA 2003, s.331 and sch. 36, paras.74 and 75

[154] *SJ* [2019] EWCA Crim 1570

[155] CAJA 2009, s.104 (not yet implemented) creates a new s.33BA of YJCEA 1999. This will provide an intermediary to an eligible defendant only while giving evidence.

trial) and, where necessary, in preparation for trial. See CrimPD 6.2.4[156] and the HMCTS scheme.[157]

(2) For further guidance on the approach to use of intermediaries for Ds see CPD 6.2.5 to 6.2.10 and generally in relation to vulnerable defendants see *Rashid*,[158] *Pringle*,[159] *Biddle*,[160] *TI v Bromley Youth Court*[161] and *Thomas*.[162]

(3) An appropriate direction to the jury explaining why D had the services of an intermediary may be needed. In *Pringle*[163] the absence of an appropriate direction contributed to the court's conclusion that the conviction was unsafe.

Procedure and Directions

7. At the PTPH/FCMH, orders should have been given concerning the involvement of an intermediary. These should include:

(1) the order appointing the intermediary;

(2) the instructions to be given to the intermediary;

(3) the date for filing the intermediary's report;

(4) the date by which the advocates must file their questions with the intermediary and the Court;

(5) arrangements for the advocates and intermediary to discuss the questions before the day of the GRH;

(6) the date and time of the GRH;

(7) an order that the intermediary must attend the GRH.

8. If the intermediary is for the benefit of D:

(1) If the intermediary is for D, the stage/s of the trial during which the intermediary should be present.

(2) An agreed form of words will be required in which the jury are told about the difficulties D has and D's need for an intermediary.

(3) Care must be taken not to give to the jury any information which might later be relied on if D elects not to give evidence; and consideration must be given to a direction on the inferences that might be drawn in that event.

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156 *R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin); *R (C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); *R (D) v Camberwell Green Youth Court* [2005] UKHL 4; *R (TP) v West London Youth Court* [2005] EWHC 2583 (Admin). But see *OP v MOJ* [2014] EWHC 1944 (Admin)

157 HMCTS intermediary services

158 *Rashid* [2017] EWCA Crim 2 and see *Grant Murray and Ors* [2017] EWCA Crim 1228

159 [2019] EWCA Crim 1722

160 *Biddle* [2019] EWCA Crim 86; which specifically deals with a common situation where an intermediary company refuses to assist for an abbreviated duration of the trial such as the defendant's evidence.

161 [2020] EWHC 1204 (Admin)

162 [2020] EWCA Crim 117

163 Ibid

(4) A neutral phrase, such as 'communication difficulties', is appropriate if it is not possible to give any other detail of D's difficulties.

(5) The presence of the intermediary sitting next to D in the dock should be explained to the jury as part of the 'Introductory words': see Chapter 3-1 above.

9. At the trial, before W/D gives evidence, the judge should explain to the jury the following:

(1) The need for an intermediary: e.g. by identifying the problems arising from the age or other difficulties of W/D.

(2) The purpose of an intermediary: which is to assist in communication, among other things by helping advocates to ask questions in a way W/D can understand and/or assisting W/D to communicate his/her answers to the jury.

(3) The intermediary is independent of the parties, is present only to assist communication and is not a witness and so is not permitted to give evidence.

(4) The use of the intermediary must not affect the jury's assessment of the evidence of W/D and is no reflection on D or W.

(5) If D elects to give evidence it may be appropriate at this point to give more detail of any difficulties D has, if those difficulties may affect the perception of the jury of D's evidence.

10. Before W/D gives evidence, the intermediary should be sworn or affirm in the presence of the jury.

Example 1: Explanation to the jury where a witness has an intermediary

During this trial, W will be helped by {name} who is an intermediary.

Intermediaries are used when a witness needs help to understand what is being said in court. They are also used to make sure the witness is understood by everyone in court. The intermediary will intervene if they feel W is having difficulty understanding something or needs a break.

An intermediary does not discuss the evidence with a witness or give evidence for them.

Before today, the intermediary met and got to know W, and now the intermediary will help W to follow the proceedings.

At an earlier hearing it was decided how W would be asked questions, for how long and in what way. The intermediary helped the court make these decisions.

The fact that W is being helped by an intermediary must not affect how you assess W's evidence and it is no reflection on D or W.

Example 2: Explanation to the jury where a defendant has an intermediary

During this trial, D will be helped by {name}, who is an intermediary.

Intermediaries are used when a defendant needs help to understand what is being said in court. If a defendant gives evidence, intermediaries are also used to make

sure that everyone in court understands what D is saying. The intermediary will intervene if they feel D is having difficulty understanding something or needs a break.

The intermediary does not discuss the evidence with the defendant or give evidence for the defendant.

Before today, the intermediary met and got to know D, and now the intermediary will help D to follow the proceedings.

At an earlier hearing it was decided how D would be asked questions, for how long and in what way. The intermediary helped the court make these decisions.

The fact that D is being helped by an intermediary must not affect how you assess any of the evidence in this case and it is no reflection on D {if appropriate: or any other D}.

3-8 Anonymous witnesses

ARCHBOLD 8-164; BLACKSTONE'S D14.72 CPD 6.6

Legal summary

1. The decision of the House of Lords in *Davis*[164] that there was no common law discretion permitting witnesses to give evidence anonymously led to Parliament enacting the Criminal Evidence (Witness Anonymity) Act 2008. This was replaced shortly after, in almost identical terms, by ss.86-90 Coroners and Justice Act 2009. The aim was to create a comprehensive statutory scheme to balance the countervailing interests of the accused, the witness, the victim and the public, and to ensure compliance with Article 6, ECHR.[165]
2. An application for a witness anonymity order may be made by either the prosecution or defence.[166] Three conditions as set out in the Act must be shown to be satisfied.[167]
3. A witness anonymity order prevents the identity of the witness from being disclosed in the proceedings,[168] although the witness cannot be screened from the judge or jury.[169] It is to be regarded as a 'special measure of last practicable resort'; save in the exceptional circumstances set out in the Act, "the ancient principle that the defendant is entitled to know the identity of witnesses who incriminate him is maintained."[170]
4. There is no common law or statutory power permitting the statement of an anonymous witness to be read.[171]

Directions

5. The jury will need careful direction to ensure that:
   (1) no unfair prejudice to the defendant is drawn from the use of such measures; and
   (2) the disadvantages faced by the defendant because of the inability to know the identity of the witness are highlighted. In *Ellis v UK*[172] the European Court relied on the judge's careful directions to the jury as a counterbalancing factor to safeguard against an unfair trial when a witness gave evidence anonymously.[173]

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164 [2008] UKHL 36
165 *Mayers* [2008] EWCA Crim 2989 by Lord Judge CJ at para. 7.
166 CAJA 2009, s.87. For procedure see CrimPR 2015 r.18. The AG has issued guidelines: Prosecutor's Role as well as the DPP: Director's Guidance
167 CAJA 2009, s.88. Section 89(2) provides a non-exhaustive list of considerations to which the court should have regard in assessing whether the conditions are met; s.88(6) provides guidance specifically in relation to Condition A.
168 CAJA 2009, s.86. Section 86(2) sets out a non-exhaustive list of protective measures.
169 CAJA 2009, s.86(4).
170 *Mayers* [2008] EWCA Crim 2989 by Lord Judge CJ at paras. 8 and 5.
171 E.g. under CJA 2003, ss.116 or 114.
172 [2012] ECHR 813
173 See paras. 85 to 86 of that judgment.

Example

NOTE: In *Mayers*[174] and in *Nazir*[175] the trial judges' directions were approved by the Court of Appeal.[176] Rather than provide a hypothetical example, what follows is the trial judge's direction in *Nazir*:

{It is not suggested, however, that the language to be used when giving such a direction could not be improved from that which the trial judge in *Nazir* adopted.}

> "Let me turn now to "Rabia Farooq" [the pseudonym of the anonymous witness]. This was a lady who alleges that she saw Nazir pulling Samaira back into the house and who gave evidence under a pseudonym, that is to say anonymously, from behind a screen.
>
> I told you at the time and I repeat that you must not hold it in any way against the defendants, in particular the defendant Nazir, whom the evidence affects, that she was permitted to give evidence in this way. Special arrangements for witnesses in criminal cases are quite commonplace these days. Giving evidence is not intended to be an ordeal and where the judge concludes that the quality of a witness' evidence is likely to be improved by such arrangements, he or she will permit them.
>
> The fact that these arrangements were made for this lady must not be allowed by you to reflect in any way upon the defendants or either of them but it does not end there.
>
> You must also bear in mind that Nazir in particular is disadvantaged by the conditions of anonymity of the witness. It is a pretty fundamental principle that the person is entitled to know the identity of his or her accuser. If the identity is known, then the defendant may be able to say, "Oh, well I am not surprised that X would want to incriminate me or because so and so that happened or that applies to us" i.e. because of some bad feeling or grudge between the witness and the defendant.
>
> This is not available to Nazir in the circumstances of this case. However, you may think that in this case what Nazir is saying and said in interview to the police is not that Rabia Farooq has lied about it, rather that she is mistaken in what she says she saw, so that her evidence is not true. So those circumstances may mitigate the potential unfairness of the situation so far as Nazir is concerned, but you must have that difficulty well in mind."

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174 [2008] EWCA Crim 2989
175 [2009] EWCA Crim 213
176 [2009] EWCA Crim 213 at para.58 for an extract of such a direction, *De St Aubin* [2013] EWCA Crim 1021

3-9 Interpreters

ARCHBOLD 4-58 – 63; BLACKSTONE'S D16.32

Legal summary

1. Every D has a right to participate fully at their trial. As was made clear by the Court of Appeal in *Begum*:[177]

   > "Unless a person fully comprehends the charge which that person faces, the full implications of it and the ways in which a defence may be raised to it, and further is able to give full instructions to solicitor and counsel so that the court can be sure that that person has pleaded with a free and understanding mind, a proper plea has not been tendered to the court. The effect of what has happened in such a situation as that is that no proper trial has taken place. The trial is a nullity".[178]

2. Where it is suspected that lack of understanding of the language of the court would interfere with D's participation in the trial, the judge has a duty to verify the need for interpretation facilities with the defendant, and to satisfy him/herself as to the adequacy of the arrangements made; failure to do so is a violation of the right to a fair trial guaranteed by Art.6(3)(e) of the ECHR. *Cuscani v United Kingdom*.[179] The right to an interpreter includes a right to have documents translated.

3. If D's command of English is such that D needs an interpreter, D cannot waive that right simply because he/she has legal representation.[180] Where D is represented, evidence should still be translated to D unless D or D's advocate requests otherwise and the judge also thinks that is appropriate having regard to whether D substantially understands the nature of the evidence that is going to be given against him/her.

4. Where interpreters are used for D in the course of police interviews, PACE Code C.13 applies. The jury may require some explanation as to why an interpreter was used in interview, particularly if an interpreter is not then used at trial.

5. Interpreter for a witness: The court has a discretion whether to allow a witness to have the assistance of an interpreter.[181]

6. Proceedings in Wales: The Welsh Language Act 1993 sets out the principle that the Welsh and English languages should, in the administration of justice in Wales, be treated on a basis of equality. Section 22(1) stipulates that in legal proceedings in Wales, the Welsh language may be used by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation must be made accordingly. See CrimPR 3.26. If a defendant in a court in England asks to give or call evidence in the Welsh language, interpreters can be provided on request.

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177 (1993) Cr App R 96
178 Per Watkins LJ p.100
179 (2003) 36 EHRR 11, ECtHR. See also European Parliament and Council Directive (EU) 2010/64 (OJ L280, 26.10.2010).
180 *Lee Kun* [1916] 1 KB 337
181 *Sharma* [2006] EWCA Crim 16

Directions

Where an interpreter has been appointed to assist a defendant

7. Where an interpreter has been appointed to assist D, it is important to remember that jurors watch what is going on in the dock and are likely to notice if an interpreter is or is not interpreting the whole of the evidence.
8. The interpreter should be sworn at the beginning of the hearing, in advance of D being identified i.e. before the jury come into court.
9. On being sworn, the interpreter will give his/her name and the language into and from which the evidence will be translated.
10. Confirm with the interpreter that he/she has spoken with D in conference and they are able to understand each other.
11. Confirm with the defence advocate that the interpreter has been able to interpret in conference.
12. Ask the defence advocate whether the interpreter is required for every word/most of the evidence or occasional assistance with words D may not understand.
13. Confirm with the defence advocate that it is appropriate that you inform the jury of the role of the interpreter in the case to avoid prejudice; if for example they see that not all of the evidence is being translated.
14. When the jury have been sworn and put in charge explain to them as part of the Introductory words [see Chapter 3-1] the presence and role of the interpreter sitting alongside D.

Where an interpreter has been appointed to assist a witness

15. Check at the outset of the trial that the interpreter is present and/or is booked to arrive in good time and that arrangements have been made for the interpreter to meet the witness.
16. Ask the advocate calling the witness to confirm, in advance of the evidence, the extent to which the witness will need/use the interpreter.
17. The interpreter is sworn in the presence of the jury and confirms the language to be interpreted.
18. Confirm in the presence of the jury whether the interpreter is to translate all questions and answers (without entering into discussions with the witness) or be available to assist as required.

Example: Interpreter for a defendant

Either: The person sitting next to D is an interpreter. This is because D's first language is {specify}, and D does not speak/ speaks very little English and will need the evidence to be translated.

Or: The person sitting next to D is an interpreter. This is because although D speaks reasonable English, D may need help with some words or phrases.

Example: Interpreter for a witness

Either: This witness does not speak English/speaks very little English. So the evidence will be translated by the interpreter into the witness's first language, which is {specify}.

Or: This witness speaks reasonable English. But their first language is {specify}, and the witness may need help from the interpreter with some words or phrases.

4. FUNCTIONS OF JUDGE AND JURY

ARCHBOLD 4-438; BLACKSTONE'S D18-26

Legal summary

1. The jury need to be directed that they are responsible for decisions of fact; the judge for decisions of law.[182] Such a direction is not a mere formality. Without it, juries might get the impression that any comments made by the judge were matters to which they were bound to pay heed. It is the duty of the judge to ensure that the jury understand that responsibility for the verdict is theirs and not that of the judge.[183] In *Wang*,[184] the House of Lords confirmed that there are no circumstances where a judge is entitled to direct a jury to return a verdict of guilty.
2. The jury does not have to resolve every issue of fact that has been raised but only those which are necessary to reach their verdict/s.
3. The jury must not speculate; they must decide the case on the evidence alone.
4. In some instances, it will be necessary to direct the jury that if they find certain facts to be proved (to the relevant standard) then as a matter of law a particular issue is established. For example, in gross negligence manslaughter, it will be for the jury to establish whether certain facts were proved which, as a matter of law meant that a particular duty of care was owed by the defendant.[185]

Directions

5. The jury should be directed as follows:
   (1) The judge and the jury play different parts in a criminal trial.
   (2) The judge alone is responsible for legal matters. When summing up the judge will tell the jury about the law which is relevant to the case, and the jury must follow and apply what the judge says about the law.
   (3) The jury alone are responsible for weighing up the evidence, deciding what has or has not been proved, and returning a verdict/s based on their view of the facts and what the judge has told them about the law.
   (4) Where there are different accounts in the evidence about a particular matter the jury must weigh up the reliability of the witnesses who have given evidence about the matter, taking into account how far in the jury's view their evidence is honest and accurate. It is entirely for the jury to decide what evidence they accept as reliable and what they reject as unreliable.
   (5) When D has given and/or called evidence: the jury must apply the same fair and impartial standards when weighing up the evidence of the witnesses for the prosecution and the defence.

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182 *Wootton and Peake* [1990] Crim LR 201
183 *Broadhurst* [1964] AC 441 at 457, 459
184 [2005] UKHL 9
185 *Evans* [2009] EWCA Crim 650

(6) The jury do not have to resolve every issue that has arisen, but only those that are necessary for them to reach their verdict(s).

(7) The jury are permitted to draw sensible conclusions from the evidence they accept as reliable, but they must not engage in speculation or guess-work about matters which have not been covered by the evidence.

(8) It is important that the jury's verdict(s) should be based only on their own independent view of the evidence and the facts of the case. Therefore:

(a) Although the jury should consider the points made about the evidence and the facts by the advocates in their speeches, it is for the jury alone to decide which of those points are good and which are not.

(b) Should the judge give the impression when summing up the case that he/she has formed a view about any of the evidence or any of the facts of the case, the jury are not in any way bound by this, and must form their own view.

(c) When summing up the case, the judge will summarise the evidence but will not attempt to remind the jury of all of it. The jury should not think that evidence which the judge does mention in the summing up must be important, or that evidence which the judge does not mention must be unimportant. It is for the jury alone to decide about the importance of the different parts of the evidence.

(9) If appropriate: the jury must not allow themselves to be influenced by any emotional reaction to the case and/or any sympathy for anyone involved in the case and/or by any fixed ideas/preconceptions/prejudices they may have had. This may be particularly appropriate in the trial of sexual offences (see Example directions in Chapter 20).

6. In almost all cases the judge should provide the jury with a written route to verdict[186] and ideally written directions on the law.[187] This is now reflected in the CrimPR – see 25.14, following on from the judgment in *Grant*.[188] The judge should either provide detailed draft directions of law and the draft route to verdict to the advocates in advance of the summing up or, at the very least, have a detailed discussion of the directions of law he/she intends to give to the jury.[189]

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186 *Atta-Dwanka* [2018] EWCA Crim 320 and see also *MJ* [2018] EWCA Crim 1077

187 *Mills* [2021] EWCA Crim 985 para 32: "We are surprised ….. that he did not feel it appropriate to prepare written directions on the law, which would provide a basis against which the jury could return and refer throughout his summing-up and during their deliberations." See also *AB* [2019] EWCA Crim 875 paragraph 56.

188 [2021] EWCA Crim 1243

189 *PP* [2018] EWCA Crim 1300

Example

At the start of this case I explained that you and I have different parts to play in this trial. I am responsible for legal matters, and will tell you about the law which applies to this case. You must accept and apply what I tell you about the law.

You are responsible for weighing up the evidence and deciding the facts of the case. It is entirely up to you to decide what evidence is reliable and what evidence is not.

You do not have to decide every disputed point that has been raised in the trial – only those that are necessary for you to reach your verdict/s.

Some points are not disputed. The evidence that was {read to you/ given to you in the form of Admissions or Agreed Facts} is not in dispute.

But on other points you have heard different accounts from different witnesses. [Briefly give one or two examples.]

Where there is conflicting evidence, you must decide how reliable, honest and accurate each witness is. When doing this you must apply the same fair standards to all witnesses, whether they were called for the prosecution or for the defence.

You may draw sensible conclusions from the evidence you have heard, but you must not guess or speculate about anything that was not covered by the evidence.

It is for you to decide whether any point or points made by the advocates in their speeches are persuasive or not and also for you to decide how important the various pieces of evidence are. For this reason if, when I review the evidence, I do not mention something please do not think you should ignore it. And if I do mention something please do not think it must be an important point. Also, if you think that I am expressing any view about any piece of evidence, or about the case, you are free to agree or to disagree because it is your view, and yours alone, which counts.

Finally, cases like this sometimes give rise to {emotions/sympathy}. You must not let such feelings influence you when you are considering your verdict.

[If appropriate]

Either: I will also give you a written summary of the law that applies to this case. This is not separate or different from what I tell you about the law. It is simply to help you remember what I have said when you are considering your verdict(s).

Or: I will also give you my directions of law in writing, so that you do not have to rely only on your memory of them when you are considering your verdict(s).]

[If appropriate: I will also give you a written list of questions to follow when you are considering your verdicts. These are also part of my written directions to you. If you answer these questions in order, you will reach verdicts which correctly take into account both the law and your conclusions about the evidence.]

5. BURDEN AND STANDARD OF PROOF

ARCHBOLD 4-444; BLACKSTONE'S D18.27 and F3.48 – 54

Legal summary

1. Otherwise than in cases of insanity and exceptions created expressly or impliedly by statute, the prosecution bears the burden of proving that the defendant is guilty: *Woolmington v DPP*;[190] *Hunt*.[191] The standard of proof is to the criminal standard: the prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty.[192]
2. The summing up must contain an adequate direction as to the burden and standard of proof whether or not it has been mentioned by any advocate: *Blackburn*.[193] No particular form of words is essential. The direction is usually given early in the summing up: *Yap Chuan Ching*.[194] What is required is a clear instruction to the jury that they have to be satisfied so that they are sure before they can convict.[195]
3. It is unwise to elaborate on the standard of proof: *Ching (supra)*,[196] although if an advocate has referred to 'beyond reasonable doubt', the jury should be told that this means the same thing as being sure.[197]
4. Particular care is needed to distinguish between situations where there is an evidential burden[198] for the D to raise a particular defence (e.g. alibi, duress, self-defence and non-insane automatism), and where the D has the legal burden of proving the defence (e.g. insanity, insane automatism, diminished responsibility, reasonable excuse for having a bladed article/offensive weapon and s.40 Health and Safety at Work etc Act 1974).[199]
5. Where the defence bears an evidential burden to raise a defence the burden of disproving it to the criminal standard is on the Crown: *Williams*.[200] There must be some evidence. The issue cannot simply be raised by the defence advocate.[201] In cases in which the defence bears the legal burden of proof, it is to the civil standard: D has to show that it is more probable than not: *Carr Briant*.[202]

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190 [1935] AC 462
191 [1987] AC 352
192 See *Ivor* [2021] EWCA Crim 923 for a recent example of the court considering the relevance of D's knowledge of a complainant's relationship dynamic in the context of the prosecution proving an absence of a reasonable belief in consent.
193 (1955) 39 Cr App Rep 84 and *Boaden* [2019] EWCA Crim 2284
194 *Ching* (1976) 63 Cr App Rep 7
195 *Miah* [2018] EWCA Crim 563
196 *Ching* (1976) 63 Cr App Rep 7 at para.11
197 *Desir* [2022] EWCA Crim 1071
198 *Ali v DPP* [2020] EWHC 2844 (Admin)
199 *AH Ltd* [2021] EWCA Crim 359
200 (1984) 78 Cr App Rep 276
201 *Pascoe Petgrave* [2018] EWCA Crim 1397
202 [1943] KB 607

6. Any question from the jury during deliberation about the burden and standard of proof must be shown to the advocates[203] and discussed with them in the absence of the jury. If the jury ask for clarification of the standard, their question should be answered as shortly as possible. In the case of *Majid*,[204] Moses LJ observed:

> "[Any] question from the jury dealing with the standard of proof is the one that most judges dread. To have to define what is meant by 'reasonable doubt' or what is meant by 'being sure' requires an answer difficult to articulate and likely to confuse. No doubt this is why the Judicial Studies Board seeks to avoid it in the direction they give to judges" (per Moses LJ at [9], referring to the direction in the Crown Court Bench Book, the precursor to The Crown Court Compendium)."

7. In the case of *JL*,[205] the jury asked exactly such a question – specifically whether the standard of proof was '100% certainty' or 'beyond reasonable doubt', and if the latter, what 'beyond reasonable doubt' actually means. With the agreement of the advocates, the trial judge said:

   (1) the jury was not required to be 100% certain (relevant only because the question had been specifically asked);

   (2) sure and beyond reasonable doubt meant the same thing; and

   (3) a reasonable doubt was the sort of doubt that might affect the jurors' minds if they were making decisions in matters of importance in their own affairs, their own lives.

   In rejecting a renewed application for leave to appeal, the Court of Appeal said that each answer was correct and appropriate, given the specific questions that had been raised by the jury, and the final formulation as to reasonable doubt was 'unexceptionable'. In *Smith*,[206] however, the court suggested that a judge had been unwise to refer to 'certain' when dealing with a jury question that did not in fact contain that word. The court provided a helpful review of the authorities in this area but like the other cases referred to above did not proffer a specific form of words suitable for use in any situation. It might be thought that it is best to avoid both 'certain' and even 'beyond a reasonable doubt' if faced with a question from the jury seeking further guidance on this topic – a reminder that the prosecution has to make the jury 'sure' in order to prove guilt is probably the safest course to adopt.[207]

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203 *Inns and Inns* [2018] EWCA Crim 1081
204 *Majid* [2009] EWCA Crim 2563
205 [2017] EWCA Crim 621, and see [2018] 2 Crim LR 184
206 [2012] EWCA Crim 702
207 *Bogdanovic* [2020] EWCA Crim 1229 and see further *Boaden* [2019] EWCA Crim 2284 and *Mohammad* [2022] EWCA Crim 380

Directions

8. When (as is usual) the burden of proof is on the prosecution, the jury should be directed as follows:

   (1) It is for the prosecution to prove that D is guilty.

   (2) To do this, the prosecution must make the jury sure that D is guilty. Nothing less will do.

   (3) It follows that D does not have to prove that he/she is not guilty. If appropriate: this is so even though D has given/called evidence.

9. In the situation when D has the burden of proving an issue, the jury should be directed as follows:

   (1) It is for D to prove {specify}.

   (2) To do this, D must show that {specify} is more probable than not to have been the case; but D does not have to go as far as making the jury sure that it was the case.

Example 1: where the burden is on the prosecution

The prosecution must prove that D is guilty. D does not have to prove anything to you. D does not have to prove that he/she is innocent. The prosecution will only succeed in proving that D is guilty if you have been made sure of D's guilt. If, after considering all of the evidence, you are sure that D is guilty, your verdict must be 'Guilty'. If you are not sure that D is guilty, your verdict must be 'Not Guilty'.

[If reference has been made to 'beyond reasonable doubt' by any advocate, the following may be added:

You have heard reference to the phrase 'beyond reasonable doubt'. This means the same as being sure.]

Example 2: where the burden is on the defendant

When you are considering {specify} this is for D to prove. D has to show that it is more likely than not that {specify}. D does not have to make you sure of it.

6. THE INDICTMENT

6-1 Procedural requirements

ARCHBOLD Supplement Appendix B; BLACKSTONE'S Supplement Appendix R

1. Regard must be had to CrimPR 3.32 (Arraigning the defendant), 10.2 (The indictment: general rules) and 25.2 (Trial: General powers and requirements), as amended with effect from 3 October 2022.
2. The court must identify the correct indictment, if more than one has been preferred or proposed: 3.32(1). Note the requirement at 10.2(6)(b) that each version of the indictment should be headed with the date and a statement that it is, as the case may be, the first indictment in the case; a proposed amended indictment; a substituted indictment; an additional indictment; the trial indictment.

Particulars of indictment

3. CrimPR 10.2(1)(b) requires that each count must contain "such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant". It should not be left to the judge, in summing up, to particularise or explain counts expressed in general terms.[208]
4. CrimPR 3.32 and 25.2 require the court to invite confirmation that the indictment is correct and that there are no outstanding amendments or unresolved objections to it, not only at arraignment but before the trial begins. On each occasion, the court must ensure that each of the allegations has been explained in terms that the defendant can understand (usually by the defendant's legal representatives, and with help if necessary).

NOTE: the new power (not requirement) at CrimPR 25.16(3)(e), in cases in which the D is convicted on more than one indictment, to direct a single substitute indictment for the purposes of sentence.

[208] *P* [2022] EWCA Crim 690

6.2 Separate consideration of counts and/or defendants

ARCHBOLD 4-453A; BLACKSTONE'S D18.28

Legal summary

1. If the indictment contains more than one count, the jury should be directed to give separate consideration to each one: *Lovesey*.[209] The jury must reach a verdict on each count separately.
2. If there is more than one count and the evidence on one count is relevant to one or more other counts (i.e. is potentially cross-admissible) see Chapter 13. Even where there is no reliance on cross-admissibility the jury need to be directed that they must reach separate verdicts on each count; see Chapter 13 and *Adams*[210] as well as *Ellis Cloud*.[211]
3. Where the trial involves more than one D, the jury should be directed to consider the case against and for each separately: *Smith.*[212] The jury's verdicts may be the same or different in respect of different Ds on different counts.
4. However, if the evidence against each D or in relation to each count is the same or very similar the judge should so advise the jury and indicate that as a matter of common sense their verdicts are likely to be the same in relation to each D or count.[213]

Directions

5. If there is more than one defendant and (as is usual) the evidence relating to each defendant differs in any material respect, the jury must be directed to consider the case of each separately, and to return separate verdicts on each, which may or may not be the same on each.
6. Where a defendant faces more than one count, the jury must be directed to consider each count separately, and to return separate verdicts on each, which may or may not be the same on each.
7. In a case in which the judge concludes, having discussed the matter with the advocates in the absence of the jury before closing speeches, that given the relevant law and/or the evidence the jury could not properly return different verdicts on two or more defendants and/or counts, the judge should direct the jury accordingly, explaining why the cases against these defendants and/or in respect of particular counts stand or fall together.[214]
8. Where the evidence on one count is likely to affect the evidence and/or verdict of the jury on another see Chapter 13: Cross-Admissibility.

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209 [1970] 1 QB 352
210 [2019] EWCA Crim 1363
211 [2022] EWCA Crim 1668
212 (1935) 25 Cr App R 119
213 *Testouri* [2003] EWCA Crim 3735 which addresses in particular the issue of a 'closed' conspiracy
214 *Testouri* [2003] EWCA Crim 3735

Example (where there are no alternative counts)

There are a number of counts against each defendant and you must return a separate verdict for each defendant that is charged on that count. To do this you must consider the evidence on each count and against each defendant separately.

Your verdicts do not have to be the same on all counts or the same for each defendant.

See also Chapter 6-4: Alternative Verdicts.

6-3 Multiple incident and specimen counts

ARCHBOLD 1-225 and 241; BLACKSTONE'S D11.35; CrimPR 10

Legal summary

1. In most cases each count in the indictment will relate to a specific incident of offending (referred to below as a 'specific incident count'). However, if the allegations relate to a course of conduct, the prosecution may choose to use one or more (a) multiple incident counts (CrimPR 10.2(2)) and/or (b) specimen counts, whether or not the indictment also includes any specific incident counts.[215]

Multiple incident counts

2. Under CrimPR 10.2(2) "more than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission". The circumstances in which such a count may be appropriate include: the same victim on each occasion; the offences involving marked repetition in the method of commission or location; a clearly defined offending period; or the same defence being advanced. Care needs to be taken in such cases to ensure that the sentencing powers for the offence remained the same throughout the period of alleged offending.[216] Helpful guidance on this topic can be found in *Hyde-Gomes*.[217] The difficulty with which a sentencing judge may be presented in the absence of counts that adequately reflect the repeated nature of the offending are highlighted in *CC.*[218]

3. Using a multiple incidents count may be an appropriate alternative to using 'specimen' counts in some cases where repeated sexual or physical abuse is alleged. The choice of count will depend on the particular circumstances of the case and should be determined bearing in mind the implications for sentencing set out in *R v Canavan; R v Kidd; R v Shaw* [1998] 1 W.L.R.604, [1998] 1 Cr. App. R. 79, [1998] 1 Cr. App. R. (S.) 243.

4. In *A*[219] Fulford LJ acknowledged:

> "The problem that this case has highlighted is how does the court deal with a course of conduct count under the Criminal Procedure Rules [now 10.2(2)] when the extent, seriousness and timespan of the defendant's offending is unclear from the jury's verdict. There were no means by which the judge was able to interpret the jury's decision in this regard.
>
> [47] In our judgment, the central answer to this problem is to be identified in the purpose underpinning multiple counts: it is to enable the prosecution to

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215 The case of *Cunningham* [2018] EWCA Crim 2704 is an example of why it is important for consideration to be given to the use of multiple incident counts.

216 See *Forbes* [2016] EWCA Crim 1388 paragraphs 30-34. Particular problems may be encountered in the context of sexual allegations where the offending may straddle, for example, the commencement date of the Sexual Offences Act 2003.

217 [2018] EWCA Crim 2364

218 [2018] EWCA Crim 2704

219 [2015] EWCA Crim 177

reflect the defendant's alleged criminality when the offences are so similar and numerous that it is inappropriate to indict each occasion, or a large number of different occasions, in separate charges. This provision allows the prosecution to reflect the offending in these circumstances in a single count rather than a number of specimen counts. However, when the prosecution fails to specify a sufficient minimum number of occasions within the multiple incident count or counts, they are not making proper use of this procedure. In cases of sustained abuse, it will often be unhelpful to draft the count as representing, potentially, no more than two incidents. Indeed, in this case, if there had been a multiple incident count alleging, for example, "on not less than five occasions" with an alternative of one or more specimen counts relating to single incidents for the jury to consider if they were unsure the offending had occurred on multiple occasions, the judge would have had a solid basis for understanding the ambit of the jury's verdict and he would been able to pass an appropriate sentence. Therefore, the prosecution needs to ensure that there are one or more sufficiently broad course of conduct counts, or a mix of individual counts and course of conduct counts, such that the judge will be able to sentence the defendant appropriately on the basis of his criminality as revealed by the counts on which he is convicted. In most cases it will be unnecessary for the counts to be numerous, but they should be sufficient in number to enable the judge to reflect the seriousness of the offending by reference to the central factors in the case: e.g. the number of victims, the nature of the offending and the length of time over which it extended. Therefore, in drafting the indictment, a balance needs to be struck between including sufficient counts to give the court adequate sentencing powers and unduly burdening the indictment. As the editors of Archbold Criminal Pleading Evidence and Practice 2015 at paragraph 1-225 have observed, the indictment must be drafted in such a way as to leave no room for misinterpretation of a guilty verdict and regard must be had to the possible views reached by the jury and to the position of the judge, so as to enable realistic sentencing." [220]

Specimen counts

5. In some instances the Crown will be relying on a specimen count charging a distinct identifiable offence as an example of one of the multiplicity of incidents which could be charged; but to keep the trial manageable these are not separately indicted. An example would be a single incident of false accounting alleged against a bookkeeper who had perpetrated the same conduct repeatedly over many years – the prosecution may, for example, opt for one count for each year over which the offending spanned. In *Greenwell*[221] the Court of Appeal rejected an argument directed towards the form of the indictment where D was charged with misconduct in public office, the count reflecting a number of distinct incidents of assault committed at a detention centre over a nine-year period. The Court stated that:

> "We can see no difference between the way in which this count was charged (and then supported by examples) and the way in which indictments are

[220] See also *W* [2022] EWCA Crim 1438
[221] [2020] EWCA Crim 1395

framed in cases of, for example, child cruelty or harassment, where several separate incidents might be relied on as examples in order to prove the single charge. In such cases an answer is not sought from the jury in relation to each incident, but the jury must still be sure that there is sufficient evidence to prove the count in question. That is why the directions on a charge of this count of this type are so important".

6. Alternatively, in some instances the Crown may rely on a specimen count alleging a single offence committed on a single occasion within a defined period during which D is alleged to have engaged in a course of similar conduct. This approach will be adopted when the Crown is unable to give particulars of every offence during the period. An example would be a case involving multiple sexual offences against W over a defined period (e.g. between birthdays).

7. It is not always necessary to give a '*Brown*' direction, see *Phillips*.[222] Only in cases in which the Crown is advancing truly alternative bases for a finding of guilt and there is a risk that the jury might feel that it is sufficient for some to be sure of one basis and some on another is a *Brown* direction needed.[223]

> "In most cases where a specimen count is relied on, it is enough for the judge to tell the jury, as the judge did in this case, that they may convict if they are sure that the offence has been committed at least once. Where the complainant cannot particularise any specific incident and merely alleges a pattern of similar conduct, the question for the jury will be whether they are sure that the account of the complainant is reliable. There will be no room for the jury to focus on one incident rather than another because no single occasion is sufficiently distinct, and it would be meaningless and unhelpful to tell the jury that they had to be sure in relation to the same incident."[224]

In *Chilvers*,[225] the court reviewed the law in this area and gave important guidance on its practical application.

The form of the indictment

8. In cases involving an alleged course of conduct, the judge should ensure that the indictment accords with the following principles:

   (1) Where the evidence discloses one or more sufficiently identifiable single incidents, it should usually be reflected in one or more specific incident counts.

   (2) Multiple incident and/or specimen counts are suitable to reflect allegations of a course of conduct (e.g. involving sexual abuse) which are made in general terms, without reference to specific incidents.[226]

   (3) Where the evidence discloses one or more specific incidents and further allegations of a more general nature, specific incidents together with multiple incident and/or specimen counts will be appropriate.

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222 [2019] EWCA Crim 577
223 *Williams* [2012] EWCA Crim 2516
224 Per Elias LJ in *Hobson* [2013] EWCA Crim 819
225 [2021] EWCA Crim 1311 from para 47 onwards and in particular paras 63 and 64
226 See *Forbes* [2016] EWCA Crim 1388 paragraphs 3-34

(4) The indictment should not include so many counts as to be overloaded. Judges have a duty to ensure that this rule is complied with.

(5) The indictment should be framed in such a way as to give the judge sufficient sentencing powers in the event of conviction. A defendant convicted of a multiple incident count, having denied any wrongdoing, must be sentenced on the basis that the defendant committed the minimum number of offences sufficient to justify his/her conviction: for example, two offences if the count alleges 'more than one occasion', or five offences if the count alleges 'at least five occasions'. Similarly, unless the defence otherwise agree, a defendant convicted of a specimen count, having denied any wrongdoing, must be sentenced on the basis that the defendant committed only one offence.[227]

(6) It may be sensible for the prosecution to err on the side of caution when specifying the minimum number of offences alleged in a multiple incident count, to avoid the risk of the jury being obliged to acquit even though sure that D has committed offences of the kind alleged, but on fewer occasions than those alleged in the count.

(7) It is permissible for an indictment to contain a multiple incident count and an alternative specimen count to provide for the possibility that the jury may not be sure that the offending occurred on more than one occasion.

(8) It is important that the defendant knows the case he/she has to meet, and that the jury know what is required of them when returning their verdicts. Unless the indictment makes it clear, the jury should be provided with a separate schedule indicating which counts are specific incident, multiple incident and specimen counts.

Directions

9. The directions should make it clear which of the counts are (as the case may be) specific incident, multiple incident and specimen counts.

10. In relation to any **multiple incident count** the jury should be directed that:

(1) where the prosecution alleges a course of criminal conduct, but are unable to point to specific incidents or say exactly when or how often offences were committed, they may bring a charge that reflects more than one offence; and

(2) before they can convict D they must be sure that D committed the offence concerned on 'at least' or 'not fewer than' or 'more than' the specified number of occasions. This will depend on how the count is expressed, something that should have been discussed with the advocates no later than the start of the trial. If the jury are not sure of the number of incidents specified in the count then they must find D not guilty, even if they are sure that D committed the offence on a smaller number of occasions (see **Example 1** below).

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[227] *Canavan; Kidd; Shaw* [1998] 1 W.L.R. 604; *Hartley* [2011] EWCA Crim 1299; *A* [2015] EWCA Crim 177; *Hyde-Gomez* [2018] EWCA Crim 2364

11. In relation to any specimen count charging an identifiable offence, the direction to the jury should explain that:
    (1) the count is an example of what the prosecution say were many similar offences committed by D;
    (2) the prosecution has chosen an example because the indictment would be too long if every alleged offence were included; and
    (3) before convicting, the jury must be sure that D committed the particular offence charged, whether or not they are sure that D committed any of the other similar alleged offences (see **Example 2** below).
12. In relation to any specimen count which is an example of a number of offences not specifically identified but occurring during a course of conduct, the direction to the jury should explain that:
    (1) the count is an example of what the prosecution say were many similar offences committed by D;
    (2) the prosecution has chosen an example because [as appropriate] the indictment would be too long if every alleged offence were charged and/or because W is not able to say exactly when or how often the offences occurred; and
    (3) before convicting, the jury must be sure that D committed at least one offence of the kind charged during the stated period whether or not they are sure that D also did so on further occasions (see **Example 3** below).
13. It may be appropriate to include a multiple incident count with a specimen count as an alternative, to cover different factual conclusions which the jury might reach (see **Example 3** below).
14. The jury will be much assisted by the use of written directions and/or a route to verdict (see **Route to verdict** below). This will be essential in most cases.

Example 1: Multiple incident count; alleged course of sexual misconduct

W has told you that D sexually assaulted him/her in the same way on many occasions. W cannot now remember when or how often, but says that to the best of his/her recollection it happened at least once a month for a period of six months.

Where the prosecution are not able to say exactly when or how often offences were committed, they may bring a charge which covers more than one incident. This is what has been done here. The count in the indictment alleges that D sexually assaulted W on at least four occasions. If you are sure that D did this, your verdict will be 'Guilty'. If you are not sure that D assaulted W on at least four occasions, your verdict must be 'Not Guilty', even if you are sure that D did sexually assault W on fewer than four occasions. Also, if you are not sure that D ever sexually assaulted W, your verdict will be 'Not Guilty'.

Example 2: Specimen count alleging a particular offence of false accounting

The prosecution say that on ten separate days D made false entries in his/her employers' accounts to hide the fact that he/she was taking their money. To avoid having lots of charges, the prosecution have brought just one charge relating to one of these entries. This is what is called an example or specimen charge.

Although you must take into account all of the evidence, you should return a verdict of 'Guilty' only if you are sure that D committed the particular offence charged, whether or not you are sure that he/she committed any of the other similar offences which the prosecution allege.

Example 3: Alternative multiple incident and specimen counts in the same indictment: alleged course of sexual misconduct; expanded version of Example 2 above

W has told you that D sexually assaulted him/her in the same way on many occasions. W cannot now remember precisely when or how often, but says that to the best of his/her recollection it happened more than once a month for a period of at least six months.

Where the prosecution are not able to say exactly when or how often offences were committed, they may bring a charge which covers more than one incident. That is the case here. In Count 1 they allege that D sexually assaulted W on at least four occasions. If you are sure that D sexually assaulted W on at least four occasions, you will find D guilty on Count 1. You will not then need to consider Count 2, so you will not reach a verdict on Count 2.

In case you are sure that D did sexually assault W but you are not sure that D did so as many as four times, the prosecution have added Count 2. In Count 2 the prosecution allege that D sexually assaulted W on at least one occasion. This is called an example or specimen charge.

If you are not sure that D sexually assaulted W on at least four occasions, but are sure that D did so on at least one occasion, you will find D not guilty on Count 1 but guilty on Count 2.

If you are not sure that D sexually assaulted W at all, you will find D 'Not Guilty' on both Counts 1 and Count 2.

Example route to verdict: Based on Example 3 above

Question 1

Are we sure that D sexually assaulted W in the way W alleges on at least four occasions?

- If **yes**, your verdict will be 'Guilty' on Count 1. This means you will not need to reach a verdict on Count 2, so you will not answer Question 2 below.
- If **no**, your verdict will be 'Not Guilty' on Count 1. You must go on to answer Question 2.

Question 2

Are we sure that D sexually assaulted W in the way W alleges on at least one occasion?

- If **yes**, your verdict will be 'Guilty' on Count 2.
- If **no**, your verdict will be of 'Not Guilty' on Count 2.

6-4 Alternative verdicts

ARCHBOLD 4-524; BLACKSTONE'S D19.41

Legal summary

1. It is highly desirable to include any available alternative as a separate count in the indictment, if it is legally possible to do so, for the following reasons:
   (1) It makes the case easier for the jury to understand and easier to sum up.
   (2) It avoids any potential difficulty arising out of s.6(3) Criminal Law Act 1967 whereby the jury can only convict of an alternative offence not charged in the indictment if they have first found D not guilty of the offence which is charged.
2. If the lesser alternative cannot legally be charged in the indictment (e.g. careless driving as an alternative to dangerous driving) it is good practice to provide the jury with written directions that include a definition of the alternative offence. Whether or not there is a separate count a written 'route to verdict' will assist the jury.
3. *Lemon and Effer*[228] examines the issue of when the defence contend that alternative charges should feature in the indictment so as to give the jury a more palatable alternative to finding D not guilty altogether when there is some evidence of wrongdoing falling short of the offence charged.

Directions

Where the alternative offence is charged in the indictment

4. The two alternative counts should be identified. The constituent elements of the two offences concerned should be explained. Where one offence is more serious than another, this should be explained to the jury.
5. The direction should explain that the prosecution say that D is guilty of Count 1, but if the jury are not sure of that Count 2 is there for them to consider.
6. The jury should be directed to consider Count 1 first. If they find D 'Guilty' of Count 1, they should not consider Count 2, on which they will not be asked to return a verdict. If they are not sure of D's guilt on Count 1, they must find D 'Not Guilty' and then go on to consider Count 2. Thus, they could find D 'Guilty' of Count 1 or Count 2 but not of both; or they could find D 'Not Guilty' of both.
7. It will almost always be appropriate to provide the jury with a written route to verdict in such cases.

Where the alternative offence is not charged in the indictment

8. The direction to the jury should deal with the following matters:
   (1) The count on which the alternative verdict is available should be identified.
   (2) The constituent elements of the two offences concerned should be explained.

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[228] [2018] EWCA Crim 2660

(3) The jury should be told why the offence charged (referred to here as 'A') is more serious than the alternative (referred to here as 'B').

(4) The direction should explain that the prosecution say that D is guilty of 'A', but if the jury are not sure of that, they should consider 'B'.

(5) The jury should be directed to consider 'A' first. If they find D 'Guilty' of that, they should not consider 'B', on which they will not be asked to return a verdict. If they find D 'Not Guilty' of 'A' they should consider 'B' on which they may return a verdict of 'Guilty' or 'Not Guilty'. Thus, they could find D 'Guilty' of 'A' or 'B' but not of both; or they could find D 'Not Guilty' of both.

(6) It will almost always be appropriate to provide the jury with a written route to verdict in such cases.

Example 1: Where alternative counts are on the indictment

There are two counts on the indictment. On Count 1, D is charged with {specify offence}. On Count 2, D is charged with {specify offence}, which is the less serious charge. The important point here is that D cannot be found guilty of both Count 1 and Count 2. I am now going to explain the order in which you need to decide these charges and why you need to do this.

You must consider Count 1 first. This alleges {specify}. If your verdict on Count 1 is 'Guilty' then that is the end of your deliberations and you will not consider Count 2 or return any verdict on Count 2.

However, if you decide that D is not guilty of Count 1, then you must go on to decide Count 2.

Example Route to verdict: Section 18 wounding with intent (count 1) / section 20 unlawful wounding (count 2)

D accepts that he/she wounded W, so the questions for you to answer are these:

Question 1.

Are we sure that when D wounded W, D was acting unlawfully? This means that D was **not** acting in lawful self-defence.

- If **no**, your verdict will be 'Not Guilty' on Counts 1 and 2. This also means you will not need to answer Question 2 below.
- If **yes**, you must go on to answer Question 2.

Question 2.

Are we sure that when D unlawfully wounded W, D intended to cause W really serious injury?

- If **yes**, your verdict will be 'Guilty' on Count 1 and you will not need to reach a verdict on Count 2.
- If **no**, your verdict will be 'Not Guilty' on Count 1 but 'Guilty' on Count 2.

[There may be some rare situations where the need for a third question could arise e.g. if D denies having caused the wound either intentionally or recklessly. In such a case the RTV will need to be amended to incorporate a Q3 as below:

Question 3.

Are we sure that when D unlawfully wounded W, D realised that he/she might cause W some injury?

- If **no**, your verdict will be of 'Not Guilty' on Count 2.
- If **yes**, your verdict will be 'Guilty' on Count 2.]

Example 2: Where alternative counts cannot be on the indictment – careless driving as an alternative to dangerous driving, where the standard of driving is in issue

NOTE: Because the jury do not have a count of careless driving, this direction should be provided in writing. In any event the potential verdicts must be provided in writing in order to avoid confusion.

[Having directed the jury about dangerous driving]

If you find D 'Not Guilty' of dangerous driving – but only in this event – you must go on to decide whether D is guilty or not guilty of careless driving. This is a less serious offence than dangerous driving.

A driver is guilty of careless driving if the way they drive falls below what would be expected of a competent and careful driver.

If you are sure that D's driving fell below that standard you will find D 'Guilty' of careless driving. If you are not sure, your verdict will be 'Not Guilty'.

As to how you should deliver your verdict, depending on what it is: the clerk of the court will ask these questions, which the person you have selected to speak on your behalf will answer.

"Have you reached a verdict on which you are all agreed?"

Assuming that the answer to that is 'Yes', you will then be asked 'What is your verdict?' to which the possible answers are:

1. 'Guilty' (which will mean you have found D guilty of dangerous driving);
2. 'Not Guilty but Guilty of careless driving' (which speaks for itself); or
3. 'Not Guilty' (which will mean that you have found D not guilty of both dangerous driving and careless driving).

NOTE: The jury should be provided with a list of their potential verdicts in writing.

6-5 Agreement on the factual basis of the verdict

ARCHBOLD 4-452; BLACKSTONE'S D18.44

Legal summary

1. The jury must be agreed that every ingredient necessary to constitute the offence has been established.[229]
2. In a small proportion of cases, as underlined in *Phillips*,[230] it will be appropriate to direct the jury that they can only convict if they are agreed about the factual basis of their verdict. Examples are:
   (1) When more than one statement or act is alleged against D in the same count.
   (2) A case of harassment in which several acts are alleged and the jury must be sure that at least two of them occurred.

Directions

3. The need for and form of any such direction should be discussed with the advocates in the absence of the jury before closing speeches. In the rare case in which this is necessary, the jury should be directed that before they can convict D they must:
   (1) all be sure that D committed the offence charged; and
   (2) all be agreed about the manner in which D did so.

Example 1: Based on a charge of putting a person in fear of violence

The prosecution must prove, among other things, that D pursued a course of conduct, which means 'behaved in a way', which amounted to harassment of W. A course of conduct is only established if it is proved that D behaved in such a way on at least two occasions. The prosecution say that D behaved this way on three occasions. They say that on one occasion D followed W in the street; that on a second occasion D assaulted W; and on a third occasion, D made an offensive phone call to W.

D can only be found guilty if you are sure that the prosecution is correct about at least two of these occasions, and you must also agree about which particular two occasions they were.

If you are sure that D behaved this way on two occasions, it does not matter if you are also sure that D behaved this way on the third occasion. But as a jury you must agree on which two occasions that D behaved in this way. If you cannot agree on which two occasions D behaved in this way, then you have to find D 'Not Guilty' of the charge.

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229 *Brown (K.)* (1983) 79 Cr.App.R. 115, CA
230 [2019] EWCA Crim 577

Route to verdict based on the above charge

It is agreed that if any 2 of the 3 alleged events occurred this would amount to a course of conduct and D would be guilty of putting a person in fear of violence. To reach a verdict on this charge, you have to answer these questions.

Question 1.

Are we all sure that D followed W in the street **and** assaulted W?

- If **yes**, your verdict will be 'Guilty'. You have no more questions to answer, so do not consider Questions 2 and 3.
- If **no**, you have not yet reached a verdict. You must go on to answer Question 2.

Question 2.

Are we all sure that D followed W in the street **and** made an offensive phone call to W?

- If **yes**, your verdict will be 'Guilty'. You have no more questions to answer, so do not consider Question 3.
- If **no**, you have not yet reached a verdict and you must go on to answer Question 3.

Question 3.

Are we all sure that D assaulted W **and** made an offensive phone call to W?

- If **yes**, your verdict will be 'Guilty'.
- If **no**, your verdict will be 'Not Guilty'.

Example 2: Route to verdict based on fraud by false representation where there have been 2 alleged representations.

It is agreed that if either of the 2 representations charged in the indictment was made, it would have been false; so the questions you have to answer are as follows:

Question 1.

Are we sure that D made representation (1)?

- If **yes**, go to Question 2.
- If **no**, skip Question 2 and go to Question 3.

Question 2.

Are we sure that when D made representation (1) D:

(a) was acting dishonestly; **and**

(b) intended to make a gain for him/herself?

- If **yes**, your verdict will be 'Guilty'. You have no more questions to answer so do not answer Questions 3 or 4.
- If **no**, go to Question 3.

Question 3.

Are we sure that D made representation (2)?

- If **no**, your verdict will be 'Not Guilty'. You have no more questions to answer, so do not answer Question 4.
- If **yes**, go to Question 4.

Question 4.

Are we sure that when D made representation (2) D:

(a) was acting dishonestly; **and**

(b) intended to make a gain for him/herself?

- If **yes**, your verdict will be 'Guilty'. You have no more questions to answer.
- If **no**, your verdict will be 'Not Guilty'. You have no more questions to answer.

7. CRIMINAL LIABILITY

7-1 Child defendants including doli incapax

ARCHBOLD 1-157; BLACKSTONE'S A3.73

Legal summary

1. The presumption that a child of not less than 10 but under 14 years inclusive is incapable of forming criminal intention (i.e. *doli incapax*) was abolished by Crime and Disorder Act 1998 s.34[231] but remains relevant for offences alleged to have been committed before its abolition, i.e. before 30 September 1998. Since 30 September 1998 all children aged 10 or over are treated as having the same capacity as adults to commit criminal offences.
2. In cases (most commonly of historic sex) where the date of the alleged offence is or may be before 30 September 1998 and the defendant was over 10 years of age but under 14 years of age at the date of the offence the court will have to direct the jury on the rebuttable presumption of *doli incapax* i.e. that D knew that what he/she was doing was seriously wrong as distinct from it being merely naughty or mischievous. The evidence to prove this knowledge must not be simply proof of the doing of the act charged or the age/maturity of the alleged offender.[232] There must be 'stand alone' evidence sufficient for the jury to be sure.
3. The irrebuttable presumption that a boy under the age of 14 is incapable of sexual intercourse was abolished by s.1 of the Sexual Offences Act 1993. It does not have retrospective effect.
4. The age of a child (whether over or under 14 years) is likely to be a relevant factor where:
   (1) the offence in question requires a specific intent or subjective recklessness (e.g. dishonesty or foresight of consequences);
   (2) a possible defence has a subjective element;
   (3) a possible defence requires an assessment of reasonableness (e.g. loss of control, duress, self-defence);
   (4) it is shown that a child is not of normal development for their age (e.g. in a defence of diminished responsibility).
5. Discussion with the advocates will be required to identify relevance in the particular case.

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231 *JTB* [2009] UKHL 20

232 See *PF* [2017] EWCA Crim 983; and *DM* [2016] EWCA Crim 674

Directions

6. The need for, and form of, any directions to the jury relating to D's age should be discussed with the advocates in the absence of the jury before closing speeches.

7. Should a direction be thought appropriate, its exact terms will have to be tailored to the circumstances of the individual case. It will have to include an identification of the issue to which D's age is relevant and a direction that the jury should consider that issue in the light of what they know of D's age, development and maturity at the time of the alleged offence.

Example

D was born on 21 January 1983. The indictment alleges that D indecently assaulted W between 1 January 1996 (when D was 13) and 31 January 1998 (when D was 15). D admits knowing W but says that nothing happened between them. In any event D says he/she had no contact with W after the end of July 1996 i.e. when D was still 13 years of age. The age of D is relevant because, as a matter of law, someone aged under 14 is presumed, unless the contrary is proved, to be incapable of committing a criminal offence.

{Define the offence in the context of the facts.}

You could only convict D if you were sure that he/she indecently assaulted W as alleged. If you are not sure, then your verdict will be 'Not guilty'.

If you are sure D did indecently assault W, **and** you are sure D was aged at least 14 when that happened, then your verdict will be 'Guilty'.

If D was or may have been under the age of 14 at the time of the alleged offence then you could only convict if you are sure D knew that what he/she did was **seriously wrong** and not merely naughty or mischievous. A conclusion that D knew what he/she was doing was seriously wrong must not be based solely on the evidence relied upon by the prosecution in support of the charge(s); there must be some other evidence.

The prosecution say that you can be sure from the evidence that D was at least 14 when this incident happened. Alternatively, if you are not sure of that, the prosecution say you can be sure that D knew what he/she was doing was **seriously wrong** because {specify supporting evidence – making clear that this evidence is not simply the proof of D doing the act charged}.

The defence say you cannot be sure D did the act alleged and thus you should find D 'Not guilty'. The defence say further that even if you are sure that D did what is alleged, you cannot be sure that D was 14 when it happened. In those circumstances the defence say that you cannot be sure that D knew that what he/she was doing was **seriously wrong** because {specify defence argument/s and, though the presumption is in D's favour and therefore need not be supported by evidence, any supporting evidence that exists}.

Route to verdict

Question 1

Are we sure that D indecently assaulted W (as defined)?

- If **yes**, go to question 2.
- If **no**, your verdict will be one of 'Not Guilty'.

Question 2

Are we sure that D was 14 or over when D indecently assaulted W?

- If **yes**, your verdict will be one of 'Guilty'.
- If **no**, go to question 3.

Question 3

Are we sure that D knew what he/she was doing was seriously wrong, as opposed to merely naughty or mischievous?

- If **yes**, your verdict will be 'Guilty'.
- If **no**, your verdict will be 'Not Guilty'.

7-2 Joint participation in an offence

ARCHBOLD 18-9 and 18-15; BLACKSTONE'S A4.1

Legal summary

General introduction

1. Legal liability for a criminal offence may arise in the following circumstances in which D is involved with another or others:
   (1) by D's own conduct and with the necessary fault, D committed the offence with another (P) [joint principal: see Chapter 7-3 below];
   (2) by D's own conduct and with intent, D assisted another (P) to commit the offence [assisting: see Chapter 7-4 below];
   (3) by D's conduct and with intent, D encouraged another (P) to commit the offence [encouraging: see Chapter 7-4 below];
   (4) D 'commanded or commissioned' (i.e. ordered or suggested) the offence committed by another (P) and P committed it with the necessary fault [procuring: see Chapter 7-4 below].
2. Any person who aids, abets, counsels or procures the commission of any indictable offence, is liable to be tried and punished as a principal offender.[233] Secondary participation is a specific intent offence for the purposes of intoxication: see Chapter 9.
3. It has always been sufficient to prove that D was either the principal or accessory:[234] it is not necessary to specify what role D is alleged to have played.[235] The Crown should draw the particulars of the offence 'in such a way as to disclose with greater clarity the real nature of the case that the accused has to answer'.[236]
4. If all that can be proved is that the principal offence was committed either by D or by P, both must be acquitted.[237] Only if it can be proved that the one who did not commit the crime as principal must have aided, abetted, counselled or procured the other to commit it, can both be convicted.[238]
5. In the context of death or injury caused to children or vulnerable adults, see however the statutory solution offered in Domestic Violence, Crime and Victims Acts 2004 and 2012.

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233 Accessories and Abettors Act 1861, s.8; *Jogee* [2016] UKSC 8
234 *Fitzgerald* [1992] Crim LR 660
235 *Gianetto* [1997] 1 Cr.App.R.1
236 *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350 at p. 1357D Lord Hailsham of St Marylebone
237 *Abbott* [1955] 2 QB 497; *Banfield* [2013] EWCA Crim 1394, [2014] Crim LR 147
238 *Lane and Lane* (1985) 82 Cr App R 5

7-3 Joint principals

ARCHBOLD 18-6; BLACKSTONE'S A4.1

Legal summary

1. Where there are several participants in a crime, D will be a principal offender if D's conduct fulfils the *actus reus* element of the crime and at the time of performing the *actus reus,* D had the relevant *mens rea*.[239] The crucial question in deciding whether D is a joint principal or an accessory is whether D by D's own act (as distinct from anything done by P with D's advice or assistance) performed the *actus reus*. There is no need for D and P to act with a common purpose to commit the crime together although in cases of joint principals they usually will: they may for example both independently engage in attacking W, each intentionally causing W GBH by their blows. If each has by their own acts caused GBH then they are liable as a principal.

Directions

2. If the prosecution put their case on the sole basis that each of two or more Ds was a principal offender (i.e. that each carried out the *actus reus* of the offence concerned with the necessary *mens rea*) the jury should be directed to consider each D separately, that their verdict(s) on each may or may not be the same, and that they should convict the D whose case they are considering only if they are sure that all the elements of the offence have been proved against him/her: see Example below.
3. However in almost all cases involving two or more Ds it will be necessary to give a direction as to the secondary liability of one or more of them: see Chapter 7-4.
4. In almost all cases the prosecution will allege that one or more Ds are guilty because they must have been either a principal offender or an accessory/secondary party. In such cases it is not necessary for the jury to be satisfied whether any one D was a principal or an accessory, provided that they are satisfied that he/she participated with relevant *mens rea*. An example would be where W suffered injuries in an attack in which several Ds took a physical part, but it is not known which D caused which injuries if any: see Examples 2 and 4 in Chapter 7-4.

Example: In a case of robbery where two Ds are alleged to have acted as joint principals

NOTE: This is a simple 'joint principal' example, but in reality there will be few cases in which it will not be open to the jury to find that of two Ds, one acted as a principal and one as a secondary party: directions will need to be crafted accordingly.

Charge: robbery. It is alleged that D1 and D2, having planned to commit a street robbery, followed W into a subway and then both Ds took hold of W and both demanded W's mobile 'phone. When W refused, both Ds searched W's pockets.

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239 *Macklin and Murphy* (1838) 2 Lew CC 225

During the search D1 found and removed W's mobile 'phone. Both Ds then ran away.

Both Ds admit that they were present but both deny using any force on W or searching W. D1 admits asking W for his/her mobile 'phone but claims that he/she only wanted to borrow it to make an urgent 'phone call and W gave it to him/her voluntarily. D2 says that he/she was with D1 but played no part in what happened.

You must consider the case of each D separately and you will return a separate verdict in respect of each D. Your verdicts may, or may not, be the same in each D. You may only convict the D whose case you are considering if you are sure that that D used force on W, that he/she did so in order to steal from W and that that D took part in stealing the 'phone from W's pocket.

7-4 Accessory/secondary liability

ARCHBOLD 18-9; BLACKSTONE'S A4.5

Legal summary

NOTE: This is a complex area of the law and what follows is no more than a summary. Whenever an issue of law arises in this area it is essential to refer to the major textbooks.

1. Following the decision in *Jogee*,[240] *Ruddock*[241] the Supreme Court and Privy Council unanimously re-stated the principles concerning the liability of secondary parties in a single judgment. The court held that the so called 'parasitic accessory' approach to liability[242] is no longer to be applied in English law. Numbers in square brackets are paragraph numbers of the judgment.
2. D's liability for criminal offences committed by P is to be based on ordinary principles of secondary liability [76].
3. D is liable as an accessory (and not as a principal) if D assists or encourages or procures another person, P to commit the offence and D does not, by D's own conduct, perform the *actus reus*.[243] The offence occurs where and when the principal offence occurs.[244] It is not necessary that D's act of assistance or encouragement was contemporaneous with the commission of the offence by P.[245] D's acts must have been performed before P's crime is completed. There is no requirement that D and P shared a common purpose or intent.[246] It is immaterial that D joined in the offence without any prior agreement.[247]
4. It is important to focus on the scope of the enterprise D and P have embarked upon and whether D has the relevant intention as to P's crime. Where D and P are targeting a particular victim, X, and P murders V, D may still be liable for murder (i) by virtue of transferred intent where P killed V intending to kill X, or (ii) P has killed V in the course of the enterprise to kill X. In that latter case, the focus will be on whether D had a 'conditional intention' that should the need arise P would kill or cause GBH to someone other than X. See *Jogee* at [92]-[94]. By contrast, there is an argument that D should not be held liable where the enterprise with P was to kill X, and P, acting on a frolic of his/her own, intentionally selected a different target, V, and murdered him/her. Where there is an issue as to whether P's targeting of V may have fallen outside the scope of the alleged joint enterprise this is quintessentially a matter for the jury.[248]

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240 [2016] UKSC 8
241 [2016] UKPC 7
242 The approach laid down by the Privy Council in *Chan Wing Siu v R.* [1985] A.C. 168, as subsequently adopted in English law could not be supported.
243 *Kennedy (No 2)* [2007] UKHL 38
244 *JF Alford Transport Ltd* [1997] EWCA Crim 654
245 *Stringer [2011] EWCA Crim 1396*
246 *A-G's Reference (No 1 of 1975)* [1975] QB 773
247 *Rannath Mohan* [1967] 2 AC 187
248 *BHV* [2002] EWCA Crim 1690 and see *Jogee*, in particular para 94

5. D's liability for **assisting** or **encouraging** an offence will depend on proof that the offence was committed even if the principal offender cannot be identified.

6. Principal guidance is provided in *Jogee* at para 12:

> "Once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on D1's conduct or on the outcome: *R v Calhaem* [1985] QB 808. In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging D1 so that the encouragement of a single one of them could not be shown to have made a difference. The encouragement might have been given but ignored, yet the counselled offence committed. Conversely, there may be cases where anything said or done by D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately, it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it."

Further assistance can be found in the judgment of *Rowe and Ors*[249] at paras 128-134. The issue has also been recently reviewed in an application for leave to appeal which was firmly rejected: see *Hussain and Ors*.[250]

7. D's liability for assisting an offence will depend on proof that:

   (1) D's conduct[251] assisted the offender, P, in the commission of the offence.[252]

   (2) D intended that his/her conduct would assist P.[253] There need not be a meeting of minds between D and P.

   (3) D intended that his/her act would assist P in the commission of: either (i) a type of crime, without knowing the precise details or (ii) one of a limited range of crimes that were within D's contemplation.

   (4) D had not withdrawn at the time of P's offence: see Chapter 7-5.

8. D's liability for **encouraging** an offence will depend on proof that:

   (1) D's conduct amounting to encouragement came to the attention of P.[254] It does not matter that P would have committed the offence anyway[255] since there is no requirement that D's conduct has caused P's conduct.[256]

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249 [2022] EWCA Crim 27
250 [2023] EWCA Crim 697
251 Which can, subject to D's *mens rea*, include an omission when D was under a duty to act *Webster* [2006] EWCA Crim 415
252 Following *Jogee* paragraph 12, read literally, the prosecution may not even have to establish this.
253 *Bryce* [2004] EWCA Crim 1321; *NCB v Gamble* [1959] 1 QB 11; *Jogee*
254 But see para 12 of *Jogee* above.
255 *A-G v Able* [1984] QB 795 at p.812; see also *Jogee* para 12
256 *Calhaem* [1985] QB 808, followed in *Luffman* [2008] EWCA Crim 1739 and *Rowe and Ors* [2022] EWCA Crim 27

Non-accidental presence may suffice if D's presence did encourage and D intended it to.[257]

(2) D intended,[258] by his/her conduct to encourage P. The prosecution do not need to establish that D desired that the offence be committed.[259] P must have been aware that he/she had D's encouragement or approval.

(3) D knew,[260] or if the act is preparatory to P's offence, intended the essential elements of P's crime, albeit not of the precise crime or the details of its commission.[261]

(4) Where it is alleged that D **counselled** P to commit the offence, that offence must have been within the scope of P's authority i.e. was one which P knew he/she had been encouraged to commit.[262]

(5) D had not withdrawn at the time of the offence: see Chapter 7-5.

9. D's liability for **commanding or procuring** will depend on proof that D's conduct caused P to commit the offence and that D acted with intent to 'to produce by endeavour' the commission of the offence.

10. It is not necessary to prove that there existed any agreement between D and P to commit an offence [17].

11. D's mens rea is satisfied by proof that:

(1) D intended to assist or encourage P.

(2) D had done so with knowledge of 'any existing facts necessary' for P's conduct/intended conduct to be criminal [9 and 16]; i.e. D must intend/know that P will act with the *mens rea* for the offence.

(3) Intention is what is required. As elsewhere in the criminal law, that is not limited to cases where D 'desires' or has as his/her 'purpose' that P commits the offence. [91] Most importantly, intention is not to be equated with foresight: "Foresight may be good evidence of intention but it is not synonymous with it." [73].

(4) "Knowledge or ignorance that weapons generally, or a particular weapon, is carried by P will be evidence going to what the intention of D was, and may be irresistible evidence one way or the other, but it is evidence and no more." [26 and 98].[263]

(5) Where P's offence requires proof that P acted with intent (e.g. murder) D must intend to assist/encourage P to act with that intent [10]; it is sufficient that D intended to assist or encourage P to commit grievous bodily harm [95 and 98]. It is not necessary for D to intend to encourage or assist P in killing.

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257 *Clarkson* [1971] 1 WLR 1402 emphasising that care is needed where D is drunk and might not realise that he/she was giving encouragement.
258 This is not restricted to purposive intent: *Bryce* [2004] EWCA Crim 1321
259 *Jogee* para. 90
260 *ABC* [2015] EWCA Crim 539
261 *Jogee* para. 14
262 *Calhaem* [1985] QB 808
263 *Brown and Ors* [2017] EWCA Crim 1870

12. Where there is a prior joint criminal venture it might be easier for the jury to infer the intent. It "will often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional." [92].

    "If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D must have foreseen that, in the course of committing crime A, P might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances." [94].

13. An intention may also be inferred where there was no prior criminal venture. Where "D joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if P acts with intent to cause serious bodily injury and death results, P and D will each be guilty of murder." [95].

14. D may claim that P's act is an overwhelming supervening event (OSE) and that any assistance or encouragement that D may have given has been superseded. The Supreme Court recognised this in *Jogee* at para [97]-[98]:

    "97. The qualification to this (recognised in *Wesley Smith*, *Anderson and Morris* and *Reid*) is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.

    98. This type of case apart, there will normally be no occasion to consider the concept of "fundamental departure" as derived from *English*. What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. The tendency which has developed in the application of the rule in *Chan Wing-Siu* to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least. Very often he may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more."

15. This approach replaces the pre-*Jogee* position in which D could plead a 'fundamental difference'. The law concerning OSE has been subject to review in *Grant and Ors*[264] and now even more recently in *Smith and Smith*[265] and what follows should be read in the light of that judgment. The court in *Grant*, echoing *Tas*, emphasised the limited circumstances in which it envisaged a successful claim of OSE arising in practice.

16. There are four things to bear in mind. First, the court will need carefully to consider whether a claim of overwhelming supervening event is something that should be left to the jury. It is perfectly proper for a judge to withdraw the issue if there is not sufficient evidence on which a jury could reach the conclusion that there was an overwhelming supervening event. In *Tas*[266] the President of the Queen's Bench Division said this:

> 40"…It is important not to abbreviate the test articulated above which postulates an act that "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history". In the context of this case, the question can be asked whether the judge was entitled to conclude that there was insufficient evidence to leave to the jury that if they concluded (as they must have) that, in the course of a confrontation sought by Tas and his friends leading to an ongoing and moving street fight (which had Tas driving his car following the chase to ensure that his friends could be taken from the scene), the production of a knife is a wholly supervening event rather than a simple escalation.
>
> 41 We repeat that in the light of the relegation of knowledge of the weapon as going to proof of intent, it cannot be that the law brings back that knowledge as a pre-requisite for manslaughter. In our judgment, whether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is in a far better position than this court to reach a conclusion as to evidential sufficiency."

17. Secondly, if the matter is left to the jury the test is a narrow one and not to be diluted: "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history".

18. Thirdly, in a case of murder by P, if P's act is a supervening overwhelming event, consideration needs to be given to whether D is liable for a lesser offence and if so what: see *Tas*.

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264 [2021] EWCA Crim 1243
265 [2022] EWCA Crim 1808
266 [2018] EWCA Crim 2603

19. Finally, in deciding whether to leave the issue to the jury, and if doing so deciding on how to direct them, care must also be taken to avoid the issue of knowledge of a weapon, which following *Jogee* is no longer necessarily a central issue, being reintroduced as a matter of overwhelming supervening event. As the PQBD stated in *Tas*:

> "…one of the effects of *Jogee* is to reduce the significance of knowledge of the weapon so that it impacts as evidence (albeit very important if not potentially irresistible) going to proof of intention, rather than being a pre-requisite of liability for murder. We do not accept that if there is no necessary requirement that the secondary party knows of the weapon in order to bring home a charge of murder (as is the effect of *Jogee*), the requirement of knowledge of the weapon is reintroduced through the concept of supervening overwhelming event for manslaughter.
>
> The argument can be tested in this way. The joint enterprise is to participate in the attack on another and events proceed as happened in this case with Tas punching one of the victims (otherwise than in self-defence), then providing backup (and an escape vehicle) to the others as they chased after them. One of the principals kicks the deceased to death (or, as articulated in [96] of *Jogee*, the violence has escalated). Alternatively, a bottle is used or a weapon found on the ground. Both based on principle and the correct application of *Church* (participation by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some, not necessarily serious, harm to another, with death resulting), a conviction for manslaughter would result: the unlawful act is the intentional use of force otherwise than in self defence."

20. That point was reiterated in *Harper*[267] where the Court rejected the argument that a failure to leave OSE to the jury undermined the safety of the conviction, when that argument was based on the lack of evidence that D knew that P had a knife when they both attacked V. As the PQBD stated:

> "This submission ignores the thrust of *Jogee*. First, intention to assist in a crime of violence is not determined only by whether D2 knows what kind of weapon D1 has in his possession: see *Jogee* at [98] which goes on: "Knowledge or ignorance that weapons generally or a particular weapon is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more." at [28]

D's liability for manslaughter if D did not intend that P should commit murder

21. If P murdered W in the course of a criminal venture with D but D did not intend that P might **intentionally** kill or cause really serious harm, D can be found guilty of manslaughter if the jury are sure that D intentionally participated in an offence in the course of which W's death was caused and a reasonable person would have realised that, in the course of that offence, some physical harm might be caused to some person.[268]

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267 [2019] EWCA Crim 343
268 *Church* [1965] EWCA Crim 1

D's liability for manslaughter if P is convicted of manslaughter

22. Where D and P participate in a crime and in the course or furtherance of that crime P kills W without intentionally doing so or intending to cause GBH, P will be liable to be convicted of manslaughter if:
    (1) P intentionally performed the unlawful act;
    (2) that act caused W's death;
    (3) a reasonable person sharing P's knowledge of the circumstances would have realised that P's unlawful act might cause a risk of some physical harm, albeit not necessarily serious harm, to W.
23. If there was a manslaughter by P, D will be guilty of it if:
    (1) D participated in the unlawful act (as a joint principal or accessory);
    (2) D was aware of the circumstances in which the unlawful act would be committed;
    (3) a reasonable person sharing D's knowledge of the circumstances would have realised that P's unlawful act might cause a risk of some physical harm to W.
24. D can also be guilty of manslaughter, irrespective of P's liability if D intentionally committed an offence and it caused W's death and a reasonable person would realise that that act might cause a risk of some physical harm to some person albeit not necessarily serious harm.[269]
25. D will not be liable for P's offence if D and P have agreed on a particular victim and P deliberately commits the offence against a different victim.

Directions

NOTE:

(a) In some cases the prosecution may allege that D is guilty because D was either a principal offender or an accessory/secondary party, though they cannot say which (see Examples 2 and 4).

(b) The following numbered paragraphs are based on the law as stated in *Jogee; Ruddock v. The Queen*.[270] As in the Legal summary above, numbers in square brackets are paragraph numbers of the judgment.

(c) A direction based on paragraph 16 below will need to be given in every case in which D is said to be liable as an accessory/secondary party. Directions based on the subsequent paragraphs should be added only if and as appropriate to the facts and issues in the particular case. The need for and form of any such directions should be discussed with the advocates in the absence of the jury before closing speeches.

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269 *Church* [1965] EWCA Crim 1; *Bristow* [2013] EWCA Crim 1540
270 [2016] UKSC 8; [2016] UKPC 7

The jury must be directed as follows:

26. D is guilty of a crime committed by another person (P) if D intentionally assists/encourages/causes P to commit the crime [8, 9 and 99].

27. If P's crime requires a particular intention on P's part, e.g. murder or a section 18 offence: this means that D must intentionally assist/encourage/cause P to (commit the *actus reus*) with (the required intent). In *Jogee* paras.90 and 98 it is said that in a case of concerted physical attack resulting in GBH to W, it may be simpler and will generally be perfectly safe to direct the jury that D must intentionally assist/encourage/cause P to cause such harm to W, D intending that such harm be caused.

28. Though the prosecution must prove that D intended to assist/encourage/cause P to commit the crime concerned, they do not need to prove that D had any particular wish/desire/motive for the offence to be committed [91]. Such a direction is most likely to be appropriate in conjunction with those referred to in Directions 20 and 28 below.

29. The prosecution must prove that D knew about the facts that made P's conduct criminal [9].

30. Where D does not know which particular crime P will commit, e.g. where D supplies P with a weapon to be used for a criminal purpose: D need not know the particular crime which P is going to commit. D will be guilty if D intentionally assists/encourages/causes P to commit one of a range of offences which D has in mind as possibilities, and P commits an offence within that range [10, 14 and 90]. See also Direction 18 above and *BHV*[271] above.

31. It does not matter whether P commits the crime alone or with others.

32. D need not assist/encourage/cause P to commit the crime in any particular way e.g. by using a weapon of a particular kind [98].

33. It is not necessary that D should have met or communicated with P before P commits the crime.

34. D's conduct in assisting, encouraging or causing P to commit the crime may take different forms. It will usually be in the form of words and/or conduct. Merely associating with P/being present at the scene of P's crime will not be enough; but if D intended by associating with P/being present at the scene to assist/encourage/cause P to commit the crime e.g. by contributing to the force of numbers in a hostile confrontation, or letting P know that D was there to provide back-up if needed, then D would be guilty [11, 78 and 89].

35. The prosecution do not have to prove that what D did actually influenced P's conduct or the outcome [12]; see also *Rowe*.[272]

36. The prosecution do not have to prove that there was any agreement between D and P that P should commit the offence concerned [17, 78 and 95].

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271 [2022] EWCA Crim 1690
272 [2022] EWCA Crim 27

37. Where the prosecution **do** allege an agreement between D and P: the agreement that P should commit the crime need not be formal or made in advance. It may be spoken or made by a look or a gesture. The way in which people behave, e.g. by acting as part of a team, may indicate that they had made an agreement to commit a crime. Any such agreement would be a form of encouragement to P to commit the crime [78].

38. Where the prosecution allege that there was an agreement between D and P to commit crime A, in the course of doing which P went on to commit crime B, with which D is also charged, a direction based on the following will be appropriate: if D agrees with P to commit crime A, in the course of doing which P also commits crime B, D will also be guilty of crime B if D shared with P an intention that crime B, or a crime of that type, should be committed if this became necessary. It is for the jury to decide whether D shared that intention with P. If the jury were satisfied that D must have foreseen that, when committing crime A, P might well commit crime B, or a crime of that type, it would be open to the jury to conclude that D did intend that crime B should be committed if the occasion arose. Whether or not the jury think it right to draw that conclusion is a matter entirely for them [91-94]. See also para 18 above.

Example 1: Dwelling house burglary; one accessory/secondary party providing assistance beforehand, the other doing so at the scene

D1 and D2 are charged with the burglary of a dwelling house with intent to steal. Neither entered the house. This was done by P who has pleaded guilty. The prosecution say that D1 provided P with tools (jemmy, wire cutter, glass cutter and a torch), which P used when breaking into the house; and that D2 went to the house with P but stood outside as a look-out. D1 denies providing the tools used by P. D2 says that he/she arrived at the house by coincidence, and knew nothing of the burglary.

The law states that a D may be guilty of a crime even if the crime is actually carried out by another person. If D intends that a crime should be committed and assists/encourages/causes it to be committed, D is guilty of the crime, even if somebody else actually carries it out.

The prosecution say that D1, D2 and P all played their different parts in committing this burglary; and that D1 and D2 are therefore guilty even though P actually carried it out.

D1 will therefore be guilty of this burglary, even though D1 did not carry it out personally, if:

1. D1 provided the tools to P; **and**
2. D1 intended to assist P (or anyone else) to carry out a burglary of some kind; **and**
3. P used the tools when breaking into the house.

The prosecution does not have to prove that D1 knew where, when or by whom the burglary was to be committed, or that D1 had any wish/desire that any burglary should be committed.

For the same reasons, D2 will be guilty of this burglary, even though D2 did not carry it out, if D2 intentionally helped P to carry out the burglary by keeping a look-out while P was in the house.

Route to verdicts for Example 1

D1

Question 1

Are we sure that D1 provided the tools used by P to commit the burglary?

- If **no**, your verdict will be 'Not Guilty'.
- If **yes**, go to question 2.

Question 2

Are we sure that when D1 provided P with the tools, D1 intended that they would be used by P to commit the burglary?

- If **no**, your verdict will be 'Not Guilty'.
- If **yes**, your verdict will be 'Guilty'.

D2

Question 1

Are we sure that D2 knew that P had entered the house as a trespasser and that when P did so he/she intended to steal property?

- If **no**, your verdict will be 'Not Guilty'.
- If **yes**, go to question 2.

Question 2

Are we sure that D2 intended to help P to commit the burglary by keeping a look-out?

- If **no**, your verdict will be 'Not Guilty'.
- If **yes**, your verdict will be 'Guilty'.

Example 2: Assault occasioning actual bodily harm – attack by three defendants – prosecution allege that each D was either a principal offender or an accessory/secondary party

The prosecution allege that the three Ds pushed W to the ground and surrounded him/her. W was then kicked by one or more of the Ds, but the prosecution cannot say by which one(s). W suffered bruising to his/her body. Each D accepts that W was assaulted and injured, but says that, though present at the scene, he/she took no part in the assault.

Although the prosecution is not able to prove which of the Ds kicked and injured W there are two ways in which one or more of them could be guilty of this charge. First, a defendant would be guilty if he/she deliberately kicked and injured W. Secondly, a defendant would be guilty if he/she deliberately helped or encouraged either or both of the other defendants to assault W.

The prosecution say that each D is guilty either because D joined in the attack on W, and must therefore either have intentionally kicked and injured W personally, or because each D deliberately helped or encouraged either or both of the others to do so.

Each D says that although he/she was present at the scene of the attack on W he/she played no part in it. Merely being present at the scene of a crime is not enough to make a defendant guilty of that crime. But if a defendant intends by his/her presence to help or encourage another to commit the crime and/or by contributing to the force of numbers, then D may be guilty, just as those who actually carry it out are.

Route to verdicts for Example 2

To reach your verdicts you should answer this question separately in respect of each defendant.

Are we sure that the defendant whose case we are considering did one or both of the following two things (even if we cannot be sure which it was):

1. deliberately assaulted W by kicking W; or
2. deliberately helped or encouraged one or both of the other Ds to assault W?

- If the answer is 'Yes, we are sure that D did do one of these things', your verdict will be 'Guilty'.
- If the answer is 'No, we are not sure that D did either of these things', your verdict will be 'Not Guilty'.

Example 3: Householder assaulted during a burglary, D being an accessory/secondary party

D is charged in Count 1 with a dwelling-house burglary with intent to steal, and in Count 2 with assaulting W, the householder, causing W actual bodily harm. D did not enter the house or assault W him/herself. This was done by P, who punched and injured W when W discovered and challenged P inside the house. It is agreed that D was outside keeping watch when P assaulted W. P has pleaded guilty to both counts. D has pleaded guilty to Count 1 (burglary) and not guilty to Count 2 (ABH).

The prosecution allege that when D and P arrived at the property the lights were on and it would have been obvious that the property was occupied and that those inside would react if someone broke in and that violence would be used by P. D, on the other hand, said in evidence that they parked around the corner from the house and he believed the property they planned to burgle had no one home. He/she denied that the idea P might assault someone in the house had even occurred to him/her.

It is possible for a person to be guilty of a crime even if it is carried out by somebody else. If D intended that P would, if P thought it necessary, use force on the householder to carry out the burglary, then D would also be guilty of that charge even though D was outside the building when the assault happened. The prosecution invite you to draw that inference from the facts of the case. D denies that he/she intended that P should assault anyone in the house that might discover

P committing the burglary. If that is right, or if it may be right, then D has no criminal responsibility for P's action in assaulting W.

Route to verdict for Example 3

Are we sure D intended that P should, if P thought it necessary, use unlawful force against any of the occupants of the house they agreed to burgle should P be discovered in the act of burglary?

- If **yes**, your verdict will be 'Guilty'.
- If **no**, your verdict will be 'Not Guilty'.

Example 4: Section 18 – attack by two defendants – prosecution allege that each was either a principal offender or an accessory/secondary party

As a result of an attack by both Ds, W suffered a fractured skull. It is agreed that the fracture was caused by a kick to the head and that the injury amounts to GBH. In addition, W sustained some bruising to his/her body which on its own would not amount to GBH.

D1 and D2 are charged in Count 1 with causing GBH to W with intent, to which they have pleaded 'Not Guilty'. In Count 2 they are charged with assaulting W occasioning him/her ABH to which, as you know, they have pleaded 'Guilty'.

The prosecution say both Ds kicked W to the head whilst W was on the ground and both of them intended that W should suffer some really serious harm. The prosecution cannot say who caused the fractured skull but say that each D is guilty of Count 1 either as a **principal**, because he/she was the one whose kick caused the fractured skull, or as an **accessory**, because he/she helped or encouraged the other to do so. Each D accepts punching W and causing injury (Count 2), but each denies intending to cause any serious injury. Each D alleges that the other D went further than planned or foreseen by kicking W in the head.

Consider each D in turn. For each of them there are two ways they can be guilty of Count 1.

First, the D whose case you are considering would be guilty if he/she personally kicked W causing the fracture of W's skull intending, by so doing, to cause W really serious injury.

Secondly, even if you are not sure that the D whose case you are considering did kick W so as to cause the fractured skull, that D would still be guilty of Count 1 if he/she was involved in the attack on W and intended that W should sustain some really serious injury.

Route to verdict for Example 4

Question 1

Are we sure that the D whose case we are considering kicked W to the head, causing the fractured skull, intending to cause W really serious injury?

- If **yes**, your verdict will be 'Guilty'.
- If **no**, go to question 2.

Question 2

Are we sure that the D whose case we are considering was involved in the attack and intended that W should sustain some really serious injury?

- If **yes**, your verdict will be 'Guilty'.
- If **no**, your verdict will be 'Not Guilty'.

Example 5: Murder/manslaughter

[**NOTE:** Participation in a 'concerted attack' is a subject dealt with at para 90 of *Jogee*. In cases where the involvement of D is more distant in time from the killing a direction as per para 97 of *Jogee* may be called for. Further, on this scenario a judge would need to think carefully about the basis upon which manslaughter may be left to the jury to consider as there is an argument that D may be guilty of this offence by participating in the unlawful act that resulted in death – *Church*.[273] Further, in a case where V may not have been the intended target, the directions will need to encompass the law as explained in *BHV*.[274] Accordingly, discussions with the advocates before settling upon the directions and route to verdict will be of critical importance.]

D accepts that he/she and P took part in a joint attack on W, punching and kicking W. W fought back, whereupon P produced a knife, stabbed W once in the chest, and killed W. P has pleaded guilty to murder (Count 1). D has pleaded not guilty to murder (Count 1) and manslaughter (Count 2), but guilty to assault occasioning actual bodily harm (Count 3). D denies that he/she intended to kill, or cause W to suffer grievous bodily harm. D further denies knowing that P had any such intention. D also contends that he/she did not know that P had a knife.

In law, it is possible for a person to be guilty of a crime even if it is actually carried out by somebody else if he/she participates by assisting in the commission of that crime.

D accepts taking part in an attack which caused W some injury. D would be guilty of murder if D personally took part in the attack with the intention of killing W or at least causing W really serious harm. D would also be guilty of murder if he/she intentionally assisted or encouraged P to attack W intending that P should kill or cause W really serious harm.

In considering whether the prosecution has made you sure D had one of those intentions you should consider all the circumstances including the level of violence in which D took part, whether D knew that P had a knife, what if anything they had agreed about their attack on W….. D's knowledge or ignorance of whether P was carrying a knife will be evidence going to what D's intention was and it may be strong evidence one way or the other, but it is not necessarily conclusive in deciding whether D was guilty. For D to be liable for murder the prosecution has to have made you sure that D intended that W would be killed or suffer GBH or D intended that P would intentionally kill or cause W GBH.

[273] [1965] EWCA Crim 1
[274] [2022] EWCA Crim 1690

You would only go on to consider the alternative charge of manslaughter if you found D not guilty of murder.

D would be guilty of manslaughter if the prosecution made you sure that D participated in the attack on W by intentionally doing acts to assist P in that attack; and that a reasonable person would realise the attack carried the risk of some harm to W which was not necessarily serious, and death in fact results from that. The defence case is that the sole cause of W's death was the act of P in stabbing W, which was no part of D's admitted assault upon W which caused the injury amounting to actual bodily harm that D admits. As with the charge of murder D's knowledge or ignorance about whether P was carrying a knife may be an important factor that you will want to consider but it is not the deciding factor; you will take account of your conclusions about the knife in the context of all the evidence in the case.

Route to verdict for Example 5

Question 1

Are we sure that D did acts to assist and intended to assist P to attack W?

- If no, then return a verdict of 'Not Guilty' on Count 1 [Murder] and Count 2 [Manslaughter].
- If yes, go to question 2.

Question 2

Are we sure that P's act of stabbing W was **not** an overwhelming supervening act that nobody in D's shoes could have contemplated might happen?

- If no then return a verdict of 'Not Guilty' on Count 1 [Murder] and Count 2 [Manslaughter].
- If yes, go to question 3.

[**NOTE:** this direction will not arise in every case and its potential significance will be fact specific and should be discussed with the parties. If the issue of some potential supervening act arises in a case there will need to be some further explanation provided to the jury in order to put the route to verdict in context.]

Question 3

Are we sure that D intended that W would be killed or caused really serious injury or that P would intentionally kill or cause really serious injury to W?

- If yes, return a verdict of 'Guilty' on Count 1 [Murder] and you need not consider Count 2 [Manslaughter].
- If no, then return a verdict of 'Not guilty' on Count 1 and go to question 4.

Question 4

Are we sure that D participated in the attack on W by intentionally doing acts to assist P in the attack upon W; and that a sober and reasonable person would realise the attack carried the risk of some harm to W which was not necessarily serious, and W's death resulted from that attack?

- If yes, return a verdict of 'Guilty' on Count 2 [Manslaughter].
- If no, return a verdict of 'Not guilty'.

7-5 Withdrawal from joint criminal activity

ARCHBOLD 18-26; BLACKSTONE'S A4.23

Legal summary

1. A secondary party may, exceptionally,[275] rely on the fact that they have withdrawn from the criminal venture prior to P's acts.
2. What constitutes effective withdrawal depends on the circumstances of the case, particularly the extent of D's involvement and proximity to the commission of the offence by P. Compare *Grundy*,[276] (effective withdrawal weeks before burglary) and *Beccara* (nothing less than physical intervention to stop P committing the violent crime they were engaged in).[277]
3. It is certainly not sufficient that D merely changed their mind about the venture: D's conduct must demonstrate unequivocally[278] D's voluntary disengagement from the criminal enterprise: *Bryce*.[279] In addition, D must communicate to P (or by communication with the law enforcement agency) D's withdrawal and do so in unequivocal terms unless physically impossible in the circumstances: *Robinson*.[280] This requirement for timely effective unequivocal communication applies equally to cases of spontaneous violence, unless it is not practicable or reasonable to communicate the withdrawal: *Robinson*;[281] *Mitchell and King*.[282] In a case in which the participants have engaged in spontaneous violence, in practice the issue is not whether there had been communication of withdrawal but whether a particular defendant clearly disengaged before the relevant injury or injuries forming the allegation were caused.[283] In some instances D throwing down their weapon and walking away **may** be enough. Whether D is still a party to the crime is a question of fact and degree for the jury to determine. Where D is one of the instigators of the attack, more may be needed to demonstrate withdrawal: *Gallant*.[284]
4. A judge need not direct on withdrawal in every case (e.g. it is unnecessary where D denies playing any part in the criminal venture: *Gallant*.[285])
5. It is not necessary for D to have taken all reasonable steps to prevent the crime although clearly it should be a **sufficient** basis for the defence.

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275 *Mitchell* [1990] Crim LR 496
276 [1977] Crim LR 543
277 *Becerra Cooper* (1975) 62 Cr App Rep 212; *Baker* [1994] Crim LR 444
278 *O'Flaherty* [2004] EWCA Crim 526 at para.58
279 [2004] EWCA Crim 1231
280 *Robinson* [2000] EWCA Crim 8
281 *Robinson* [2000] EWCA Crim 8, explaining *Mitchell, King* [1999] Crim LR 496. *O'Flaherty* [2004] EWCA Crim 526 at para.61 per Mantell LJ
282 *Mitchell, King* [1999] Crim LR 496
283 See *O'Flaherty* [2004] EWCA Crim 526; *Mitchell* [2008] EWCA Crim 2552 [2009] 1 Cr. App. R. 31 [2009] Crim. L.R. 287; *Campbell* [2009] EWCA Crim 50
284 [2008] EWCA Crim 1111
285 [2008] EWCA Crim 1111

Directions

6. Any direction on withdrawal from assisting or encouraging is likely to be highly fact-specific. The need for and form of any such direction should therefore be discussed with the advocates in the absence of the jury before closing speeches.

7. Subject to this, it will usually be appropriate to direct the jury as follows:

   (1) The law provides that a person can withdraw from involvement in a crime only if strict conditions are met.

   (2) The person must before the crime has been committed:

      (a) conduct him/herself in such a way as to make it completely clear that he/she has withdrawn; and

      (b) if there is a reasonable opportunity to do so, inform one or more of the others involved in the enterprise/a law enforcement agency (as appropriate) in clear terms that he/she has withdrawn.

   (3) Against that background, it is for the jury to decide whether, in the circumstances of the case, D did (and said) enough and in sufficient time to make an effective withdrawal from the enterprise. If D did or may have done so, the verdict would be 'Not Guilty'. If D did not, the verdict would be 'Guilty' if all the elements of the offence were proved against D.

   (4) The circumstances to be taken into account would include (as appropriate):

      (a) the nature of the proposed joint crime;

      (b) D's anticipated role in the proposed crime;

      (c) what, if anything, D had already done to further the proposed crime;

      (d) the time at which D sought to withdraw;

      (e) what D did to indicate withdrawal;

      (f) whether D had any reasonable opportunity to inform anyone else that he/she was withdrawing/; and, if so

      (g) how and when D took that opportunity.

   Briefly summarise the parties' cases on these issues.

Example: Withdrawal from a joint attack

NOTE: In this Example the only substantial issue is whether or not D3 had withdrawn from the attack on W.

D1, D2 and D3 are all charged with causing grievous bodily harm, which means really serious injury, to W, with intent to do so. Witnesses called by the prosecution have said that all three defendants punched and kicked W and then ran away together, leaving W seriously injured on the ground.

You know that D1 and D2 have pleaded guilty. D3 has pleaded not guilty. D3 admits that he/she had been part of a plan, with D1 and D2, to cause really serious injury to W, but D3 says that he/she withdrew/backed out before the crime was

committed. D3 says that just as the attack was about to begin, he/she shouted 'Leave it' to the others and then stood back while they attacked W.

If you are sure that the prosecution witnesses are telling the truth, you would be bound to conclude that D3 was as guilty as D1 and D2. But what if you thought that D3's account was or might be true?

The law provides that a person who joins a plan to commit a crime can withdraw/back out of it, but only if, before the crime has been committed, he/she does or says something to make it clear that he/she has backed out.

So if you decide that D3 did do or say something to suggest that he/she had withdrawn/backed out, or may have done so, you will have to consider when this happened.

If D3 did not do or say anything until W had already suffered really serious injury that would be too late. The crime would already have been committed, and D3 would be guilty of it.

But if you decide that D3 did do or say something, or may have done so, before W had suffered really serious injury, you would have to decide whether what D3 did or said was enough to make it clear that he/she had backed out. If you think it was, or may have been, your verdict would be 'Not Guilty'. Otherwise, it would be 'Guilty' (assuming of course that you were sure that D3 had, with the others, intentionally caused W really serious injury).

On the question of withdrawing or backing out:

- the prosecution say {specify};
- the defence say {specify}.

Example Route to verdict

Because D3 admits that he/she had planned with D1 and D2 to cause really serious injury to W and that W suffered really serious injury when W was attacked, the questions for you to answer are as follows:

Question 1

Are we sure that:

(a) D3 took part in the attack on W; **and**

(b) D3 intended that W should suffer really serious injury?

- If **yes**, your verdict will be 'Guilty' and do not answer questions 2 to 4.
- If **no**, go to question 2.

Question 2

At any time did D3 do or say, or may D3 have done or said, anything to suggest that he/she had withdrawn from the plan to cause really serious injury to W?

- If **yes**, go to question 3.
- If **no**, your verdict will be 'Guilty' and do not answer questions 3 and 4.

Question 3

Did D3 do or say this, or may D3 have done or said this, before W had suffered really serious injury?

- If **yes**, go to question 4.
- If **no**, your verdict will be 'Guilty' and do not answer question 4.

Question 4

Did D3 do or say enough, or may D3 have done or said enough, to make it clear that he/she had withdrawn from the plan to cause really serious injury to W?

- If **yes**, your verdict will be 'Not Guilty'.
- If **no,** your verdict will be 'Guilty'.

7-6 Conspiracy

ARCHBOLD 33-1; BLACKSTONE'S A5.43

Legal summary

Statutory conspiracy

1. The offence of conspiracy under Criminal Law Act 1977, s.1 requires proof that the defendant[286] agreed[287] with another or others (whether identified or not) that a course of conduct would be pursued which **if carried out in accordance with their intentions** would necessarily involve the commission of any offence[288] by one or more of the parties to the agreement, or would do so but for the fact that it was an impossible attempt. The *mens rea* for conspiracy requires proof of that intention to be a party to an agreement to do an unlawful act[289] and that D and one other party knew or intended that the circumstance element(s) of the intended offence would exist at the time of the offence (even if the substantive offence can be committed without proof of knowledge).[290]
2. The offence is complete upon agreement; nothing need be done in pursuit of the agreement. The conspiracy continues for as long as there are two or more parties to it intending to carry it out.[291]
3. The Court of Appeal has repeatedly noted that:

   > "the prosecution should always think carefully, before making use of the law of conspiracy, how to formulate the conspiracy charge or charges and whether a substantive offence or offences would be more appropriate."[292]

4. Where the agreement relates to multiple offences, particular care is needed to ensure that the Ds were all parties to the relevant agreement at the relevant time. The prosecution's decision as to whether to charge multiple counts or a single conspiracy requires careful thought. In *Johnson*[293] it was held that:

   > "….it is of the essence of a conspiracy that there must be an agreement to which the defendant is a party and that each defendant charged with the offence must be proved to have shared a common purpose and design, rather than similar or parallel purposes and designs. However, it is possible for the evidence to show the existence of a conspiracy of narrower scope and involving fewer people than the prosecution originally alleged, in which case it is not intrinsically wrong for the jury to return guilty verdicts accordingly.

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286 There can be no conspiracy with an intended victim, spouse /civil partner or child under 10.
287 Mere negotiation is insufficient.
288 But not merely aiding and abetting an offence: *Kenning* [2008] EWCA Crim 1534
289 *Anderson [1986] AC 27*
290 E.g. in conspiracy to rape it is necessary to prove knowledge that W would not be consenting even though no such proof would be required for the substantive offence of rape: *Saik* [2006] UKHL 18, applied in *Thomas* [2014] EWCA Crim 1958
291 *DPP v. Doot [1973] AC 80*
292 *Shillam* [2013] EWCA Crim 160 at para. 25
293 [2020] EWCA Crim 482

> 27. What are referred to as 'chain' conspiracies and 'wheel' conspiracies are different in structure. In a chain conspiracy, A agrees with B, B with C and C with D. In a wheel conspiracy: A at the hub recruits B, C & D. In each it is necessary that the defendants must be shown to be a party to the common design and aware that they are part of a common design to which they are attaching themselves."

5. In *Ali*[294] the Court of Appeal held that:

> "It is not permissible to put into an indictment an alternative factual basis which makes no difference to the offence committed whether it is for the purpose of enabling a jury to decide an issue of fact or for any other purpose. The judge must resolve the factual issues which are material to sentencing if the offences are the same; in limited circumstances, the judge may ask the jury a specific question."

6. Similarly, care is needed when the allegation is that the agreement was to commit either one or another crime in the alternative.[295]

7. It is not necessary for each member of the conspiracy to know the other members. If it is alleged that the parties to the conspiracy is a 'wheel' or 'chain' conspiracy, each alleged conspirator must each be shown to be party to a common design, and he/she must be aware that there is a larger scheme to which he/she is attaching him/herself.[296]

8. The Court of Appeal has reiterated this in *Serious Fraud Office v Papachristos*.[297] The Court of Appeal considered the legitimacy of a second count added late in the trial. Fulford LJ cited *Shillam* as establishing (at [19]) that:

> "The evidence may prove the existence of a conspiracy of narrower scope and involving fewer people than the prosecution originally alleged, in which case it is not intrinsically wrong for the jury to return guilty verdicts accordingly, but it is always necessary that for two or more persons to be convicted of a single conspiracy each of them must be proved to have shared a common purpose or design."

Common law conspiracy

9. At common law, offences of conspiracy to defraud and conspiracies to do acts tending to corrupt public morals or outrage public decency are available. In practice, conspiracy to defraud is the only common law offence commonly prosecuted. Conspiracy to defraud is committed if there is:

> "...an agreement by two or more [persons] by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled [or]

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294 [2011] EWCA Crim 1260 at para. 37

295 *Hussain* [2002] EWCA Crim 6; [2002] 2 Cr. App. R. 26; [2002] Crim. L.R. 407 and see also *Saik* [2007] 1 AC 18 on the difficulty with 'suspect', 'believe' and 'intend' in a statutory conspiracy.

296 *Shillam* [2013] EWCA Crim 160

297 [2014] EWCA Crim 1863

> an agreement by two or more by dishonesty to injure some proprietary right of his...[298]
>
> *or*
>
> an agreement to deceive a person into acting contrary to the duty he owes to his clients or employers."[299]

10. The Attorney-General has issued guidance (November 2012) to prosecuting authorities as to when it is appropriate to charge a common law conspiracy to defraud instead of a substantive offence. More recently in *Bermingham*[300] the Court of Appeal addressed the issue of 'legal certainty' and reviewed the law relating to conspiracy to defraud generally. The judgment quotes at length from the directions of the trial judge which were held to have been the appropriate way to define the offence to the jury in the context of that case and thus may provide a helpful example for judges to consider when faced with summing up such a charge. Care needs to be given to the number of counts: two or more similar but separate agreements cannot be charged as a single conspiracy to defraud.[301]

Evidence

11. On the common law evidential rule admitting hearsay evidence of statements made in furtherance of a common enterprise: see Chapter 14-14.

12. Evidence admissible against one D to a conspiracy may be inadmissible against another. Particular care will be needed in directing the jury in such cases.[302] An acquittal of one conspirator will not necessarily mean that the conviction of the other(s) is impermissible. Directions on circumstantial evidence and inferences may also be necessary.

Directions

13. The jury should be directed as follows:

    (1) A conspiracy is an agreement between two or more people to commit an intended crime/one or more intended crimes.

    (2) A conspiracy or agreement of that kind is itself a crime, separate from the intended crime(s).

    (3) In this case the prosecution say that the intended crime(s) was/were {specify} and that D was part of a conspiracy or agreement to commit it/them.

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298 *Scott v Metropolitan Police Commissioner* [1975] AC 819. See the detailed analysis in *Evans and others* [2014] 1 WLR 2817. On dishonesty in conspiracy to defraud see *Barton and Booth* [2020] EWCA Crim 575 and *Bermingham* [2020] EWCA Crim 1662

299 *Wai Yu-tsang v The Queen* [1991] UKPC 32

300 [2020] EWCA Crim 1662

301 *Mehta* [2012] EWCA Crim 2824

302 *Testouri* [2003] EWCA Crim 3735

(4) To prove its case, the prosecution must make the jury sure that:

(a) there was a conspiracy or agreement to commit {**specify**};

(b) D joined in that conspiracy; and

(c) when D joined in D intended that {**specify**} should be committed by (as appropriate) him/herself and/or one or more of the other conspirators.

14. Only if and to the extent that it is relevant to the particular case the jury should also be directed that conspirators may:

(1) join and leave a conspiracy at different times;

(2) play different parts in the conspiracy, be they major or minor;

(3) not necessarily know/meet/communicate with all of the other conspirators;

(4) not necessarily know all the details of the conspiracy.

15. In *Testouri*[303] the court considered the issue of how a jury should be directed in the context of a 'closed' conspiracy and whether it may be permissible for the jury to convict one accused but not the other. It is suggested that such a situation will always call for very carefully crafted directions.

16. Since the evidence will usually be circumstantial it will usually be necessary to add a direction based on 10-1 Circumstantial evidence (Circumstantial evidence) below. It may also be necessary to add a direction based on Chapter 14-14 (Hearsay – Statements in furtherance of a common enterprise) below.

Example 1

In this case, D is charged with entering into a conspiracy with X, Y and Z (who are named in the indictment) to steal a car.

Just as it is a criminal offence for an individual to steal something, so it is a criminal offence for two or more people to agree to steal something. An agreement to steal a car is called a conspiracy to steal, which is itself a crime.

The prosecution say that there was an agreement to steal a car. The prosecution also say that D joined in the agreement with one, or more of X, Y and Z and that when he/she did so, D intended that a car should be stolen by one or more of X, Y and Z.

In contrast, D disputes that there was an agreement to steal a car. Even if you were sure there was such an agreement, D says he/she was not part of that agreement and did not intend that a car should be stolen by one or more of those people.

The issues for you are first, whether there was an agreement to steal a car and second, was D part of that agreement to steal a car.

303 [2003] EWCA Crim 3735

Before you could convict D of the charge he/she faces, you must be sure that D joined the agreement to steal a car, as alleged by the prosecution. In deciding whether D joined the agreement to steal a car you must be sure that:

(a) It was the common purpose of each of those involved in the agreement that a car was to be stolen;

(b) When D joined that agreement D did so knowing that he/she was agreeing that a car would be stolen; and

(c) When D joined in that agreement, D intended that the offence of stealing a car should be carried out by one, or more, of X, Y and Z.

There is no direct evidence of this criminal agreement. This is not unusual: you would not expect people who are planning a crime to put their agreement into writing or to tell other people about it. So you should consider the evidence of what happened and of what D, X, Y and Z did and said and ask yourselves whether that makes you sure that there was a conspiracy and that D was part of it and intended that it would be put into effect.

The prosecution does not have to prove that:

(a) D was part of the agreement from the beginning. People may join and leave an agreement at different times;

(b) D had been in contact with all of the other people in the agreement; or

(c) D played an active part in putting the agreement into effect;

(d) That the agreement was successful in the sense of a car or cars actually being stolen – the offence is agreement; what was agreed to be done does not have to be carried out in order for the prosecution to succeed.

Route to verdict

Question 1

Are we sure that there was an agreement to steal a car?

- If **yes**, go to question 2.
- If **no**, your verdict will be 'Not Guilty'.

Question 2

Are we sure that the defendant joined that agreement to steal a car?

- If **yes**, go to question 3.
- If **no**, your verdict will be 'Not Guilty'.

Question 3

Are we sure that when the defendant joined that agreement he/she intended that a car or cars would be stolen by at least one other person who was party to the agreement?

- If **yes**, your verdict will be 'Guilty'.
- If **no**, your verdict will be 'Not Guilty'.

Example 2

In this case X, Y and Z are each charged with entering into a conspiracy, together with others unknown, to supply Class A drugs to others on a large scale.

Just as it is a criminal offence for an individual to supply drugs so it is also a criminal offence for two or more people to agree to supply drugs to others. An agreement to supply drugs is called a conspiracy to supply drugs.

The prosecution say there was an agreement to supply Class A drugs. In this case the prosecution say that the agreement extended to and involved the distribution of Class A drugs on a large scale to numerous individuals and that X, Y and Z each joined in that agreement knowing and intending that Class A drugs should be supplied on such a scale. In the circumstances of this case the prosecution argue that each of the defendants joined that conspiracy by intending that he/she should, with one or more others who were party to the agreement, commit the offence of supplying Class A drugs.

In contrast X, Y and Z each dispute there was such an agreement to supply drugs on such a large scale or indeed on any scale. Each of the defendants argues that even if there is evidence of a criminal agreement it is not one that involved the supply of Class A drugs. X, Y and Z each say that he/she was not part of that agreement and did not intend that any drugs should be supplied or were being supplied by himself/herself or others.

The issues for you are first, whether there was an agreement to supply Class A drugs on a large scale, and not any other agreement, and second, were X, Y or Z part of that agreement as alleged by the prosecution?

Before you could convict X, Y or Z of the charge he/she faces you must be sure that the defendant whose case you are considering joined the specific conspiracy alleged by the prosecution. In deciding whether any of the defendants joined the specific agreement to supply Class A drugs on a large scale to others you must be sure that:

(a) it was the shared intention (or common purpose) of each of the conspirators to supply Class A drugs on a large scale to others;

(b) when D joined in that agreement D did so knowing that he/she was agreeing to the supply of Class A drugs;

(c) when D joined in that agreement, he/she intended that the offence of supplying Class A drugs should be carried out by one or more of those named in the Indictment (including others unknown).

There is no direct evidence of this agreement. This is not unusual, you would not expect people who are planning a crime to put their agreement into writing or to tell other people about it. So you should consider the evidence of what happened and of what X,Y,Z and others did and said and ask yourselves whether that makes you sure that the specific conspiracy alleged by the prosecution existed and that the defendant whose case you are considering was a part of **that** conspiracy, and not any other conspiracy, and intended that it would be put into effect.

The prosecution does not have to prove that:

(a) A defendant was part of the agreement from the beginning. People may join and leave an agreement at different times;

(b) A defendant had been in contact with all of the other people in the agreement; or

(c) A defendant played an active part in putting the agreement into effect. That the agreement was successful in the sense of drugs actually being supplied.

Route to verdict

Answer each of the following questions separately in respect of X, Y and Z.

Question 1

Are we sure that there was a conspiracy to supply Class A drugs to others involving the distribution of those drugs on a large scale to various individuals?

- If your answer is **yes**, go to question 2.
- If your answer is **no**, your verdict is 'Not Guilty'.

Question 2

Are we sure that D not only joined but also knew that they were joining **that**, rather than some other, conspiracy?

- If your answer is **yes**, then your verdict is 'Guilty'.
- If your answer is **no**, then your verdict is 'Not Guilty'.

7-7 Criminal attempts

ARCHBOLD 17-39 and 33-127; BLACKSTONE'S A5.72

Legal summary

1. By s.1(1) Criminal Attempts Act 1981, the *actus reus* of an attempt to commit an offence is any act "more than merely preparatory to the commission of the offence". Intent is the essence of attempt: the more than merely preparatory act must be accompanied by an intention to commit the full offence, even if the full offence is one of strict liability or one in which the full offence requires only a lesser degree of *mens rea* than intent (e.g. although for murder intent to cause GBH is enough, attempted murder requires intent to kill).[304]
2. In *Pace and Rogers*,[305] the Court of Appeal held that s.1(1) requires intent to commit all the elements of the full offence.
3. It does not matter that the offence which the defendant intends to commit is impossible by reason of facts unknown to him/her: s.1(2); *Shivpuri*.[306] However, where mistake of law is a defence to a charge of committing a specific offence (e.g. s.2(1)(a) Theft Act 1968), it will also be a defence to a charge of attempting to commit that offence.
4. It is for the judge to decide whether there is sufficient evidence of an attempt for the issue to be left to the jury; if so, it is for the jury to decide whether the acts proved amount to an attempt.[307] *MS*[308] provides a helpful and detailed review of the relevant case law in the context of an allegation of attempted abduction of a child and whether the steps taken were more than merely preparatory to the commission of the offence where the defendant was stopped en route to the port of embarkation.

Directions

5. The offence which D is charged with attempting should be defined.
6. The jury should be told that the prosecution must prove that:
   (1) D intended to commit that offence; and
   (2) with that intention, D did an act/acts which in the jury's view went beyond mere preparation to commit the offence.
7. If there is an issue as to whether D's acts did go beyond mere preparation, the parties' arguments in that regard should be briefly summarised.

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304 *Whybrow* (1951) 35 Cr App R 141. The Court of Appeal had previously held, however, that whilst intent is required as to any specified consequences of D's conduct, something less may suffice in respect of any relevant circumstances: *Khan* [1990] 1 WLR 813 (attempted rape committed where D intended to have intercourse with W and was reckless as to W's lack of consent); *Pace and Rogers* [2014] EWCA Crim 186

305 [2014] EWCA Crim 186

306 [1987] AC 1

307 Criminal Attempts Act 1981, s.4(3), (4); *Griffin* [1993] Crim LR 515

308 [2021] EWCA Crim 600 and for a further recent review see *Andrews v The Chief Constable of Suffolk* [2022] EWHC 3162 (Admin)

8. If it is appropriate in the circumstances of the case, the jury should be told that the fact that the full offence could not have been committed (e.g. because the pocket which D was trying to pick was empty) provides no defence.

Example 1: Attempted theft from the person

The prosecution case is that D saw W withdraw some money from a cash machine and put it into his/her inside jacket pocket. They say that D then followed W along a crowded street and deliberately bumped into W a number of times. This was seen by PC X, who thought that D was trying to distract W in order to steal the cash. PC X then arrested D.

D says that he/she had not seen W get any money and was not aware of bumping into him/her but that if it happened then it was by accident.

There is a distinction between attempting to commit a crime and doing something which is no more than mere preparation in order to commit it; and if you think that what D did was, or may have been, no more than mere preparation in order to steal the money you must find D 'Not guilty'. But if you are sure that what PC X observed was D actually trying to steal from W then you will find D 'Guilty'.

Example Route to verdict

Question 1

Are we sure that D deliberately bumped into W at least once?

- If **no**, your verdict will be 'Not guilty'.
- If **yes**, go to question 2.

Question 2

Are we sure that when D deliberately bumped into W, D was trying to steal the money?

- If **yes**, your verdict will be 'Guilty'.
- If **no**, your verdict will be 'Not guilty'.

7-8 Causation

ARCHBOLD 17-56, 19-6 and 19-12; BLACKSTONE'S A1.25, B1.58

Legal summary

General rule

1. Offences which require proof of a result require proof of causation. The question of whether D's act caused the prohibited result is one for the jury; but in answering this question, they must apply legal principles which should be explained to them by the judge.[309]
2. D's act need not be the sole or the main cause of the result. It is wrong to direct a jury that D is not liable if D is, for example, less than one-fifth to blame.[310]
3. D's contribution to the result must have been more than negligible or minimal.[311] D may be held to have caused a result even if D's conduct was not the only cause and even if D's conduct could not by itself have brought about the result.[312] Where there are multiple causes (including where the victim has contributed to the result), D will remain liable if D's act is a continuing and operative cause.[313]
4. Contributory causes from third parties, or victims, will not necessarily absolve the accused of causal liability unless the contribution from the other party is such as to break the chain of causation – see below. In *Warburton and Hubbersty*[314] Hooper LJ, delivering the judgment of the court, emphasised that:

> "the test for the jury is a simple one: did the acts for which the defendant is responsible significantly contribute to the victim's death."

Novus actus interveniens and remoteness

5. Most problems of causation concern the application of the principle *'novus actus interveniens'* or 'new and intervening act'. If there is an intervening event,[315] either as a naturally occurring phenomenon or by some human conduct, it may operate to 'break the chain of causation', relieving D of liability for the ultimate result (although D may remain liable for an attempt in many cases). Although D's original act may remain a factual 'but for' cause of the result, the intervening act may operate so as to supplant it as the legal cause.[316]

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309 *Pagett* [1983] EWCA Crim 1

310 *Henningan* [1971] 3 All ER 133

311 Affirmed by the Supreme Court in *Hughes* [2013] UKSC 56 at para. 33 and by the Court of Appeal in *L* [2010] EWCA Crim 1249 at para. 9 (concerning Road Traffic Act 1988, s.2B). *Hennigan* [1971] 3 All ER 133; *Cato* [1976] 1 WLR 110; *Notman* [1994] Crim LR 518

312 *Warburton* [2006] EWCA Crim 627

313 For a recent review of the law relating to causation see: *Wood Treatment Limited* [2021] EWCA Crim 618

314 [2006] EWCA Crim 627

315 Which can be an act or omission.

316 E.g., *Pagett* (1983) 76 Cr App R 279 at p.288 by Robert Goff LJ: "… the Latin term [*novus actus interveniens*] has become a term of art which conveys to lawyers the

6. The Court of Appeal has, on more than one occasion, advised against entering into an exposition of the *novus actus interveniens* principle when it is plain that there is more than one cause and the issue is whether D made a more than minimal contribution to the result.[317]
   (1) An intervening act by D will not break the chain of causation so as to excuse D where the intervening act is part of the same transaction perpetrated by D e.g. D stabs W and then shoots W.
   (2) If, despite the intervening events, D's conduct remains a 'substantial and operative cause' of the result, D will remain responsible, and if the intervention is by a person, that actor may also become liable in such circumstances.
   (3) D will not be liable if a natural event which is extraordinary or not **reasonably foreseeable** supervenes and renders D's contribution merely part of the background.
   (4) D will not be liable if a third party's intervening act is one of a **free deliberate and informed nature** (whether reasonably foreseeable or not)[318] rendering D's contribution merely part of the background. Human intervention in the form of a foreseeable act instinctively done for the purposes of self-preservation or in the execution of a duty to prevent crime or arrest an offender will not break the chain of causation: *Pagett.*[319]
   (5) D will not be liable if a third party's act which is not a free deliberate informed act, was not reasonably foreseeable, rendering D's contribution merely part of the background.
   (6) D will not be liable if a medical professional intervenes to treat injuries inflicted by D and the treatment is so **independent** of D's conduct [320]and **so potent** as to render D's contribution part of the history and not a substantial and operating cause of death. The jury must remain focused on whether D remains liable, not whether the medical professional's conduct ought to render him/her criminally liable for his/her part. Even where incorrect treatment leads to death or more serious injury, it will only break the chain of causation if it is (a) unforeseeably bad, and (b) the sole significant cause of the death (or more serious injury) with which D is charged. *Malcharek*[321] confirms that 'switching off' a life support system will not break the chain of causation: such medical intervention will not meet the test of being (1) unforeseeably bad and (2) the sole significant cause of death.[322]

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crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused."

317 E.g. *Pagett* (1983) 76 Cr App R 279

318 This includes acts instinctively done for self-preservation and acts of an involuntary nature by the third party: *Empress Car* [1998] UKHL 5 in the case of a strict liability environmental offence only if the intervening act was extraordinary would it break causation.

319 (1983) 76 Cr App R 279

320 Although usually an act, it can be an omission to act: *McKechnie* (1992) Cr App R 51

321 [1981] 1 WLR 690

322 On this topic see also *Broughton* [2020] EWCA Crim 1093

(7) D will not be liable if the victim's subsequent conduct in response to D's act is not within a range of responses that could be regarded as reasonable in the circumstances. Was W's act daft or wholly disproportionate to D's act? If so it will break the chain.

(8) D **will** be liable if W has a pre-existing condition rendering W unusually vulnerable to physical injury as a result of an existing medical condition or old age. D must accept liability for any unusually serious consequences which result: *Hayward*;[323] *Blaue.*[324] Caution needs to be exercised with cases of unlawful act manslaughter.

7. Many of the modern authorities on causation relate to cases of causing death by dangerous driving. In such cases the bad driving of the defendant and that of others may be concurrent causes of death. In *Hennigan*,[325] Lord Parker CJ made clear that the jury is not in such cases concerned with apportionment. It was enough if the dangerous driving of the defendant was a real cause of death which was more than minimal. In *Skelton*,[326] Sedley J (as he then was), held that the defendant's dangerous driving must have played a part, "not simply in creating the occasion of the fatal accident but in bringing it about." In *Barnes*,[327] it was held that it was open to the jury to find that the defendant's dangerous driving "played more than a minimal role in bringing about the accident and death." Hallett LJ noted that in some circumstances judges might have to give the jury further assistance in relation to the difference between bringing about the conditions in which death occurred and 'causing' the death.

8. In *L*,[328] Toulson LJ, as he then was, held that *Hennigan*, *Skelton* and *Barnes* established the following principles:

> "first, the defendant's driving must have played a part not simply in creating the occasion for the fatal accident, i.e. causation in the "but for" sense, but in bringing it about; secondly, no particular degree of contribution is required beyond a negligible one; thirdly, there may be cases in which the judge should rule that the driving is too remote from the later event to have been the cause of it, and should accordingly withdraw the case from the jury."[329]

He concluded that:

> "it is ultimately for the jury to decide whether, considering all the evidence, they are sure that the defendant should fairly be regarded as having brought about the death of the victim by his careless driving. That is a question of fact for them. As in so many areas, this part of the criminal law depends on the collective good sense and fairness of the jury."[330]

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323 [1908] 21 Cox CC 692
324 [1975] 1 WLR 1411
325 [1971] 3 All ER 133
326 [1995] Crim LR 635
327 [2008] EWCA Crim 2726
328 [2010] EWCA Crim 1249 (concerning death by careless driving)
329 [2010] EWCA Crim 1249 at para.9
330 [2010] EWCA Crim 1249 at para. 16

9. The Court of Appeal in *Girdler*[331] considered how the trial judge might best explain to the jury the concept of foreseeability where the defence case was that a new act had intervened. In *A*[332] the Court of Appeal explained the approach adopted in *Girdler* and in particular that "the law does not require that the particular circumstances in which a collision occurs should be foreseeable." [27] per Simon LJ

10. At [33] the Court cited with approval editorial comment from Blackstone's Criminal Practice 2020 at §A1.32:

> "…even an accidental or unintended intervention may break the chain of causation if it was not reasonably foreseeable in the circumstances (*Girdler* [2009] EWCA Crim 2666). This does not mean that the exact form of any such intervention must have been foreseeable at the time of the original assault etc. in order for the chain of causation to remain unbroken. If the general form and risk of further harm was reasonably foreseeable, *it may not then matter if the specific manner in which it occurred was entirely unpredictable* (*Wallace* [2018] EWCA Crim 690, [2018] 2 Cr App R 22 (325) at [84], citing *Maybin* 2012 SCC 24 (SC Canada))" (emphasis added).

11. In Israr Muhammed[333] the court reviewed the case law in this area and concluded:

> "…the judge correctly identified, and subsequently directed the jury that (i) the dangerous driving did not have to be the sole or major cause of the death or injuries; (ii) the Prosecution did not have to establish that the precise mechanism of the collision leading to death or serious injury was foreseeable; and, (iii) the question of the seat belt deficiencies, whether as to use or facility, could establish in the appropriate context, dangerous driving in accordance with the provisions of Road Traffic Act 1988, section 2A,…"

12. Another area in which problems can arise is when it is alleged that the victim has broken the chain of causation by their free deliberate informed decision to engage in conduct which risks their own death. It had been established by the House of Lords in *Kennedy No 2*[334] that D will not be liable if a third party's act which is not a free deliberate informed act, was not reasonably foreseeable, rendering D's contribution merely part of the background. (In that case D supplied V with drugs and V self injected and died). That act by V was regarded as a free deliberate informed act breaking the chain of causation and absolving D of liability for homicide. Subsequent cases have considered when a victim's conduct might be regarded as insufficiently free and informed.

13. The Court of Appeal in *Wallace*[335] considered whether the decision of the victim to undergo voluntary euthanasia in a jurisdiction in which that was permitted, would necessarily break the chain of causation (in contradistinction to death arising from circumstances involving, for example, flight from the scene or an apparent act of suicide closely related in time to the allegedly precipitating event

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331 [2009] EWCA Crim 2666
332 [2020] EWCA Crim 407
333 [2021] EWCA Crim 802
334 [2007] UKHL 38
335 [2018] EWCA Crim 690

as in *Dear).*[336] In *Wallace,* W had been left severely disfigured, permanently paralysed, and in a state of unbearable physical and psychological suffering as a result of injuries alleged to have been inflicted by D. He was euthanised in Belgium by doctors in compliance with Belgian law. The Court of Appeal held that the act of W in taking the decision to be euthanised, and the acts of the doctors in Belgium in compliance with his wishes, did not necessarily break the chain of causation. If the jury were sure that D inflicted the injuries, and did so with the requisite intent, then the jury would further have to be satisfied that the injuries inflicted by D were a significant and operating cause of W's death (i.e. more than a minimal but not necessarily the only cause of W's death). If so satisfied then the jury would be entitled to convict so long as W's act in electing to be euthanised was (as at the time of the attack) an objectively reasonably foreseeable response to the injuries inflicted by D, i.e. within the range of responses that might sensibly have been anticipated from someone in W's situation. The Court of Appeal set out the appropriate route to verdict in such circumstances. The facts of the case, and the resulting consideration in the Court of Appeal, should be considered as being truly exceptional. It is suggested that the greatest care should be taken if seeking to apply this case to different circumstances.

14. In *Field*,[337] the Court of Appeal upheld a conviction for murder where D had covertly drugged W, whilst suggesting to others that W had started drinking too much and developing a suicidal ideation. W's cause of death was subsequently confirmed to be acute alcohol toxicity and Dalmane (a drug prescribed for insomnia) use. D accepted that a bottle of strong whisky he had left out to tempt W (who had given up drinking for medical reasons) had played some part in the fatality but argued that he had not intended to kill him. He maintained that he had played no direct part in W drinking alcohol at the time of his death and that he was not present when he died. The Court of Appeal concluded that D's undisclosed murderous intention substantively changed the nature of the undertaking upon which W embarked. W believed that he was drinking the whisky in the company of someone who loved and cared for him, not someone who wished for his death. Consequently, W would not have had an informed appreciation of the truly perilous nature of what was occurring. He was in fact being encouraged by D to consume a significant quantity of a powerful alcoholic drink, which inevitably would have started to impair his judgment, most particularly as it interacted with the Dalmane. The court concluded that engaging in that activity was not the result of a free, voluntary and informed decision by W. To the contrary, he was being deliberately led into a dangerous situation by someone who pretended to be concerned about his safety. D, therefore, manipulated and encouraged W into a position of grave danger and his undisclosed homicidal purpose changed the nature of the act. It was therefore open to the jury to conclude that W had been lured into a false sense of security by D's undisclosed murderous purpose, embarking as a consequence on a fatal course of action uninformed as to or unaware of the true dangers of the undertaking, so that the deceit was a cause of death.

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336 [1996] Crim LR 595
337 [2021] EWCA Crim 380

15. In *Rebelo*,[338] D had supplied dangerous chemicals (DNP) to W advertising them as a food supplement. W became addicted to them and following an excessive intake of the drugs she died. D's conviction for gross negligence manslaughter on a retrial was upheld. The trial judge had made clear that it was for the prosecution to make the jury sure that W 'did not make a fully free, voluntary and informed decision to risk death' by taking the amount of DNP she did, spelling out that if her decision was fully free, voluntary and informed, or might have been, then as a matter of law her death was caused by her free choice because, in those circumstances, D set the scene for her to make that decision but he did not cause her death. The Court of Appeal concluded that the judge addressed the relevant issue of W's capacity in some depth.

Directions

16. No specific direction will be required unless, unusually, a particular issue of causation arises. If it does, it will usually be one of two kinds.

    (1) **Where D's conduct was not the only cause of the relevant outcome** (e.g. where vehicles were driven by D and another person in such a way as to cause a fatal collision), the jury should be directed that before they can treat D's conduct as having caused the outcome concerned, they must be satisfied that D's conduct contributed to the outcome in a way that was significant, that is more than trivial.

    (2) **Where D's conduct set in train a sequence of events leading towards the outcome concerned, but a new act intervened and became the immediate cause of the outcome** (e.g. where D's unlawful act caused W to react in a way which caused W's injuries or death), the jury should be directed that before they can treat D's conduct as having caused the outcome concerned, they must be satisfied that:

        (a) a reasonable, ordinary, sensible person, in the circumstances which D knew about at the time of his/her conduct, could sensibly have foreseen that the new event might follow from his/her conduct; and

        (b) D's conduct contributed to the outcome in a way that was significant, that is more than trivial.

Example

You have heard that after D stabbed W, W was taken to hospital where he/she was treated negligently. If W had been treated properly, W would have had a 75 per cent chance of survival.

You have to decide whether by stabbing W, D caused W's death. This does not need to have been the only cause, but it must have made more than a minimal contribution to W's death. If you are sure that it made more than a minimal contribution, and so was a cause of death, you must go on to decide whether the other elements of the offence of murder have been proved. But if you are not sure that the stabbing made more than a minimal contribution to W's death, your verdict must be 'Not Guilty'.

[338] [2021] EWCA Crim 306

The prosecution say that the contribution made by the stabbing was clearly more than minimal. If D had not stabbed W, W would not have had to go to hospital, would not have suffered negligent treatment and would not have died. The defence, on the other hand, say that as W would have had a good chance of survival if W had been not been treated negligently, the contribution made by the stabbing should be seen as minimal.

8. STATES OF MIND

8-1 Intention

ARCHBOLD 17-31; BLACKSTONE'S A2.4

Legal summary

1. Numerous offences are defined so as to require proof of 'intention' to cause specified results. The definition of intention has generated considerable case law. The 'golden rule'[339] when directing a jury upon intent is to avoid any elaboration or paraphrase of what is meant by intent. It is an ordinary English word. It is quite distinct from 'motive'.
2. Where some extended explanation is needed, the most basic proposition is that a person 'intends' to cause a result if he/she acts in order to bring it about. In such circumstances it is immaterial that D's chances of success are small.
3. In some cases[340] it may be necessary to give a further detailed explanation, sometimes described as 'oblique' as distinct from 'direct' intention.[341] Under this definition, a court or jury **may find** that a result is intended, though it is not D's purpose to cause it, when:
   (1) the result is a virtually certain consequence of that act; and
   (2) D knows that it is a virtually certain consequence.
4. It is advisable not to deviate from that formula by use of words such as 'high probability' or 'very high probability' instead of 'virtual certainty'.[342] In *Allen*,[343] the Court of Appeal emphasised that it "is only in an exceptional case that the extended direction by reference to foresight becomes necessary". It is needed where D denies his/her purpose, not where e.g. D denies any part in the crime: *Phillips.*[344]
5. The probability of the result is an important matter for the jury to consider when determining whether D foresaw the result as virtually certain and whether they infer that D intended it. If the trial judge is convinced that, on the facts, and having regard to the way the case has been presented, some further explanation about foresight of consequences is necessary to avoid misunderstanding, then a specific direction may be given. The trial judge will be best placed to make the decision on the appropriate direction.

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339 Per Lord Bridge in *Moloney* [1984] UKHL 4
340 Usually where D claims his/her aim was to achieve a different purpose and D hoped that the harm for which he/she is being prosecuted would not arise.
341 The House of Lords in *Woollin* [1998] UKHL 28 limited its definition to murder, but the test appears to be applied across the criminal law.
342 *Royle* [2013] EWCA Crim 1461
343 [2005] EWCA Crim 1344
344 [2004] EWCA Crim 112

6. "Where (in such a rare case) it is necessary to direct the jury on the matter, they should be directed that they are not entitled to find the necessary intention unless they are sure that the consequence was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case".[345]
7. The mere fact that the result is virtually certain in fact is not proof of intention – the inquiry into intention is one involving an assessment of D's state of mind: *Stringer*.[346]
8. Section 8 Criminal Justice Act 1967 provides:

   "A court or jury, in determining whether a person has committed an offence,

   (1) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable result of those actions; but

   (2) shall decide whether he did intend or foresee that result."
9. For the purposes of voluntary intoxication, if the offence charged has intention as the predominant *mens rea* it can for practical purposes be treated as one of specific intent: see Chapter 9.

Directions

10. A direction about intention will only be needed if the offence charged requires the prosecution to prove that D intended a particular action and/or result and D disputes this.
11. Any doubts about the need for, and form of, any direction about intention should be discussed with the advocates in the absence of the jury before closing speeches.
12. If a direction is necessary, it will usually be sufficient to direct the jury that:

    (1) the prosecution have to prove that D had the required intention at the time of the alleged offence (but see paragraph 16 below); and

    (2) when considering whether the prosecution have done so, the jury should draw such conclusions as they think right from [as appropriate] D's conduct and/or words before and/or at the time of and/or after the alleged offence (see Example 1 below).
13. It will **not** usually be necessary or desirable to attempt a definition of 'intention', this being a word in ordinary English usage. If, unusually, some further explanation is thought necessary, it will usually be sufficient to add only that D intends a certain result if D acts to bring it about and (if the issue arises) that if D does so, D's chances of actually bringing it about are not relevant.
14. However, where D contends that he/she did not act to bring about the result contended for by the prosecution, and/or acted to bring about a different result, it **may** be necessary to add a direction (sometimes referred to as a *Nedrick* or *Woollin* direction) that before the jury could find that D intended the result

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345 *Woollin* [1998] UKHL 28
346 [2008] EWCA Crim 1222

contended for by the prosecution, they would have to be sure that it was virtually certain that D's actions would have that result unless something unexpected happened, and that D realised that that was so. If the jury were sure of that, it would be open to them to find that D intended that result, if they thought it right to do so in the light of all the evidence (see Example 2 below). The jury would be assisted by a written 'Route to verdict' (see Route to verdict below).

15. The following directions **may** also be necessary, depending on the evidence and issues.

    (1) The prosecution do not have to prove that the offence was planned, or that D's intention was formed in advance. It is sufficient if D had the required intention at the time D {committed the act / did what is alleged}.

    (2) Although the prosecution must prove that D intended the result concerned, they do not have to prove that D had any particular motive or desire to bring about that result.

    (3) The fact that D may have regretted afterwards what he/she had done does not negate any intention that D held at the time to do it.

    (4) When deciding whether D had the required intention, the jury are entitled to take into account [as appropriate] D's age/maturity/any relevant learning difficulty or mental or personality disorder referred to in the evidence.

16. The directions suggested in paragraphs 12 to 14 above will need to be adapted if D took alcohol/drugs to give him/herself 'Dutch courage' to commit an offence, because in such a case the prosecution must prove that D had the required intention when D started drinking/taking drugs rather than at the time of the alleged offence.

17. For directions about the effect of alcohol/drugs on a defendant's intention, see the relevant sections of Chapter 9.

Example 1: Causing grievous bodily harm with intent

D is charged with unlawfully and maliciously causing W grievous bodily harm with intent to do so. On this charge, the word 'maliciously' adds nothing so I suggest that you cross out the words 'and maliciously' in the Particulars of Offence.

Grievous bodily harm means really serious injury. It is accepted that W's facial fractures amount to really serious injury, but the prosecution have to prove that D intended to cause really serious injury at the time that D struck W in the face. They do not have to prove that D had formed that intention in advance.

To decide what D's intention was you need to consider what D did and said before, at the time of and after the incident, and then draw conclusions from your findings about these things.

So first consider what D did. D's fist only made contact once, but how much force was used? W said that D gave W "a really hard crack" and sent W straight to the floor. Dr. E told you that severe force would have been needed to cause W's injuries. However, D says that he/she only struck a tame and accidental blow as D was flailing his/her arms about.

You should also consider what D said. W told you that, before hitting W, D said {specify} and that, after W had hit the floor, D said {specify}. D denies saying any of this.

When you have considered all of this, you must then decide, in the light of your findings, what D's intention was when D caused W's injuries.

Example 2: Murder – D claims he/she acted only to frighten W – *Nedrick* / *Woollin* direction. Manslaughter is not being left as an available alternative verdict

D admits killing W by pouring paraffin through W's letterbox and setting it alight. The only question for you to answer is whether or not you are sure that when D did this, D intended either to kill W or to cause W really serious injury. The prosecution say that D clearly intended to do so, but D says that he/she wanted only to frighten W.

To decide what D's intention was you need to consider what D did and said before, at the time of and after the incident, and then draw conclusions from your findings about these things. [Refer briefly to the evidence and arguments relied on by the prosecution and the defence in this regard.]

If you are sure that D's intention was to kill or seriously injure W, the prosecution will have proved the intention necessary for murder and your verdict will therefore be 'Guilty'.

If, however, you accept that D may only have wanted a different result, namely to frighten W, you should then consider whether it was virtually certain that, unless something unexpected happened, what D did would cause W really serious injury or even death; and, if so, whether D realised that this was virtually certain. If you are sure about these things, it would then be open to you if you think it right to do so in the light of all the evidence, to conclude that D did intend to kill or, at least, seriously injure W, and your verdict would be 'Guilty'. Otherwise, the prosecution would not have proved the intention necessary for murder, and so your verdict would be 'Not Guilty'.

Route to verdict based on Example 2

Question 1

Are we sure that when D poured paraffin through W's letterbox and set it alight, D's intention was to kill W or to cause W really serious injury?

- If **yes**, your verdict will be 'Guilty' and do not answer questions 2 to 4.
- If **no**, go to question 2.

Question 2

Was it virtually certain that D's pouring paraffin through W's letterbox and setting it alight would, unless something unexpected happened, cause death or really serious injury to someone inside the house?

- If **yes**, go to question 3.
- If **no**, your verdict will be 'Not Guilty' and do not answer questions 3 and 4.

Question 3

Are we sure that D realised that this was virtually certain?

- If **yes**, go to question 4.
- If **no**, your verdict will be 'Not Guilty' and do not answer question 4.

Question 4

In the light of our answers to questions 2 and 3, do we think it right, in the light of all the evidence, to come to the conclusion that we are sure that D did intend to kill or cause really serious injury to someone inside the house?

- If **yes**, your verdict will be 'Guilty'.
- If **no**, your verdict will be 'Not Guilty'.

8-2 Recklessness

ARCHBOLD 17-49; BLACKSTONE'S A2.6

Legal summary

1. Recklessness features as a *mens rea* element in a wide range of offences. In some, it relates to the circumstances (e.g. whether the property belongs to another) in others, to the consequences (whether damage or injury will result).
2. The leading authority is *G*,[347] where, in the context of criminal damage Lord Bingham based his definition of recklessness on the Draft Criminal Code, cl 18(c):

   "A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to—

   (i) a circumstance when he is aware of a risk that exists or will exist;

   (ii) a result when he is aware of a risk that it will occur;

   and it is, in the circumstances known to him, unreasonable to take the risk."
3. It is likely that this subjective definition of recklessness applies for all statutory offences of recklessness unless Parliament has explicitly provided otherwise.
4. It is a subjective form of *mens rea*, focused on the defendant's own perceptions of the existence of the risk. Whether it is reasonable for D to run the risk is a question for the jury dependent on all the facts. In directing a jury, there is no need to qualify the word 'risk'.
5. It is well established that where D closes his/her mind to the risk D can be found reckless within the subjective definition, as where D claims that his/her extreme anger blocked out of his/her mind the risk involved in D's action. As Lord Lane CJ put it: "Knowledge or appreciation of a risk of the [proscribed harm] must have entered the defendant's mind even though he may have suppressed it or driven it out."[348]
6. For the purposes of voluntary intoxication, it is submitted that where the predominant *mens rea* for an offence is recklessness, that offence can be treated as one of basic intent: see Chapter 9.

Directions

7. A direction to the jury about the meaning of recklessness should be based on the following definition of Lord Bingham in *G*[349] which is thought to be of general application albeit provided in the context of an arson case:

   "A person acts recklessly… with respect to —

   (i) a circumstance when he is aware of a risk that it exists or will exist;

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347 [2003] UKHL 50

348 *Stephenson* [1979] EWCA Crim 1. See also the comments of Lord Bingham in *G* [2003] UKHL 50 para. 39 and Lord Steyn para. 58

349 [2004] 1 AC 1034

(ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take that risk".

8. It may be appropriate to add that:

   (1) the prosecution have to prove that D was reckless at the time of the alleged offence (but see paragraph 9 below); and

   (2) when considering whether the prosecution have done so, the jury should draw such conclusions as they think right from [as appropriate] D's conduct and/or words before and/or at the time of and/or after the alleged offence.

9. In the definition of some offences for which recklessness will suffice to establish liability, such as criminal damage, recklessness is a lesser alternative to intention. If the prosecution base their case only on intention a direction about recklessness will be unnecessary and confusing. It will rarely be appropriate to direct a jury on recklessness in relation to assault.

10. Any doubt about the way in which the prosecution puts its case should be resolved before the case is opened. If any doubt about the need for and form of a recklessness direction remains at the end of the evidence it should be discussed with the advocates in the absence of the jury before closing speeches.

11. In relation to the effect of voluntary intoxication by alcohol/drugs, offences based on recklessness are treated as offences of basic intent: see Chapter 9.

Example 1: Criminal damage

The prosecution must prove that D:

(a) destroyed/damaged {specify} by fire; **and** when D did so

(b) D **either** intended to do so **or** was aware of the risk that {specify} would be destroyed/damaged and took that risk when it was unreasonable to do so in the circumstances that were known to him/her.

Example 2: Arson (deliberately setting fire but being reckless as to whether life would be endangered)

The prosecution must prove that D:

(a) intentionally destroyed/damaged {specify} by fire; **and** when D did so

(b) was reckless as to whether by starting the fire the life of another would be endangered.

D would be reckless if he/she was aware that a life might be endangered by the fire D started and, in the circumstances known to D, it was unreasonable for D to take that risk. There is in fact no need for the prosecution to prove that any life was in fact endangered, although in this case the prosecution suggest that this was in fact the result of D's actions.

Route to verdict for Example 2

Question 1

Has the prosecution made us sure that D intentionally started the fire?

- If **no**, your verdict will be 'Not Guilty'.
- If **yes**, go to question 2.

Question 2

Has the prosecution made us sure that at the time D started the fire D realised there was a risk that the life of another would be endangered?

- If **no**, your verdict will be 'Not Guilty but Guilty to Simple Arson'.
- If **yes**, go to question 3.

Question 3

Has the prosecution made us sure that in the circumstances known to D the risk taken was one that it was not reasonable for D to take?

- If **no**, your verdict will be 'Not Guilty but Guilty to Simple Arson'.
- If **yes**, your verdict will be 'Guilty'.

Example 3: Assault Occasioning Actual Bodily Harm

Throwing a glass in the course of a disturbance in a public house:

The prosecution must prove that D:

(a) threw a glass; **and**

(b) when D did so,

(i) D intended that the glass should hit someone; **or**

(ii) D was aware of the risk that the glass would hit someone and took that risk {Only if in issue: when it was unreasonable to do so in the circumstances that were known to him/her}; **and**

(c) the glass hit W, causing W to suffer some personal injury (however slight).

Route to verdict for Example 3

Question 1

Are we sure that D threw a glass?

- If **no**, your verdict will be 'Not Guilty' and do not answer questions 2 to 4.
- If **yes**, go to question 2.

Question 2

Are we sure that when D threw the glass he/she intended it would hit someone?

- If **no**, go to question 3.
- If **yes**, go to question 4.

Question 3

Are we sure that in the circumstances in which D threw the glass the risk taken was one that it was not reasonable for D to take?

- If **no**, your verdict will be 'Not Guilty'.
- If **yes**, go to question 4.

Question 4

Are we sure that W suffered some injury from being hit with the glass?

- If **no**, your verdict will be 'Not Guilty'.
- If **yes**, your verdict will be 'Guilty'.

8-3 Malice

ARCHBOLD 17-42; BLACKSTONE'S A2.12

Legal summary

1. Malice features as a form of *mens rea* in a number of old offences that are commonly prosecuted (including OAPA 1861 s.20).[350] The classic definition is that provided in *Cunningham*,[351] where the Court of Criminal Appeal cited with approval text from the 16th Edition of Outlines of Criminal Law in which it was stated:

   > "In any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured."

2. In cases requiring 'malice' D must actually foresee the risk that harm might occur and deliberately take it. It is wrong to suggest that it is enough that D 'ought to have' foreseen the risk.

3. The test of recklessness requires that D not only foresaw a risk, but unjustifiably went on to take it. It seems from *Cunningham* that that element is not a requirement for the *mens rea* of malice. The House of Lords in *Parmenter and Savage* have approved the *Cunningham* formulation when interpreting the word malice.

4. For the purposes of voluntary intoxication, where the predominant *mens rea* is one of malice, the offence is one of basic intent: see Chapter 9.

Directions

5. Except in relation to an offence contrary to s.20 Offences against the Person Act 1861 a direction to the jury about the meaning of 'malice' or 'maliciously' should be based on *Cunningham*:[352] see paragraph (d) in Example 1 below.

6. In relation to an offence contrary to s.20 of the 1861 Act, the '*Cunningham*' direction should be adapted in the light of *Savage*;[353] the difference being that in such a case the intention or recklessness need not relate to the particular kind of harm that was in fact done. It is sufficient if it relates to any injury however slight: see paragraph (b) in Example 2 below.

7. If the charge combines 'maliciously' with words requiring a specific intent which encompasses the legal meaning of 'maliciously', the jury should simply be directed that the word 'maliciously' adds nothing and can be disregarded. The example most commonly occurring in practice is unlawfully and maliciously

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350 In that offence it requires proof only that D foresaw a risk of injury of some type and not that D foresaw a risk of injury of the level actually caused: *Savage* [1992] UKHL 1

351 [1957] 2 QB 396

352 [1957] 2 QB 396

353 [1992] 1 AC 699

wounding or causing grievous bodily harm **with intent** to do grievous bodily harm, contrary to s.18 of the 1861 Act: see the Example in Chapter 8-1 above.

8. In relation to the effect of voluntary intoxication by alcohol/drugs, offences of 'malice' are treated as offences of basic intent: see Chapter 9 below.

Example 1: Causing grievous bodily harm with intent to resist arrest (s.18)

The prosecution must prove the following:

(a) that D deliberately struck PC W;

(b) that D did so unlawfully;

(c) that by striking PC W, D caused PC W to suffer grievous bodily harm (which means 'really serious injury');

(d) that when D struck PC W, D was acting 'maliciously'. The word 'maliciously' has a particular legal meaning, which is that D either:

(i) intended to cause PC W some injury, however slight; or

(ii) was aware of a risk that he/she might cause PC W some injury, however slight, but took that risk; and

(e) that when D struck PC W, D intended to prevent PC W from lawfully arresting him/her.

Example 2: Causing grievous bodily harm/wounding (s.20)

The prosecution must prove the following:

(a) that D used some unlawful force on W;

(b) that when D did so D was acting 'maliciously'. The word 'maliciously' has a particular legal meaning which is that D either:

(i) intended to cause W some injury, however slight; or

(ii) was aware of a risk that he/she might cause W some injury, however slight; but took that risk; and

(c) that in the event D caused W to suffer a wound/grievous bodily harm (which means 'really serious injury').

8-4 Wilfulness

ARCHBOLD 17-44; BLACKSTONE'S A2.13

Legal summary

1. This *mens rea* term appears in many statutory offences including some which are commonly prosecuted. To prove that D's conduct was wilful[354] the Crown must prove either intention or recklessness. In *Sheppard*,[355] Lord Keith held that 'wilfully' is a word which ordinarily carries a pejorative sense:

   > "It is used here to describe the mental element, which, in addition to the fact of neglect, must be proved. … The primary meaning of 'wilful' is 'deliberate'. So a parent who knows that his child needs medical care and deliberately, that is by conscious decision, refrains from calling a doctor, is guilty under the subsection. As a matter of general principle, recklessness is to be equipirated [sic] with deliberation. A parent who fails to provide medical care which his child needs because he does not care whether it is needed or not is reckless of his child's welfare. He too is guilty of an offence. But a parent who has genuinely failed to appreciate that his child needs medical care, through personal inadequacy or stupidity or both, is not guilty."[356]

2. In *JD*[357] the Court of Appeal confirmed that, when it is alleged that D's conduct was 'wilful' on the basis that D's conduct was 'deliberate' or 'intentional', few if any problems arise in satisfying the test. When the allegation is that the alleged 'wilfulness' is demonstrated by D being reckless, the question is whether D was reckless in the subjective (*G*[358]) sense rather than the objective (*Caldwell*) sense of the word. The question is whether D had seen the risk of the proscribed circumstances or consequences and nevertheless gone on unreasonably to take that risk; if so D's conduct can be described as wilful.

3. In *Turbill*,[359] the Court of Appeal disapproved of the judge using terms like 'carelessness' or 'negligence' when directing on wilful neglect. As Hallett LJ made clear: "They are not the same. ….The neglect must be "wilful" and that means something more is required than a duty and what a reasonable person would regard as a reckless breach of that duty."

4. When considering the effect of voluntary intoxication on criminal liability, it must be borne in mind that where the predominant *mens rea* is one of wilfulness the offence is to be treated for practical purposes as one of basic intent: see also Chapter 9.

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354 The same test applies whether the element is one requiring proof of an act or omission: *W* [2006] EWCA Crim 2723

355 [1981] AC 394 at p.408 in the context of the offence under the Children and Young Persons Act 1933, s.1 as amended by the 2015 Act

356 At p. 418. Quoted with approval in *Emma W* [2006] EWCA Crim 2723

357 [2008] EWCA Crim 2360

358 [2003] UKHL 50. *Att.-Gen.'s Reference (No. 3 of 2003)* [2004] 2 Cr.App.R. 23

359 [2013] EWCA Crim 1422

Directions

5. When directing the jury about the meaning of 'wilful' or 'wilfully', reference should be made to section 8-1 (Intention) and/or section 8-2 (Recklessness) above, depending on the offence charged and whether the prosecution put their case on the basis of intention and/or recklessness.
6. In relation to the effect of voluntary intoxication by alcohol/drugs, offences of 'wilfulness' are treated as offences of basic intent: see Chapter 9 below.

Example: Child Cruelty by wilful neglect

D is charged with child cruelty by wilfully neglecting his/her son W, who is four, in a manner likely to cause injury to health. The prosecution say that D did this by failing to get adequate medical help after W had developed a serious rash all over his body.

The prosecution must first prove that D neglected W in a way likely to damage W's health, and the law is that D is to be taken to have done this if D failed to provide adequate medical help for W.

The prosecution must also prove that D neglected W 'wilfully'.

To do this the prosecution must prove **either**:

(a) that D knew that W needed medical help but deliberately failed to get it; **or**

(b) that D simply did not care whether medical help was needed or not.

Route to verdict

Question 1

Are we sure that D failed to get adequate medical help for W's rash?

- If **no**, your verdict will be 'Not Guilty'.
- If **yes**, go to question 2.

Question 2

Are we sure D knew W needed medical help but deliberately failed to get it?

- If **no**, go to question 3.
- If **yes**, your verdict will be 'Guilty' and do not answer question 3.

Question 3

Are we sure that D did not care whether W needed medical help or not?

- If **no**, your verdict will be 'Not Guilty'.
- If **yes**, your verdict will be 'Guilty'.

8-5 Knowledge, belief and suspicion

ARCHBOLD 17-46, 17-47 and 17-48; BLACKSTONE'S A2.14 and 15

Legal summary

Knowledge

1. Knowledge is a *mens rea* term that arises in a vast number of offences. Whereas intention is usually descriptive of a state of mind as to consequences (e.g. D intends to make a gain), knowledge is usually used in relation to circumstances (e.g. possessing an article knowing it is prohibited). Knowledge is a stricter form of *mens rea* than belief or suspicion.
2. In *Montila*,[360] the House accepted that:

   > "A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point. Then there is the question whether the person knows that the property is A."[361]

3. Subsequently in *Saik* the House of Lords concluded in the context of a requirement of knowledge in conspiracy that: "the word 'know' should be interpreted strictly and not watered down. In this context knowledge means true belief".[362]
4. Proof of negligence is not sufficient to satisfy a requirement of knowledge in an offence: *Flintshire County Council v Reynolds*[363] (a person who has 'constructive notice' may be negligent as to the relevant facts, but is not to be taken to have knowledge of them).
5. An accused's knowledge as to the legality of their actions was a relevant factor in the offence of being knowingly concerned in a fraudulent evasion of the prohibition on the importation of goods under the Customs and Excise Management Act 1979 s.170(2). A genuine mistaken belief that the goods were not subject to a prohibition on importation could be relied upon to assert that the prosecution had failed to prove an essential ingredient of the offence: *Datson*.[364]

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360 [2004] UKHL 50
361 [2004] UKHL 50 at para. 27
362 [2006] UKHL 18 at para. 26. See also Hooper LJ in *Liaquat Ali and Others* [2005] 2 Cr App R 864 at para. 98
363 [2006] EWHC 195 (Admin) obtaining benefit contrary to Social Security Administration Act 1992, s.112. *Amayo* [2008] EWCA Crim 912
364 [2022] EWCA Crim 1248

6. *Wilful blindness:* Knowledge is interpreted as including "shutting one's eyes to an obvious means of knowledge" or "deliberately refraining from making inquiries the results of which the person does not care to have".[365] The House of Lords adopted this proposition:

> "It is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed."[366]

7. Similarly, in *Sherif*[367] the court stated that the jury are entitled to conclude, if satisfied that the defendant deliberately closed their eyes to the obvious because they did not wish to be told the truth, that this was capable of being evidence in support of a conclusion that the defendant did indeed either know or believe the matter in question.

8. Devlin J in *Roper v Taylor Garages (Exeter)*[368] distinguished actual knowledge, wilful blindness (knowledge in the second degree), and constructive knowledge (knowledge in the third degree). Actual knowledge was considered above.

9. As for wilful blindness, Devlin J emphasised:

> "…a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which a person does not care to have [wilful blindness], and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make [constructive knowledge]."[369]

10. See also Davis LJ in *Wheeler* 'wilfully shutting eyes to the obvious may constitute evidence connoting knowledge or belief; and it need not necessarily be assumed in all cases that suspicion is all that can safely be inferred from the relevant facts.'[370]

Belief

11. Belief differs from knowledge because knowledge is limited to true beliefs but not those which are mistaken.

12. According to the Court of Appeal in *Hall*:[371]

> "Belief, of course, is something short of knowledge. It may be said to be the state of mind of a person who says to himself: 'I cannot say I know for certain

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365 *Roper v Taylor's Garage* [1951] 2 TLR 284 per Devlin J. *Warner v Metropolitan Police Comm* [1969] 2 AC 256, p.279, per Lord Reid

366 *Westminster City Council v Croyalgrange Ltd* (1986) 83 Cr App R 155 at p.164, per Lord Bridge

367 [2008] EWCA Crim 2653

368 [1951] 2 TLR 284

369 *Roper v Taylor's Garage* [1951] 2 TLR 284 at p.288. The Draft Criminal Code suggests that knowledge includes wilful blindness Cl.18(1)(a) a person acts knowingly 'with respect to a circumstance not only when he is aware that it exists or will exist but also when he avoids taking steps that might confirm his belief that it exists or will exist'.

370 [2014] EWCA Crim 2706, [10]

371 (1985) 81 Cr App R 260 at p.264

that the circumstance exists] but there can be no other reasonable conclusion in the light of all the circumstances, in the light of all that I have heard and seen'."

13. In *Forsyth*[372] the court said that the judgment in *Hall* is 'potentially confusing'. In *Moys*,[373] the court suggested simply that the question whether D knew or believed that the proscribed circumstance existed is a subjective one and that suspicion, even coupled with the fact that D shut their eyes to the circumstances, is not enough.

14. For the purposes of voluntary intoxication, it is submitted that offences in which the predominant *mens rea* is knowledge or belief can for practical purposes be treated as offences of specific intent: see Chapter 9.

15. In the very different situation where it is an issue as to whether D has a belief at all, and whether that belief is reasonable, see Chapter 20 Sexual Offences and *Ishaqzai*.[374]

Suspicion

16. This form of *mens rea* features in a number of cases including those under the Proceeds of Crime Act and Terrorism Acts. It is important to distinguish between 'suspicion' itself, which is a low form of *mens rea*, and 'reasonable cause to suspect', which is an objective test and does not generally require proof of actual suspicion.[375] Note, however that different considerations will apply to conspiracy to commit an offence: see para 19 below.

17. In *Da Silva*,[376] 'suspicion' was held to impose a subjective test: D's suspicion need not be based on 'reasonable grounds'. Suspicion is an ordinary English word. This dictionary definition is consistent with the previous judicial interpretations of the concept of suspicion in the related field of criminal procedure. One of the most famous statements is that of Lord Devlin in *Hussien v Chong Fook Kam*:[377]

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."

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372 [1997] 2 Cr App R 299. A *Hall* direction is not necessary in every case: *Toor* (1987) 85 Cr App R 116

373 (1984) 79 Cr App R 72

374 [2020] EWCA Crim 222

375 See the Scottish case of *Menni v HM Advocate* [2013] HCJAC 158; 2014 SCL 191, construing s.17 Terrorism Act 2000. In the Supreme Court in *Lane and Letts* [2018] UKHL 36 the court construed s.17 as imposing an objective test: there was no need to prove D personally suspected anything.

376 [2006] EWCA Crim 1654. See also *Shah v HSBC* [2010] EWCA Civ 31

377 [1969] UKPC 26 at p.3

18. The court in *Da Silva* added held that:

> "…the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts' or based on 'reasonable grounds".[378]

19. The court stated that using words such as 'inkling' or 'fleeting thought' is liable to mislead. This implies that juries ought to be encouraged to look for some foundation for the defendant's alleged suspicion.

20. For the purposes of voluntary intoxication, offences where the predominant *mens rea* is one of suspicion can for practical purposes be treated as offences of basic intent: see Chapter 9.

21. Note that 'having reasonable grounds to suspect' money is criminal property is sufficient *mens rea* for the substantive offence of money laundering, but the mental element required in **conspiracy** to commit such an offence requires actual knowledge or intention that the property is criminal. In such a case the enhanced mental element required in conspiracy subsumes the lesser element required for the substantive offence.[379]

Directions

22. It should be made clear to the jury that the prosecution must prove that D had the required knowledge/belief/suspicion at the time of the alleged offence.

23. It will usually be unnecessary to give the jury any direction about the meaning of 'knowledge', 'belief' or 'suspicion', these being ordinary words in common usage.

24. If, however, any elaboration is thought necessary, the jury should be directed to the following effect, as appropriate to the particular case.

    (1) To show that D **knew** 'X', the prosecution must prove that 'X' was in fact the case, and that D was sure that 'X' was the case.

    (2) To show that D **believed** 'X', the prosecution must prove that because of the circumstances and/or what D had seen and/or heard, D realised that the only reasonable explanation was that 'X' was the case.

    (3) To show that D **suspected** 'X', the prosecution must prove that D thought that there was a real possibility that 'X' was the case, even though D could not prove / be sure about it.

25. In a case in which the prosecution contend that D believed or suspected 'X', the prosecution may contend (usually because of the definition of the offence concerned):

    (1) that 'X' was in fact the case; and/or

    (2) that the belief or suspicion was unreasonable.

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[378] [2006] EWCA Crim 1654 at para. 16. Applied in *Afolabi* [2009] EWCA Crim 2879
[379] *Saik* [2006] UKHL 18

26. If so, the jury should be directed that the prosecution must prove as much. If not, the jury should be directed, as appropriate, that the prosecution do not have to prove that 'X' was in fact the case and/or that the belief or suspicion was unreasonable.
27. Though the direction to the jury should be kept as simple as possible, it may be necessary in some cases based on knowledge to explain that belief or suspicion are not enough, and in some cases based on belief that suspicion is not enough, by reference to paragraph 21 above.
28. It may also be appropriate to add that if the jury concluded that D closed his/her eyes to 'X' being the case, and asked no questions to avoid being told that 'X' was the case, they could treat that as evidence that D knew / believed / suspected 'X', if they thought it right to do so.
29. In relation to the effect of voluntary intoxication by alcohol/drugs, offences based on 'knowledge' and 'belief' are treated as offences of specific intent, and offences based on 'suspicion' are treated as offences of basic intent: see Chapter 9.

Example: Handling stolen goods

The prosecution must prove that when D received the stolen {specify}, which D admits he/she did, D knew or believed that it was stolen, and was acting dishonestly.

These two issues go together. If you are sure that D knew or believed that the {specify} was stolen when D received it and that D intended to keep it, you would be bound to conclude that D was acting dishonestly.

The defence have told you that suspicion is not enough and that is true. So it is important to understand the difference between knowledge or belief on the one hand and suspicion on the other. To prove that D **knew** that {specify} was stolen the prosecution must show that D was sure that it had been stolen. To show that D **believed** that {specify} was stolen they must show that, because of the circumstances in which D received it, D realised that the only reasonable explanation was that it had been stolen. However, if D merely thought that {specify} might have been stolen that would amount only to suspicion and would not be enough to prove that D knew or believed that {specify} was stolen.

[Here there should be a summary of the circumstances in which D received the stolen goods.]

The prosecution say that it is obvious in these circumstances that D knew or at the very least believed that {specify} was stolen. One of the things that the prosecution rely on is that D said nothing at the time he/she received it. If you come to the conclusion that D turned a blind eye and asked no questions because D did not need or want to be told the truth, you could treat that as evidence that D did indeed know or believe that {specify} was stolen.

8-6 Dishonesty

ARCHBOLD 21-5; BLACKSTONE'S B4.51

Legal summary

1. In the opening paragraph of *Barton and Booth*,[380] a five-judge Court of Appeal specifically constituted to consider the implications of the decision of the Supreme Court in *Ivey v Genting Casinos*,[381] it is stated:

   > "For 35 years the approach to dishonesty in the criminal courts was governed by the decision of the Court of Appeal Criminal Division in *R v Ghosh* [1982] QB 1053. In *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2017] UKSC 67; [2018] AC 391 the Supreme Court, in a carefully considered lengthy obiter dictum delivered by Lord Hughes of Ombersley, explained why the law had taken a wrong turn in *Ghosh* and indicated, for the future, that the approach articulated in *Ivey* should be followed. These appeals provide the opportunity for the uncertainty which has followed the decision in *Ivey* to come to an end. We are satisfied that the decision in *Ivey* is correct, is to be preferred, and that there is no obstacle in the doctrine of stare decisis to its being applied as the law of England and Wales."

2. Accordingly, the two-limb test of dishonesty set out in *Ghosh*[382] no longer represents the law. Directions based on *Ghosh* should no longer be given. The law as set out in *Barton* adopts the test as expounded at para 74 of *Ivey*, which identified the subjective and objective elements.

   > "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. […]
   >
   > Once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

3. At paragraph 84 of *Barton* the court set out the test thus:

   > "(a) what was the defendant's actual state of knowledge or belief as to the facts and (b) was his conduct dishonest by the standards of ordinary decent people?"

4. The first limb is a subjective enquiry. The focus is not on whether D believed his/her conduct was honest, but what D knew or believed to be the factual circumstances in which that conduct occurred. The court in *Ivey* gave the example

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380 [2020] EWCA Crim 575

381 [2017] UKSC 67

382 "(a) was the defendant's conduct dishonest by the ordinary standards of reasonable people? If so, (b) did the defendant appreciate that his conduct was dishonest by those standards?"

of a person travelling on a train without a ticket having just arrived from a country in which public transport was always free. The first stage is to establish what D knew or believed to be the factual situation and the second stage is an objective test. The jury is to assess the honesty of D's conduct objectively in the light of any relevant knowledge or beliefs D may have held as to the facts.[383]

5. The test unifies the law in relation to dishonesty in criminal and civil contexts. Within crime it will apply to any offence requiring proof of dishonesty: those in the Theft Act 1968 (theft, handling, false accounting) and Fraud Act 2006, but also other statutory offences and common law offences such as conspiracy to defraud.

6. How frequently it will be necessary to give a direction in accordance with *Barton* is open to question. Before *Ivey,* it was rare to need to give a *Ghosh* direction. This was explained in *Jouman*[384] at para 17 (addressing the law as set out in *Ghosh*) on the basis that: "It is trite law that the legal directions in any summing-up must be tailored to the facts of the instant case and the issues raised by it". The Court of Appeal in *Barton* did not stipulate whether the new two-limb test should be given in every case or only those in which something particular about the way the defence is being run renders it necessary to direct the jury on dishonesty.

7. In most cases the jury will need no further direction than the short two-limb test in *Barton* "(a) what was the defendant's actual state of knowledge or belief as to the facts and (b) was his conduct dishonest by the standards of ordinary decent people?" In cases in which D has adduced evidence to support a claim that he/she did not consider his/her conduct would be regarded as dishonest by ordinary decent people, it may be necessary to elaborate in two ways:

   (1) By making clear that in assessing whether the conduct was dishonest by the standards of ordinary decent people, the jury is to have regard to D's beliefs [and explain those in the context of the case].

   (2) To emphasise that D's beliefs as to whether the conduct would be seen as dishonest by the others is not determinative. The question whether it is dishonest conduct is for the jury to decide applying the standards of ordinary decent people.

8. In *Hayes*,[385] a pre-*Ivey* case, the defence called evidence about the culture and ethos of the LIBOR market. The Court of Appeal approved the trial judge's emphatic direction [para 10] that in considering the objective test under *Ghosh* the jury should consider the standards of reasonable and honest people, and not the standards, if different, of those operating within the LIBOR market or even of those regulating it. The question of whether evidence of, for example, market practices or 'industry standards' as featured in *Hayes*, will still be admissible in the light of *Barton* may be a vexed one that will call for careful consideration. If such evidence is admitted then an expanded direction based on *Barton* i.e.

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383 See para 60 of *Ivey* wherein it is suggested that the result should be the same whichever test is applied.

384 [2012] EWCA Crim 1850

385 [2018] 1 Cr App R 10

explaining the jury's approach to the defendant's beliefs and the standards of ordinary decent people, may be called for.

9. Some of the discussion in *Hayes* may still be of assistance when it is necessary to decide what evidence may be relevant and admissible in respect of the objective test under *Barton*. It is suggested that, when addressing the admissibility arguments, benefit may be gained by reflecting upon how the jury will in due course need to be directed. It will be necessary to ensure that where *Barton* type issues are a relevant consideration the directions given to a jury are carefully tailored to reflect the facts of a particular case and have been discussed with the advocates in advance.

10. In *Bermingham*,[386] the defence sought to persuade the Court of Appeal to revisit the decisions in *Ivey* and *Barton* and come to a different conclusion. That invitation was emphatically (and unsurprisingly) rejected, the court stating that it was bound by *Barton* "but even if we were free to depart from it, we would not do so as we consider it is undoubtedly correct" [103]. The court went on to state [104] "…there is simply no basis for the submission that the applicants were unfairly convicted because they did not realise at the relevant time that what they were doing was wrong and the conduct made them criminally liable". Example 3 below has been taken from the judgment in *Bermingham* wherein the trial judge's directions on dishonesty are set out.

Theft

11. In cases of theft, s.2 Theft Act 1968 specifies three situations which are not dishonest:

    (1) if D appropriates the property in the belief that he/she has in law the right to deprive the other of it, on behalf of him/herself or of a third person; or

    (2) if D appropriates the property in the belief that he/she would have the other's consent if the other knew of the appropriation and the circumstances of it; or

    (3) (except where the property came to him as trustee or personal representative) if D appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

12. If the defendant's state of mind may have been within one of the situations provided for in s.2 he/she is not dishonest. In a case of theft the jury must be reminded of the s.2 provisions whenever they are raised by the evidence.[387]

Directions

13. There will continue to be cases where the issue of dishonesty does not arise as something upon which the jury have to decide e.g. a charge of robbery where the issue at trial is identification.

14. It is suggested that in most cases where the question of dishonesty is a matter that the jury have to address a direction based upon the two-stage test as set out in *Barton* at paragraph 84 will need to be given.

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386 [2020] EWCA Crim 1662

387 *Falconer Atlee* [1973] 58 Cr App R 348; *Wootton and Peake* [1990] Crim LR 201

15. Depending on the circumstances of the case, in some rare cases it may be necessary to expand the direction to emphasise that:

    (1) in determining whether D was dishonest, the jury will need to consider what they can be sure about as to the state of D's knowledge and belief as to the relevant facts;

    (2) the jury will need to consider whether they are sure that D's conduct was dishonest by the standards of ordinary decent people;

    (3) D's beliefs as to whether the conduct would be seen as dishonest by others is not determinative. The question is whether they are sure the conduct was dishonest applying standards of ordinary decent people;

    (4) when considering whether the prosecution have proved that D was dishonest, the jury should draw such conclusions as they think right from D's conduct and/or words before and/or at the time of and/or after the alleged offence.

16. Cases where a defendant suggests that he/she did not consider that the conduct would be regarded as dishonest by ordinary decent people, may call for the more expanded exposition of the principles identified in *Barton* as set out in the preceding paragraph.

17. Where evidence in the case has been given which refers to 'industry standards' or the equivalent in a particular context it may be necessary to go on to give a *Hayes* type direction reminding the jury that the standard to be applied is that of ordinary decent people, and not those, if different, of operators or even regulators of that market sector.

Example 1

{Multi-defendant case where managers and suppliers to a hospice have generated false invoices in order to secure grant monies to which they would have been entitled had the work already been done and where the work was going to be done in the next financial year. The intent of the managers and suppliers is said to be avoiding the loss of grant monies that would be applied for the benefit of the terminally ill patients cared for in the hospice.}

Dishonesty – common to all counts

The matters required to be proved in this trial extend far beyond whether grant monies can and should be reclaimed from the company for whom the Ds worked. Those issues, on their own, would be a matter for the civil courts. Proof of an irregularity followed by some loss or some gain cannot on its own constitute proof of dishonesty. A D must have been dishonest in doing what they did. This is more than simply failing to follow proper procedure or best practice. You must first decide the facts as at the time of the relevant actions – what the prosecution have proved was done by whom and when. You must then decide, for the individual defendant whose case you are considering, the actual state of knowledge or belief about the facts of the surrounding agreement or transactions with which they are said to be involved. When examining knowledge or belief the question is whether it is genuinely held. Once you've decided the actual state of mind of the individual D the question whether the prosecution have made you sure the conduct was dishonest is to be determined by applying the (objective) standards of ordinary

decent people. It is by those standards that the issue of dishonesty must be decided and not by standards set by the D.

Example 2

{D has been stopped walking out of a computer store with a laptop for which D has not paid. On arrest and in evidence D said that the lack of an ability to easily access the internet was preventing D from securing employment and accommodation.}

The only issue in this case is whether D was acting dishonestly. D admits that he/she walked out of the shop with the laptop intending not to pay for it and that he/she intended to keep it. But D says that it was only a cheap laptop, he/she had no money, and was living on the streets and needed the laptop in order to find a job and so get a home. In these circumstances D says that he/she did not think that it was dishonest to take the laptop, and neither, D says, would anyone else. The prosecution say that what D did was obviously dishonest, that D knew it, and that D is now putting forward a false argument to avoid being convicted. In the alternative the prosecution says that D's belief as to his/her needing a laptop cannot operate as to make such an obviously dishonest act of taking one without paying something that ordinary decent people would consider honest.

You must first consider the circumstances in which the behaviour occurred, including what D knew or believed to be the factual situation. Have that in mind when you ask yourselves whether, in light of any understanding of the situation D had (or may have had), you are sure that D's action in taking the laptop without intending to pay for it was dishonest by the standards of ordinary decent people.

If you are sure it was, the prosecution will have proved that D acted dishonestly and your verdict will therefore be 'Guilty', whether or not D thought his/her behaviour was dishonest.

But if you are not sure that D's behaviour was dishonest by those standards, the prosecution will not have proved that D acted dishonestly, and your verdict will therefore be 'Not Guilty'.

Route to verdict for Example 2

Having taken into account D's state of knowledge and belief about the factual circumstances in which D acted, are we sure that D's action in taking the laptop from the shop, intending to keep it but without intending to pay for it, was dishonest by the standards of ordinary decent people?

- If **yes**, your verdict will be 'Guilty'.
- If **no**, your verdict will be 'Not Guilty'.

Example 3[388]

In a criminal trial, where it is alleged that a defendant was dishonest, it is for the prosecution to prove that the defendant was dishonest. It is not for the defendant to prove that he/she was honest. The burden of proof remains throughout the trial on the prosecution. The question of whether a defendant was dishonest is therefore for you the jury to determine.

Dishonesty is a central issue in this case. When considering the question of dishonesty, you must firstly, ascertain the defendant's actual knowledge or belief as to the facts; that is, ascertain what the defendant genuinely knew or believed the facts to be.

When considering the defendant's belief as to the facts, the reasonableness or unreasonableness of his/her belief is a factor that is relevant to the issue of whether the defendant genuinely held the belief. However, it is not an additional requirement that the belief must be reasonable. The question is whether the belief was genuinely held.

Secondly, having determined the defendant's state of knowledge or belief, go on to determine whether the defendant's conduct, as you have found it to be, was honest or dishonest by the standards of ordinary decent people.

There are no different standards of honesty which apply to any particular profession or group in society whether as a result of market ethos or practice. If you are sure that the defendant's conduct was dishonest, by the standards of ordinary decent people, the prosecution does not have to prove that the defendant recognised that the conduct was dishonest by those standards.

[388] Based on the direction in *Bermingham* ibid as set out in para 95.

8-7 Mistake

ARCHBOLD 17-10 and 17-18; BLACKSTONE'S A2.35, A3.2 and A3.60

Legal summary

Mistake of criminal law

1. Ignorance or mistake of law is no defence to a criminal charge;[389] *mens rea* does not involve knowledge on the part of D that his/her behaviour was against the criminal law.[390] For the care necessary in determining whether something amounts to a mistake of law or fact see *Datson*[391] in 8-5 above.

Mistake of civil law

2. Where the *mens rea* of an offence turns on proof of an element of civil law, D's mistake of civil law will excuse him/her whether or not D's mistake was a reasonable one. For example, where D is charged with criminal damage it must be proved that the damaged property 'belonged to another'. If D has made, or may have made, a mistake in thinking the property is his/her own, D is not guilty of that offence because D has not intended or been reckless as to damaging property belonging to another.[392]

Mistake of fact

3. Where D has made a mistake of fact this provides an excuse in all crimes of *mens rea* where it prevents D from possessing the relevant fault element which the law requires for the crime with which D is charged.[393] It is not a question of defence, but of denial of *mens rea*.

4. In crimes where the *mens rea* element is subjective (intention, recklessness, malice, wilfulness, knowledge and belief) the mistake need not be a reasonable one, but reasonableness of D's conduct will be important in evidential terms. The jury may infer from D's conduct and the unreasonable nature of the mistake in the particular circumstances that D had the relevant *mens rea*; but the onus of proof remains throughout on the Crown and, technically, D does not bear even an evidential burden.

5. The same approach applies where D makes a mistake about an element of a defence that calls for D to have a genuine (though not necessarily reasonable) belief in certain facts. For example, in self-defence, D must believe that there is a need for the use of force. D will not be denied the defence of self-defence if D made, or may have made, a sober mistake as to the need for the use of force,

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389 *Esop* (1836) 7 C & P 456

390 Statutory Instruments Act 1946, s.3(2) provides a defence for D charged with an offence created by Statutory Instrument to prove that, at the time of the offence, the instrument had not been published nor reasonable steps taken to bring its contents to the notice of the public or D.

391 [2022] EWCA Crim 1248

392 *Smith* [1974] QB 354

393 *B v DPP* [2000] UKHL 9; *K* [2001] UKHL 41; *G* [2003] UKHL 50

even if D's mistake was unreasonable.[394] In such a case D would not intend to use unlawful force; see Self-defence Chapter 18-1.

6. In crimes of negligence D's mistake of fact will only excuse if the mistake is a reasonable one. Similarly, where a defence requires D to hold a reasonable belief in a fact,[395] only if the mistake was a reasonable one to make in the circumstances will the defence still be available to D.

7. Mistake of fact, however reasonable, does not afford a defence to crimes of strict liability.

Directions

8. Where D claims to have been ignorant of or mistaken about the criminal law, the jury should be directed that this provides D with no defence.

9. Where D claims to have made a mistake about the civil law which would affect his/her criminal liability, the jury should be directed as follows:

   (1) If the jury find that D really did make the mistake concerned, or may really have done so, their verdict should be 'Not Guilty'.

   (2) This is so whether the jury regard the mistake as a reasonable or unreasonable one to have made in the circumstances of the case.

   (3) Nevertheless, when deciding whether D really did make or may have made the mistake D claims, the jury may, if they find it helpful, consider D's conduct, and whether or not the mistake was reasonable. They could take the view, if they thought it right, that the less reasonable the mistake D claims to have made, the less likely it is that D really made it.

   (4) If the jury were sure that D did not make the mistake at all, it could not provide D with a defence.

10. Where D claims to have made a mistake of fact which would affect his/her criminal liability whether it was reasonable or not, the jury should be directed as indicated in paragraph 9 above.

11. Where D claims to have made a mistake which would affect his/her criminal liability only if it was reasonable, the jury should be directed as follows:

   (1) If the jury find that D really did make the mistake concerned, or may really have done so, **and** consider that it was a reasonable one to have made in the circumstances of the case, their verdict should be 'Not Guilty'.

   (2) If the jury find that D really did make the mistake concerned, or may really have done so, **but** consider that it was not a reasonable one to have made in the circumstances of the case, it would not provide D with a defence.

   (3) [If the point arises:] A mistake resulting entirely from D's voluntary intoxication by alcohol and/or drugs cannot be regarded as reasonable.

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394 *Williams* [1987] 3 All ER 441; *Beckford* [1987] UKPC 1

395 E.g. duress where D must genuinely and reasonably believe there is a threat of death or serious injury: *Hasan* [2005] UKHL 22

(4) If the jury are sure that D did not really make the mistake at all, it could not provide D with a defence.

Example: Mistake of fact – burglary

It is alleged that D entered {address} as a trespasser, intending to steal something from inside the house. D says that he/she was drunk and that D was not trespassing because D mistakenly thought that the house was D's mother's, with whom D was going to stay the night.

The prosecution must first prove that D was a trespasser. To do this they must make you sure either that D did not make the mistake D claims or that, although D may have made the mistake, D would not have done so if D had been sober. In other words, the prosecution must prove that D knew the house was not D's mother's or that D would have known this if D had been sober.

If you decide that D made or may have made the mistake he/she claims and that D would or may have made the same mistake if sober, the prosecution will not have proved that D was a trespasser and your verdict will therefore be 'Not Guilty'. If however you are sure that D did not make this mistake, or although D may have made it D would not have done so if sober, the prosecution will have proved that D was a trespasser, and you must then consider a second question.

This question is whether you are sure that D intended to steal something from inside the house. Here it is D's actual intention that counts, whether D was drunk or not. However, you should bear in mind that a person affected by alcohol may still be able to form an intention, and it is no defence for D to say that he/she would not have formed that intention had he/she been sober.

If you are sure that D did intend to steal something from inside the house, your verdict will be 'Guilty'. If you are not sure, your verdict will be 'Not Guilty'.

See also Example 3 in Chapter 18-1 (relating to mistaken belief in self-defence cases when voluntarily intoxicated).

9. INTOXICATION

ARCHBOLD 17-86 to 17-103; BLACKSTONE'S A3.15 – 22

Legal summary

1. The effect of a defendant's intoxicated state on their criminal liability turns upon whether it was self-induced, the type of offence charged and the level of intoxication. The same principles apply whether the alleged intoxication is induced through alcohol or through drugs.[396]

Voluntary intoxication

2. Cases of voluntary intoxication include those where the defendant has taken drink or drugs or any other intoxicating substance although the defendant was unaware of its strength.[397]

3. Voluntary intoxication may be relevant to particular defences: for example see Chapter 18-1 Self-defence; Chapter 18-3 Duress. Particular statutory defences may make special provision. See e.g. Criminal Damage Act 1971, s.5(2).[398] Note in particular that an honest belief in the need to act in self-defence which is attributable to an intoxicated mistake may not be relied upon.[399] D cannot rely on the defence if his/her state of mind is a direct and proximate result of self-induced intoxication even if the intoxicant is no longer still present in D's system. However, the defendant **may** be able to rely on a genuine belief in self-defence resulting from mental illness caused by the long-term use of alcohol.[400]

4. If the level of voluntary intoxication is such that D did not know the nature of their act or that what he/she was doing wrong that is **not** a plea of insanity.[401] If the voluntary intoxication has resulted in a disease of the mind and the defendant claims that the disease caused him/her to lack awareness of the nature and quality or wrongfulness of the act, the plea is one of insanity:[402] see Chapter 18-5 *M'Naghten* insanity including insane automatism.

5. Specific intent offence:

   (1) An offence is one of specific intent if the predominant *mens rea* is one of intention (e.g. murder).[403] If the offence charged is one of specific intent the Crown must prove that the defendant had the relevant *mens rea* for the offence despite being intoxicated.[404] The defendant's intoxication can

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396 *Lipman* [1970] 1 QB 152
397 *Allen* [1988] Crim LR 698
398 *Jaggard v Dickinson* [1981] QB 527. Cf *Magee v. Crown Prosecution Service*, 179 J.P. 261, D.C.
399 See the Criminal Justice and Immigration Act 2008 s.76(4), (5).
400 *Taj* [2018] EWCA Crim 1743
401 *Coley* [2013] EWCA Crim 223
402 *Coley* [2013] EWCA Crim 223
403 *Heard* [2007] EWCA Crim 125 suggesting that the test is whether the *mens rea* goes to some ulterior matter beyond the *actus reus* (e.g. on this view reckless criminal damage being reckless whether life is endangered is specific intent).
404 *Majewski* [1976] UKHL 2

provide evidence that he/she did not form the *mens rea.* The quantity of intoxicant taken is just one of the circumstances to be considered.

(2) If the defendant did form the *mens rea*, intoxication provides no excuse: an intention formed in drink or under the influence of drugs remains an intention. If the *mens rea* was formed, it is no excuse for the defendant to say that they would not have formed it but for the intoxication. In *Sheehan and Moore*,[405] Lane LJ stated:

> "Indeed in cases where drunkenness and its possible effect on the defendant's mens rea is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on the defendant had the requisite intent."

This approach was endorsed recently in *Campenau*[406] where it was emphasised that "for a *Sheehan* direction to be necessary there must be a proper factual or evidential basis for it." In *Garlick*[407] the court, in allowing an appeal on the basis that the judge failed to direct in accordance with *Sheehan,* stated that:

> "[w]hen the question of drunkenness arises, it is not a question of capacity of the defendant to form a particular intent which is in issue. What is in issue is the question simply whether he did form such an intent. Applying it to this case, what the jury had to decide was not whether Garlick was or was not capable of forming the intent to do really serious bodily harm, but whether he did in fact form the intent. "

There may be some cases in which the separate question of capacity to form intent is an appropriate question to ask as an initial stage in the overall question of whether a defendant did in fact form the relevant intention. In rare cases it may be appropriate for medical evidence to be called which can suggest or establish a lack of capacity, in which case the lack of capacity, if accepted by the jury, will be determinative of the case, because if objectively a defendant lacks capacity to form the relevant intention, it necessarily follows that the defendant did not in fact subjectively form that intention in the circumstances of the case. But such cases in which medical evidence will be available and of assistance will be rare.

In *Mohamadi*[408] the evidence was that the 16-year-old D was drunk and may have been particularly affected by alcohol to an extent that could impact on his capacity to form the specific intent to encourage others engaged in an act of gang rape. While the test remains focussed on whether

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405 [1975] 1 WLR 739 – and see *White* [2017] NICA 49
406 [2020] EWCA Crim 362
407 (1981) 72 Cr App R 291, 293-4
408 [2020] EWCA Crim 327

D **did form** the intent, not whether he was capable of doing so, the Court of Appeal considered that it would have been preferable if the judge had given a *Sheehan* direction but concluded that the absence of doing so did not render the conviction unsafe.

Leggatt LJ noted that the first part of the direction, to the effect that a drunken intent is still an intent, is not favourable to the defence. The second part, which may be helpful to the defence, is:

> "little more than a direction to draw such inferences as to intention which the jury think proper from the evidence. The only additional content which the direction has is to remind the jury that part of the evidence is evidence relating to drink." [42]

(3) If the defendant has voluntarily intoxicated him/herself in order to commit/or in anticipation of committing a crime ('Dutch Courage' intoxication) that intoxication does not provide an excuse even though, because of the voluntary intoxication, at the time of committing the offence the defendant did not form the *mens rea.*[409]

6. Basic intent offence:

(1) A basic intent offence encompasses, *inter alia*, crimes of recklessness, malice, wilfulness, suspicion, negligence and strict liability.

(2) **Intoxication by dangerous drug:** Where the offence charged is a basic intent offence, the defendant's claim of lack of *mens rea* on the basis of voluntary intoxication will not afford a defence.[410] The jury should be told to ignore the evidence of the voluntary intoxication and ask whether the defendant would have had the relevant *mens rea* if sober.[411]

(3) **Intoxication by non-dangerous drug:** When the voluntary intoxication arises as a result of the defendant taking an intoxicating substance that is not commonly known to create states of unpredictability or aggression (e.g. valium), the jury need to be sure that the defendant was, in taking that drug, subjectively reckless as to becoming aggressive or unpredictable in his/her behaviour.[412] If they are sure of that recklessness having regard to all the circumstances including the drug and its quantity and the defendant's knowledge and experience of it, then the state of the defendant's intoxication at the time of the offence can provide no defence.

Involuntary intoxication

7. Where the intoxication is involuntary (e.g. spiked drinks, unforeseen adverse reactions to bona fide medical prescription drugs) the defendant is entitled to be acquitted unless the Crown prove that he/she had the relevant *mens rea* for the offence despite being intoxicated. If it is proved that the necessary *mens rea* was present when the necessary conduct was performed by him/her, a

409 *Attorney General for Northern Ireland v Gallagher* [1961] UKHL 2
410 *Majewski* [1976] UKHL 2
411 *Richardson* [1999] 1 Cr App R 392
412 *Hardie* [1984] EWCA Crim 2

defendant has no 'defence' of involuntary intoxication: *Kingston.*[413] A defendant is not involuntarily intoxicated where he/she has taken a substance commonly known to create states of unpredictability but was unaware of its strength.[414]

8. The jury should be directed to consider whether they are sure the defendant did form the *mens rea* for the offence. Intention or recklessness formed in drink or under the influence of drugs, even if imbibed involuntarily, remains intention or recklessness. The question for the jury is whether the defendant did form the *mens rea*, not whether the defendant was capable of doing so.[415] In a case under the Public Order Act 1986, s.6 requires D to 'show' that his/her intoxication was not voluntary.

Directions

9. A direction about the effect of intoxication by alcohol and/or drugs on D's state of mind will be necessary only if:

   (1) D claims not to have formed the required state of mind (*mens rea*) because he/she was intoxicated by such substances; and

   (2) there is evidence that D may have consumed such substances in such a quantity that D may not have formed that state of mind.

10. The need for and form of any such direction should be discussed with the advocates in the absence of the jury before closing speeches.

11. In *Aidid*[416] at paras [86]-[94] the Court of Appeal gave guidance on when a trial judge should give a direction to the jury on the relevance of the defendant's self-induced intoxication, the essential elements of the direction, and the consequences of not doing so in relation to **offences of specific intent**. The Court stated that:

    "If there is evidence of drunkenness which might give rise to an issue as to whether specific intention could be formed by the accused, a direction should normally be given to the jury that a drunken intent was nevertheless an intent, but that they had to feel sure, having regard to all the evidence, that the defendant had had the intent." [88]

12. In relation to an **offence of specific intent** where D was **voluntarily intoxicated by alcohol and/or drugs**, the jury should normally be directed as follows:

    (1) It is possible for a person to be so intoxicated by alcohol/drugs that he/she does not form the requisite intent.

    (2) However, in many cases a person intoxicated by alcohol/drugs may still be perfectly capable of forming an intention and does in fact do so.

    (3) The crucial question for the jury is whether, notwithstanding the level of intoxication, D did in fact have and/or act with the relevant intent.

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413 *Kingston* [1994] UKHL 9
414 *Allen* [1988] Crim LR 698
415 *Sheehan, Moore* [1975] 1 WLR 739 – and see *White* [2017] NICA 49
416 [2021] EWCA Crim 581

(4) If D does so, then it is no defence for D to say that they would not have had a particular intention or acted in a particular way had they not been affected by alcohol/drugs.

(5) The jury should therefore consider whether, despite being intoxicated, D had the required intention at the time of the alleged offence.

(6) If they were sure that D did have the relevant intent, D's intoxication would not provide him/her with any defence.

(7) If they were not sure, D would be not guilty.

(8) See also paragraphs 16 and 18 below.

13. In relation to an **offence of basic intent** where recklessness is sufficient and D was **voluntarily intoxicated by alcohol and/or a dangerous drug**, the jury should normally be directed as follows:

(1) They should consider whether they are sure that D would have had the required state of mind had he/she not been intoxicated i.e. D would have recognised the risk had he/she been sober.

(2) If they are sure of this, D's intoxication would not provide him/her with any defence.

(3) If they are not sure, D will be not guilty.

(4) See also paragraphs 16 and 18 below.

14. In relation to an **offence of basic intent** where D was **voluntarily intoxicated by a non-dangerous drug**, (i.e. one which does not usually lead to unpredictable or aggressive behaviour, such as valium or insulin, but is said to have done so in D's case), the jury should normally be directed as follows:

(1) They should consider whether, when D took the drug, D was aware of the risk that it might lead to such behaviour in his/her case, but went on to take the risk when it was unreasonable to do so in the circumstances known to him/her.

(2) If they were sure of this, D's intoxication would not provide him/her with any defence.

(3) If they were not sure, D would be not guilty.

(4) See also paragraphs 16 and 18 below.

15. In relation to **any offence** (other than one of strict liability) where D claims to have been **intoxicated involuntarily** (e.g. because his/her drink had been spiked) the jury should normally be directed as follows:

(1) They must first decide whether or not D's claim is true.

(2) If they were sure it was untrue, they should obviously disregard it.

(3) If they thought that it was or might be true, they should consider whether, despite being involuntarily intoxicated, D had formed the required state of mind at the time of the alleged offence.

(4) If they were sure of this, D's intoxication would not provide him/her with any defence, even though it was involuntary.

(5) If they were not sure, D would be not guilty.

(6) See also paragraphs 16 and 18 below.

16. If D claims not to remember what happened because of the alcohol/drugs he/she had taken, the jury should be directed as follows:

(1) They must first decide whether or not D's claim is true.

(2) If they were sure that it was untrue, they should obviously disregard it.

(3) If they thought that it was or might be true, they should take it into account when deciding whether the prosecution have proved that D had the required state of mind. They should bear in mind, however, that D might have had the required state of mind at the time of the alleged offence even if D did lose or may have lost his/her memory of the events at some later stage.

17. The jury should also be directed that when they are considering all these matters they should take into account (as relevant in the particular case) any evidence about the quantity of alcohol and/or the nature and quantity of the drugs that D had taken; when D had done so; the circumstances in which D had done so; D's knowledge and/or experience of alcohol and/or the drug concerned; any expert evidence; and any relevant evidence of D's condition, and/or of what D did and/or said, before and/or at the time of and/or /after the alleged offence.

18. The directions suggested above will need to be adapted if D took alcohol/drugs to give him/herself 'Dutch courage' to commit an offence, because in such a case the prosecution must prove that D had the required state of mind when he/she started drinking/taking the drugs rather than when the offence was committed.

Example: Wounding with intent and unlawful wounding

In relation to Count 1 (section 18) D's defence is that he/she did not intend to cause W grievous bodily harm, which means really serious injury, and that because D had drunk about ten pints of strong lager in the two hours or so before the incident D was so drunk that he/she did not form that intention.

It is possible for a person to be so drunk that he/she does not form a particular intention. However, a person who is drunk may still be able to form an intention; and, if he/she does so, it is no defence to say that he/she would not have formed that intention if he/she had been sober.

If you think that D was or may have been so drunk that D did not form an intention to cause W really serious injury, you must find D not guilty of Count 1 and go on to consider the alternative Count 2 (section 20). But if you are sure that, despite being affected by alcohol, D did intend to cause W really serious injury you will find D guilty of Count 1 and in that event you will not consider, or return a verdict on, Count 2.

When you are considering how drunk D was and whether D intended to cause really serious injury, you should look at all of the evidence on this point.

[Here summarise the relevant evidence.]

If you need to consider Count 2, the amount that D had had to drink is irrelevant. The question on Count 2 is whether you are sure that D either acted 'maliciously' in the sense that I have already explained to you [see Chapter 8-3 Example 2] or would have done so if D had been sober. If you are sure that one of these things has been proved, your verdict on Count 2 will be 'Guilty'. Otherwise it will be 'Not Guilty'.

10. EVIDENCE – GENERAL

10-1 Circumstantial evidence

ARCHBOLD 9-36; BLACKSTONE'S F1.22

Legal summary

1. Most criminal prosecutions rely on some circumstantial evidence. Others depend entirely or almost entirely on circumstantial evidence and it is in this category that most controversy is generated and specific directions will be required.
2. A circumstantial case is one which depends for its cogency on the unlikelihood of coincidence: circumstantial evidence "works by cumulatively, in geometrical progression, eliminating other possibilities" (*DPP v Kilbourne*[417] per Lord Simon). The prosecution seeks to prove separate events and circumstances which can be explained rationally only by the guilt of the defendant. Those circumstances can include opportunity, proximity to the critical events, communications between participants, scientific evidence and motive. The subsequent conduct of the defendant may also furnish evidence of guilt, for example evidence of flight, fabrication or suppression of evidence, telling lies or unexplained possession of recently stolen property.
3. At the conclusion of the prosecution case the question for the judge is whether, looked at critically and in the round, the jury could safely convict.[418] The question for the jury is whether the facts as they find them to be drive them to the conclusion, so that they are sure, that the defendant is guilty.[419] *Bassett*[420] is a example of the Court of Appeal concluding that the judge should have allowed a submission in a case which depended upon circumstantial evidence. The judgment sets out the correct test to apply.
4. Evidence, not probative in its own right, might legitimately be used when aggregated with other circumstantial evidence, so as to lend support for the case being advanced: see *Olive*.[421]
5. In a conspiracy, the cases of *Hunt*[422] and *Awais*[423] underline that the judge is required to analyse the evidence so as to identify whether it could legitimately permit a jury not just to identify the existence of the conspiracy but also the nature of the crime the agreement is intended to bring about.
6. Pitchford LJ in *Masih*[424] suggested that the correct question is "Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?" For another helpful distillation of the correct approach when addressing a submission of no case to answer in a

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417 [1973] AC 729 at p.758
418 *P(M)* [2007] EWCA Crim 3216
419 *McGreevy v DPP* [1973] 1 WLR 276
420 [2020] EWCA Crim 1376
421 [2022] EWCA Crim 1141
422 [2015] EWCA Crim 1950
423 [2017] EWCA Crim 1585
424 [2015] EWCA Crim 477

circumstantial evidence case see *Lowther.*[425] In *Cooper*[426] the court commented on this approach and stated that there is no precise formulation that needs to be adopted in order to address this process of analysis.

7. It has been held that circumstantial evidence must always be:

> "narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. …It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference": *Teper*.[427]

There is no requirement, however, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion.[428] On this topic see also *Lewis*.[429]

8. *Teper* and *McGreevy* were considered in *Kelly*[430] in which Pitchford LJ said:

> "39. The risk of injustice that a circumstantial evidence direction is designed to confront is that (1) speculation might become a substitute for the drawing of a sure inference of guilt and (2) the jury will neglect to take account of evidence that, if accepted, tends to diminish or even to exclude the inference of guilt (see *Teper v R*). However, as the House of Lords explained in *McGreevy*, circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. The ultimate question for the jury is the same whether the evidence is direct or indirect: Has the prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty? It is the task of the trial judge to consider how best to assist the jury to reach a true verdict according to the evidence."

Directions

9. In a case in which there is both direct and circumstantial evidence, the jury should be directed as follows:

   (1) Some of the evidence on which the prosecution rely is direct evidence. Briefly summarise the direct evidence.

   (2) The prosecution also rely on what is sometimes described as circumstantial evidence. That means different strands of evidence no one of which proves that D is guilty but which, the prosecution say, when taken together and with other evidence prove the case against D. Briefly summarise the circumstantial evidence, and the conclusions which the prosecution say are to be drawn from it.

   (3) See also paragraph 10 below.

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425 [2019] EWCA Crim 1499
426 [2022] EWCA Crim 166
427 [1952] UKPC 15 at p.3 per Lord Normand
428 *McGreevy v DPP* [1973] 1 WLR 276
429 [2017] EWCA Crim 1734
430 [2015] EWCA Crim 817

10. In a case in which the **only** evidence is circumstantial, the jury should be directed as follows:

    (1) In some cases there is direct evidence that a defendant is guilty, for example evidence from an eye-witness who saw the defendant committing the crime, or a confession from the defendant that he/she committed it.

    (2) In other cases however, including this one, there is no direct evidence and the prosecution rely on (what is sometimes referred to as) circumstantial evidence. That means different strands of evidence which do not directly prove that D is guilty but which do, say the prosecution, leave no doubt that D is guilty when they are drawn together.

    (3) Briefly summarise the circumstantial evidence and the conclusions which the prosecution say are to be drawn from it.

    (4) See also paragraph 11 below.

11. In any case involving some circumstantial evidence, the jury should **also** be directed as follows:

    (1) Briefly summarise any evidence and/or arguments relied on the defence to rebut the circumstantial evidence and/or the conclusions which the prosecution contend are to be drawn from it.

    (2) The jury should therefore examine each of the strands of circumstantial evidence relied on by the prosecution, decide which if any they accept and which if any they do not, and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept.

    (3) However, the jury must not speculate or guess or make theories about matters which in their view are not proved by any evidence.

    (4) It is for the jury to decide, having weighed up all the evidence put before them, whether the prosecution have made them sure that D is guilty.

Example

NOTE: although an example is provided judges should bear in mind the words of Pitchford LJ in *Kelly*:[431]

> "It is not unusual for the trial judge to point out to the jury the difference between proof by direct evidence and proof by circumstances leading to a compelling inference of guilt. However, there is no rule of law that requires the trial judge to give such an explanation or any requirement to use any particular form of words. It depends upon the nature of the case and the evidence."

Where all the prosecution evidence is circumstantial

There is no direct evidence that D committed the crime with which he/she is charged, such as evidence from an eye-witness who saw D committing it, or evidence that D confessed to committing it.

[431] [2015] EWCA Crim 817

The prosecution therefore rely on what is sometimes referred to as circumstantial evidence: that is pieces of evidence relating to different circumstances, none of which on their own directly proves that D is guilty but which, say the prosecution, when taken together leave no doubt that D is guilty.

[Summarise the pieces of evidence on which the prosecution rely and the conclusions they say should be drawn from them.]

The defence say that you should not accept [some of] these pieces of evidence.

[Identify the pieces of evidence concerned, and summarise the defence arguments about them.]

The defence also say that the evidence on which the prosecution rely does not in fact prove D's guilt at all. They say that there are too many gaps and too many unanswered questions.

[Summarise the defence arguments about this.]

You must decide which, if any, of these pieces of evidence you think are reliable and which, if any, you do not. You must then decide what conclusions you can fairly and reasonably draw from any pieces of evidence that you do accept, taking these pieces of evidence together. You must not however engage in guess-work or speculation about matters which have not been proved by any evidence. Finally you must weigh up all the evidence and decide whether the prosecution have made you sure that D is guilty.

10-2 Corroboration and the special need for caution

ARCHBOLD 4-468; BLACKSTONE'S F5.1

Legal summary

1. Corroborative evidence is relevant, admissible,[432] and credible[433] evidence independent of the source requiring corroboration,[434] and which has the effect of implicating the accused.
2. Historically there were specific categories of case where, because of the nature of the allegation or the type of witness, a direction was required that the jury should look for corroboration of the evidence in question: evidence of an accomplice, a complainant in the trial of a sexual offence and evidence of a child, but corroboration is now required by statute only in cases of treason,[435] perjury,[436] speeding[437] and attempts to commit such offences.[438]
3. Although corroboration in the strict sense is now no longer required in support of the categories outlined above, circumstances may nevertheless require the judge, as a matter of discretion in summing up, to give a warning to the jury about the need for caution in the absence of supporting evidence.
4. In *Makanjuola*,[439] Lord Taylor CJ gave the following guidance:

   "To summarise:

   (1) Section 32(1) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.

   (2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.

   (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. **This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.**

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[432] *Scarrott* [1978] QB 1016 at p.1021
[433] *DPP v Kilbourne* [1973] AC 729 at p.746; *DPP v Hester* [1973] AC 296 at p.315
[434] *Whitehead* [1929] 1 KB 99
[435] Treason Act 1795, s.1
[436] Perjury Act 1911, s.13
[437] Road Traffic Regulation Act 1984, s.89(2)
[438] Criminal Attempts Act 1981, s.2(2)(g)
[439] [1995] 1 WLR 1348 at p.1351D

(4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.

(5) **Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.**

(6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

(7) .....

(8) Finally, this Court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the Wednesbury sense." [emphasis added]

5. The need to consider giving a discretionary warning of the type described in *Makanjuola* arises whenever the need for special caution before acting on the evidence of certain types of witness, if unsupported, is apparent. The following types of witnesses/categories of case are worth consideration:

   (1) Co-defendants: An accused may have a purpose of their own to serve by giving evidence which implicates a co-defendant.[440] In *Jones*,[441] in which each of the defendants in part placed blame on the other, Auld LJ commended counsel's suggestion that in such cases the jury should be directed:

      (a) to consider the cases of each defendant separately;

      (b) the evidence of each defendant was relevant to the case of the other;

      (c) when considering the co-defendant's evidence, the jury should bear in mind that the interest may have an interest to serve; and

      (d) the evidence of a co-defendant should otherwise be assessed in the same way as the evidence of any other witness.

   (2) Witnesses tainted by improper motive.[442]

   (3) Witnesses of bad character.[443]

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440 *Cheema* [1994] 1 WLR 147; *Muncaster* [1998] EWCA Crim 296; *Jones* [2003] EWCA Crim 1966

441 *Jones* [2003] EWCA Crim 1966 at para 47

442 *Beck* [1982] 1 WLR 461 at p.467E (defence making allegations of impropriety against witnesses for the prosecution); *Chan Wai-Keung* [1995] 1 WLR 251 (prisoner awaiting sentence giving evidence in unrelated case); *Ashgar* [1995] 1 Cr App R 223 (defence allegation that prosecution witnesses were protecting one of their number); *Pringle* [2003] UKPC 9 and *Benedetto* [2003] UKPC 27 (cell confession); *Spencer* [1987] UKHL 2 (patients in a secure hospital).

443 *Spencer* [1987] UKHL 2; *Cairns, Zaidi and Chaudhary* [2002] EWCA Crim 2838

(4) Evidence from a witness received after s.73 SOCPA 2005/s.74 SA 2020 agreement.[444]

(5) Children: Whether to give a direction will depend on the circumstances of the case, including the intelligence of the child and, in the case of unsworn evidence, the extent to which the child understands the duty of speaking the truth. In *MH*,[445] a case involving a three-year-old complainant, the Court of Appeal rejected the suggestion that the judge should have directed the jury that children may imagine, fantasise or misunderstand a situation, may easily be coached, may say what they think their mother wants to hear, or may merely repeat by rote that which has been said on a previous occasion; and that the judge should have warned the jury not to be beguiled by the attractiveness of the child and to bear in mind the child's extreme youth. It would have been wrong for the judge to engage in such generalisations remote from the facts of the case.

(6) Unexplained infant deaths: Such cases may give rise to serious and respectable disagreement between experts as to the conclusions which can be drawn from post mortem findings. Supporting evidence independent of expert opinion may be required.[446]

(7) Inherently unreliable witnesses: for example if it has become clear that a witness has made a false complaint, otherwise lied or given substantially different accounts in the past.

6. Whether a warning is given and the terms of any warning given are matters of judicial discretion.[447] "Even where a witness is said to be unreliable it is a direction that is given sparingly"; *Hindle.*[448] In *Stone*[449] the Court of Appeal reiterated the need to examine the particular circumstances of the case before reaching a judgment as to the terms in which the requirement for caution should be expressed.[450] A possible starting point, drawing on *Turnbull*[451] [see Chapter 15-1] is to warn the jury of the special need for caution before acting on the disputed evidence, and to explain the reason why such caution is required. Where the jury is advised to look for supporting evidence, the judge should identify the evidence which is capable of supporting that of the witness;[452] if there is none, the jury should be directed to that effect.

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444 *Daniels and Ors* [2010] EWCA Crim 2740

445 [2012] EWCA Crim 2725 at para.50 to 51 per Pitchford LJ

446 *Cannings* [2004] EWCA Crim 1; *Kai-Whitewind* [2005] EWCA Crim 1092 (evidence supporting the experts' opinion as to cause of death was found in post mortem results) and *Hookway* [2011] EWCA Crim 1989 (dispute between experts not whether there was DNA evidence incriminating the appellants but as to the strength of that evidence).

447 *Laing v The Queen* [2013] UKPC 14 at para.8 citing Lord Taylor CJ in *Makanjuola* [1995] 1 WLR 1348 at p.1351

448 [2021] EWCA Crim 1367

449 [2005] EWCA Crim 105

450 The content of the warning is a matter for the judge's discretion in the light of the evidence, the issues and the nature of the particular taint on the evidence of the impugned witness: *Muncaster* [1998] EWCA Crim 296; *L* [1999] Crim LR 489

451 [1977] QB 224

452 *B (MT)* [2000] Crim LR 181

Directions

7. In some cases, for example those listed in paragraph 5 above, it may be appropriate for the judge to direct the jury to approach the evidence of a particular witness with caution. The need for and terms of any such direction should be discussed with the advocates in the absence of the jury before closing speeches.

8. It is usually a matter for the judge's discretion whether to give any direction, and if so in what terms. However, if one defendant or suspect in relation to an offence gives evidence against another a cautionary direction will almost always be necessary, as to which see also the final bullet point below.

9. Any such direction is best given as part of the review of the evidence rather than as a set-piece legal direction during the first part of the summing up.

10. The strength and terms of any such direction will depend on the circumstances of the individual case. No set formula is available. The following is offered only by way of general guidance, and is not intended to cover every situation that might arise:

    (1) The witness concerned ('W') should be identified and the reason(s) for the need for caution should be explained.

    (2) Sometimes it will be sufficient simply to direct the jury to approach the evidence of W with caution. If so, the jury should also be directed that they may nevertheless rely on that evidence if, having taken into account the need for caution, they are sure that W is telling the truth.

    (3) Where there is no independent supportive evidence, it may be appropriate to remind the jury of that fact, and possibly to suggest that the jury may have wished for such evidence. In that event the jury should also be directed that they may nevertheless rely on the evidence of W if, having taken into account the need for caution and the absence of any independent supportive evidence, they are sure that W is telling the truth.

    (4) In cases where there **is** potentially independent supportive evidence, that evidence must be identified, adding that it is for the jury to decide whether they accept that evidence and if so whether they regard it as supportive. If they conclude that there is independent supportive evidence they may take this into account when assessing W's evidence, but it does not mean that W is bound to be telling the truth. On the other hand, even if the jury conclude that there is no independent supportive evidence, they may still rely on the evidence of W if, having taken into account the need for caution and the absence of any independent supportive evidence they are sure that W is telling the truth.

    (5) Where co-defendants give evidence against each other, the need for caution needs to be conveyed without unnecessarily diminishing the evidence of either defendant. This can usually be achieved by incorporating directions that the jury should consider the case of each defendant separately; should examine that part of each defendant's evidence which implicates the other with caution, since each may have his/her own purpose to serve; but otherwise should assess each defendant's evidence in the same way as that of any other witness. This approach can be adapted to

cover a case in which one co-defendant gives evidence against another, but not *vice versa*.

Example 1: Co-defendant[453]

When considering the evidence of D1 and D2 you should bear these points in mind:

1. First, as I have already explained to you, you must consider the case against and for each D separately.
2. Secondly, you should decide the case in relation to each D on **all** of the evidence, which includes the evidence given by each of the Ds.
3. Thirdly, you should assess the evidence given by each of the Ds in the same way as you assess the evidence of any other witness in the case.
4. Finally, when the evidence of one D bears upon the case of the other, you should have in mind that the D whose evidence you are considering may have an interest of his/her own to serve and may have tailored their evidence accordingly. Whether either D has in fact done this is entirely for you to decide.

Example 2: Co-defendant who has pleaded guilty and has, by written agreement, assisted the prosecutor by giving evidence[454]

When considering the evidence of W you should bear in mind that W has already pleaded guilty to the offence with which D is charged and gave evidence which implicated D after formally agreeing to help the prosecution by doing so. W did this hoping to get a lesser sentence.

Because this is the situation you should approach W's evidence with caution, knowing that W has an obvious incentive to give evidence which implicates D. You should ask yourselves whether W has, or may have, tailored his/her evidence to implicate D falsely or whether you can be sure, despite the potential benefit to W of giving evidence against D, that W has told you the truth. If you are sure that W has told the truth, you may rely on his/her evidence.

453 This example is based on *Jones and Jenkins* [2003] EWCA Crim 1966
454 Serious Organised Crime and Police Act 2005, s.73

10-3 Expert evidence

ARCHBOLD 10-35; BLACKSTONE'S F11.4; CrimPR 19; CrimPD 2023 Chapter 7

Legal summary

1. Expert opinion evidence is admissible in criminal proceedings at common law[455] if:
   (1) it is relevant to a matter in issue in the proceedings;
   (2) it is needed to provide the court with information likely to be outside the court's own knowledge and experience;
   (3) the witness is competent to give that opinion;
   (4) the evidence satisfies the test set out in *Reed*[456] at para 111:

   > "Expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury. There is, however, no enhanced test of admissibility for such evidence. If the reliability of the scientific basis for the evidence is challenged, the court will consider whether there is a sufficiently reliable scientific basis for that evidence to be admitted, but, if satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted, then it will leave the opposing views to be tested in the trial."

2. Case management is essential in keeping expert evidence on track and relevant to the issues in the case. Useful case management directions can include inviting parties to admit as a fact a summary of the expert's conclusions (CrimPR 19.3(1)); directing a single joint defence expert where there are two or more experts (CrimPR 19.7); directing a joint meeting between the experts and an agreed statement of issues between the parties summarising matters agreed and in dispute (CrimPR 19.6 and CrimPD 7.3).
3. CrimPR 19 requires the service of expert evidence in advance of trial in the terms required by those rules. An expert report is admissible in evidence whether or not the person who made it gives oral evidence, but if that person does not give oral evidence, then the report is admissible only with the court's permission.[457]
4. In considering the admissibility of expert opinion evidence, a judge must have regard to the factors listed in CPD Ch 7.

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455 *Brecani* [2021] EWCA Crim 731 contains a helpful review of the legal principles in the context of the National Referral Mechanism and decisions of the Single Competent Authority in relation to victims of modern slavery. See also *AAD* [2022] EWCA Crim 106 regarding opinion evidence not being admissible in relation to particular aspects of the s.45 Modern Slavery Act defence, and the correct approach to 'compulsion' under s.45.

456 [2009] EWCA Crim 2698

457 Section 30 Criminal Justice Act 1988

5. Expert evidence is admitted only on matters that lie beyond the common experience and understanding of the jury: *Turner.*[458] The purpose of the expert's opinion evidence is to provide the jury with evidence of findings and the conclusions that may be drawn from those findings. Particular care is needed to avoid expert opinion as to the credibility, reliability or truthfulness of a witness or confession: *Pora v The Queen*[459] Lord Kerr explained:

   > "It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case."

   See also *H*.[460]

6. The expert must be duly qualified and should only provide evidence on matters within his or her expertise: *Atkins*;[461] *Clarke*,[462] *SJ*,[463] *Pabon*.[464]

7. Unlike lay witnesses, experts may give evidence of opinion. Where the expert has given evidence of opinion, the jury remains the ultimate arbiter of the matters about which the expert has testified. The jury are not bound to accept the expert's opinion if there is a proper basis for rejecting it. But "where there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence, juries may not do so": see *Brennan*[465] and also *Golds*[466] at para 49. The jury must be warned not to substitute their own opinions for those of the experts e.g. by undertaking their own examination of handwriting or a fingerprint. A jury is entitled to rely on an expert opinion which falls short of scientific certainty: *Gian.*[467]

8. If an expert expresses their conclusions in relative terms (e.g. "no support, limited support, moderate support, support, strong support, powerful support") it may help the jury to explain that these terms are no more than labels which the witness has applied to their opinion of the significance of the findings and that because such opinion is entirely subjective different experts may not attach the same label to the same degree of comparability: *Atkins*.[468] Where the opinion is

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458 [1975] QB 834 and see *Townsend* [2020] EWCA Crim 1343 where the court considered the admissibility of expert evidence as to the age of a child depicted in images, explaining that *Land* [1998] 1 Cr App R 301 did not establish that such evidence was inadmissible; it could, in certain circumstances, be properly admitted and in fact was in practice commonly adduced.

459 [2015] UKPC 9 and see *Murphy and Others* [2021] EWCA Crim 190

460 [2014] EWCA Crim 1555

461 [2010] 1 Cr App R 117, [27]

462 [1995] 2 Cr App R 425

463 [2019] EWCA Crim 1570

464 [2018] EWCA Crim 420

465 [2014] EWCA Crim 2387

466 [2016] UKSC 61

467 [2009] EWCA Crim 2553

468 [2010] 1 Cr App R 117

not based on a statistical database that should be made clear to the jury: *Atkins* and see also *Purlis*.[469] In *T*[470] the court gave important guidance in this area with particular relevance to footwear mark evidence to which reference should be had when such evidence arises.

9. The fact that a prosecution expert cannot rule out, as a matter of science, a proposition consistent with D being not guilty does not mean that the case should be withdrawn: *Vaid*.[471] *Olive*[472] provides an example of an approach held sufficient to render the conviction safe where the prosecution relied upon some very limited GSR evidence.

10. In deciding what weight, if any, to attach to the expert's evidence the jury may take into account the expert's qualifications, experience, credibility, and whether the opinion is based on established facts or assumptions.

11. Sciences and techniques in their infancy need to be approached with caution but that does not necessarily mean the expert opinion based on such techniques should not be adduced: *Ferdinand and others*.[473]

12. If the expert testifies as to primary facts rather than opinion (e.g. that there was no blood on D's boots) the jury cannot reject that and form their own opinion on the matter. *Anderson*.[474]

13. If the expert is someone involved in the investigation of the offence, the jury will need to be aware of that when considering the weight to give to the expert's evidence: *Gokal*.[475]

14. In an extreme case where the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between reputable experts it may be unwise to leave the case to the jury: *Cannings*;[476] cf. *Hookway.*[477] The content of a summing-up in such cases will require considerable care: see *Henderson* for guidance.[478]

15. There are eight publications by the Royal Society that have been specifically designed to assist the court in making use of expert evidence – DNA, gait analysis, statistics, ballistics, forensic anthropology, forensic collision investigation and fire that are worthy of consideration where those issues arise in a trial. They are not, however, designed to assist with crafting legal directions for a jury.

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469 [2017] EWCA Crim 1134
470 [2011] 1 Cr App R 9
471 [2015] Crim.L.R 532
472 [2022] EWCA Crim 1141
473 [2014] 2 Cr.App.R. 331(23), C.A
474 [1971] UKPC 25
475 [1999] 6 Archbold News 2
476 [2004] [2004] EWCA Crim 1
477 [2011] EWCA Crim 1989
478 [2010] 2 Cr App R 185

16. Challenges to an expert may need to be considered in the context of the Forensic Science Regulator Act 2021 and the Code of Practice which will come into force on 2 October 2023. The Code sets quality standard requirements for forensic science activities related to the investigation of crime in England and Wales.

Directions

17. There is no invariable rule as to when a direction on expert evidence should be given. CrimPR 25.14(2) states that the "court must give the jury directions about the relevant law at any time at which to do so will assist jurors to evaluate the evidence". This includes giving the jury directions that may assist them before they are due to hear competing expert evidence or expert evidence that is being challenged.

18. The direction should be as follows:

    (1) Begin by identifying the expert witness/es and, shortly, the issue/s on which they have given evidence.

    (2) In every case, the jury should then be directed as follows:

        (a) Expert witnesses give evidence and opinions in criminal trials to assist juries on matters of a specialist kind which are not of common knowledge.

        (b) However, as with any other witness, it is the jury's task to weigh up the evidence of the expert(s), which includes any evidence of opinion, and to decide what they accept and which they do not. The jury should take into account [as appropriate] the qualifications/practical experience/methodology/source material/quality of analysis/whether or not based upon a statistical analysis/objectivity of the experts. Any factors capable of undermining the reliability of the expert opinion or detracting from his/her credibility or impartiality should be summarised.[479] The reliability factors listed in CrimPD Ch 7[480] reflect the common law, and should be used to assist the jury in evaluating and assessing the weight of the expert evidence. It may be that not all these factors will be under consideration during the evidence and therefore the direction and the factors should be tailored to the issues in the case. These factors are as follows:

            (i) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;

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[479] CrimPR 19.3(3)(c) which includes amongst other things, conflicts of interest, fee arrangements, adverse judicial comment, disciplinary proceedings, and convictions

[480] Which also sets out five factors that could be considered when identifying potential flaws in expert scientific opinion which are: (a) being based on a hypothesis which has not been subject to sufficient scrutiny; (b) being based on an unjustifiable assumption; (c) being based on flawed data; (d) relying on an examination, technique, method or process which was not properly carried out or applied or was not appropriate; (e) relying on an inference or conclusion which has not been properly reached.

(ii) if the opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms such as the 'sliding scale');

(iii) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

(iv) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise such as peer reviewed publications, and the views of those others on that material;

(v) the extent to which the opinion is based on material which is outside the expert's field of expertise;

(vi) the completeness of the information available to the expert, and whether the expert took account of all relevant information in arriving at the opinion, which includes information as to the context of any facts to which the opinion relates;

(vii) if there is a range of expert opinion on the matter in question, where in that range the expert's own opinion lies and whether the expert's preference has been properly explained; and

(viii) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

(c) The jury's verdicts must be based on the evidence as a whole, of which the expert evidence and opinion forms only a part.

(3) In addition, it may be necessary to incorporate one or more of the following directions:

(a) The jury are not themselves experts on the matters about which the expert(s) have given evidence, and should not therefore carry out any tests, comparisons or experiments of their own, or try to reach conclusions of their own which disregard the expert evidence: see **Notes 1** and **2** below.

(b) The jury do not have to accept the expert evidence even though it is uncontested: see **Note 3** below.

(c) In a case where an expert expresses an opinion in relative terms, a direction in accordance with *Atkins,* referred to in the Legal summary in Part I.

19. For a suggested direction where a D is tried for murder although there is uncontradicted expert medical evidence supporting a plea of Diminished Responsibility see Chapter 19-1 paragraph 23 below.

NOTES:

1. Such a direction will be necessary if, without it, there is a realistic danger that the jury will be tempted to engage in an exercise of scientific or expert comparison – e.g. in cases involving handwriting or finger-print comparison.
2. If a non-expert witness gives an opinion on a subject (e.g. handwriting comparison) which is properly the subject of expert opinion, but no such expert evidence has been called, the jury should be directed to disregard the non-expert evidence. This happens infrequently. In any event a distinction is to be drawn between this situation and one in which a non-expert witness who is able to recognise a person's handwriting purports to identify it. This is not expert, but factual, evidence.
3. Such a direction will not always be appropriate. It will not be if, for example, expert evidence is read to the jury because it is agreed by all parties; or if there is un-contradicted expert evidence on which the defence rely. It will be appropriate if, for example, a prosecution expert witness has been challenged in cross-examination, but no defence expert has been called. Before giving any direction about expert evidence it should be discussed with the advocates in the absence of the jury before being given.

Example 1: Facial mapping expert

The CCTV footage shows the person who committed the robbery running away from the scene. The prosecution say that the person shown on the CCTV was D. D says that it is not him/her.

Two facial mapping experts gave evidence about this. Ms Smith for the prosecution said that there were certain features she could identify on the footage that lent strong support for D being the person shown on the CCTV. Mr Jones for the defence said that there are strong indications that it was not D on the CCTV.

Expert witnesses provide the courts with evidence and opinions in specific areas where we do not have specialist knowledge. In this case, it was on the techniques of facial mapping. Your job as a jury is to weigh up the evidence and opinions of the two experts and decide which parts you accept and which you do not.

With any evidence about identification there is always a need for caution. Experience shows that mistakes about identity can be and are made, even with an honest witness doing their best to give reliable evidence. Bear in mind also that the opinions expressed by both facial mapping experts are not based on statistical analysis or scientific measurement, and the terms they used for the level of certainty of their opinions are not scientific terms.

When you are evaluating the reliability of an expert's opinion, you need to consider the following factors:

- [List the CrimPD Chapter 7 factors that require consideration in conjunction with a summary of the evidence given relevant to those factors. List and summarise any factors under CrimPR 19.3(3)(c) that are capable of undermining the reliability of the expert's opinion or detracting from their credibility or impartiality.]

- When you assess the experts' different opinions you also need to take into account what you have heard about the experts' qualifications and experience.
- You must not try to reach conclusions on the expert evidence by carrying out your own experiments or by comparing the defendant you have seen in court or his/her image with the CCTV footage. You are not experts in this field, and you must be guided in this specific area by the experts who are. Everyone involved in the case has agreed that experts were needed to study the CCTV footage.

  {If the imagery is of a quality that would allow the jury to reach their own safe assessment as to whether it showed D or not then the directions will need to be tailored to reflect that but in that event the issue of whether there should be expert evidence at all advanced at trial, and the limitations of any opinion that an expert witness is allowed to express on the topic, will need to have been considered at the stage it was admitted and with directions being given to the jury at that stage.}

Finally, please remember that the expert witnesses are only able to give evidence about one element in this case because facial mapping is in their field of expertise. This means the expert's evidence is only part of the evidence you have heard. Your job as a jury is to reach a verdict(s) by considering all the evidence in the case.

Example 2: Handwriting expert

It is agreed that the signature on the will has been forged. The defendant says that he/she did not write it.

Two handwriting experts compared a sample of D's handwriting to the signature on the will, and gave evidence about this. Both experts agree that no two writers have identical handwriting and every person has natural variations in his or her handwriting. Ms Smith for the prosecution, said that there were strong indications that the signature was written by D. Mr Jones for the defence said there were strong indications that D did not write it.

Expert witnesses provide the courts with evidence and opinions in specific areas where we do not have specialist knowledge. In this case, it was on the techniques of comparing handwriting. Your job as a jury is to weigh up the evidence and opinions of the two experts and decide which parts you accept and which you do not.

It is important to remember that you are not experts on handwriting. You must not attempt to carry out tests or make comparisons in the way that the two experts have. You also do not have to accept the evidence of either expert. An expert's view is no more than an opinion. Being an expert witness does not mean that the expert must be correct.

When you are evaluating the reliability of the expert's opinion, you need to consider the following factors:

- Whether Mr Jones was justified in criticising the method Ms Smith used. Mr Jones said Ms Smith should have carried out chromatography in addition to analysing the handwriting style and physical indentations. The experts also disagree about the quality of the sample of D's handwriting. Mr Jones has said the sample was insufficient and he relies on a research paper to support that

view. Ms Smith relies on several research papers to support her view that the sample was more than adequate.

- Both experts have given opinions on the similarities and differences in handwriting. Ms Smith has said that there are very significant similarities in respect of word and letter spacing, the stylistic impression of particular letters and punctuation. She accepts there are some variations between the sample and the will, but she said these are in the normal range of variation that one would expect. Mr Jones has drawn your attention to what he says are differences in slant and slope and the drawing of particular letters. In his view these differences are so stark that he believes it was not D who wrote the forged signature.
- Both experts have the necessary qualifications and experience. But Ms Smith has been an expert witness for the past ten years only for the prosecution, while Mr Jones has only ever given evidence for the defence in his twenty-year career. The expert's duty is to the court. But you are entitled to consider these points in assessing the credibility of the experts and deciding whether they are giving impartial evidence or simply helping the side that asked them to give evidence.

Finally, please remember that the expert witnesses are only able to give evidence about one element in this case because handwriting analysis is in their field of expertise. This means the expert's evidence is only part of the evidence in this case. Your job as a jury is to reach a verdict(s) by considering all the evidence in the case.

For example, Mr Phillips says he distinctly remembers a conversation with D about the will in which D was asking questions about it and the place it was kept. The prosecution relies on this evidence to support their theory that D had an interest in the will, and this conversation revealed D's motivation to commit the crime. Bear in mind, however, that D denies he/she said any such thing.

So, remember you must consider all the evidence in deciding whether or not you are sure it was the defendant who forged the will.

10-4 Delay

ARCHBOLD 4-465; BLACKSTONE'S D3.73

Legal summary

1. A defendant has the right to a fair trial within a reasonable time. In exceptional cases delay will lead to a stay of proceedings as an abuse of process.[481] That involves a separate question from whether (applying the principles in *Galbraith*)[482] there is a case to answer.
2. A prolonged delay between the commission of the alleged offence and the complaint leading to trial is capable of leading to forensic disadvantages.
3. In cases in which there has been a significant delay, the jury need to be directed on the relevance of that delay[483] including the impact on the preparation and conduct of the defence and the relationship with the burden of proof. Such a direction is only required where the potential difficulty arising from delay is significant and becomes apparent in the course of the trial. Whether a direction on delay is to be given and the way in which it is formulated will depend on the facts of the case.[484]
4. Particular care will be needed in sexual cases where the issue of delay may be perceived as having an effect on the credibility of a complainant:[485] see Chapter 20-1 and 20-2.
5. Note in particular *PS*:[486]

> "37 Although viewed globally the judge's direction contained all of the essential elements he needed to include when directing the jury on this issue (set out at paragraph 35 above), we do not consider it was necessarily structured in the most appropriate way, given the circumstances of this case. As with the direction on the burden and standard of proof, the direction regarding delay – **as it affects the defendant** – is designed to ensure his criminal trial is fair. The courts have decided that even very considerable delays in bringing prosecutions can, save exceptionally, be managed in the trial process. But this is often (although not necessarily always) best addressed by a short, self-contained direction that focuses on the defendant rather than amalgamating it with other aspects of the relevance of delay, for instance as regards the victim or victims. The risk of combining and interweaving the potential consequences of delay for the accused with the other delay-related considerations ("putting the other side of the coin") is that

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481 *A-G's Reference (No 1 of 1990)* [1992] QB 630 at pp.643–4; *A-G's Ref (No. 2 of 2001)* [2003] UKHL 68; *Burns v HM Advocate (A-G for Scotland intervening)* [2008] UKPC 63. *F(S)* [2011] EWCA Crim 1844

482 [1981] 1 WLR 1039

483 The principles were reviewed in *H (Henry)* [1998] 2 Cr App R 161, at pp.164-168, per Potter LJ. Reviewed in *PS* [2013] EWCA Crim 992. Also *E* [2009] EWCA Crim 1370; *E(T)* [2004] EWCA Crim 1441

484 *M (Brian)* [2000] 1 Cr App R 49; *PS* [2013] EWCA Crim 992 at para.25

485 *Doody* [2008] EWCA Crim 2557

486 [2013] EWCA Crim 992 and see *Warren and Ors* [2021] EWCA Crim 413

the direction, as the principle means of protecting the defendant, is diluted and its force is diminished."

6. In *PR*[487] it was stated at [72]:

> "The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents and other materials he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the prosecution had been able to prove, so that they are sure, that he or she is guilty. The judge gave an impeccable direction to this effect, of which there is no criticism by [counsel for the appellant]."

In *Hewitt,*[488] the Court of Appeal considered in detail the way the judge at first instance had dealt with delay. One ground of appeal was that the judge had failed to provide sufficient by way of examples as to missing documents and the potential disadvantage that could represent for the defendant. The Court quoted with approval this passage from the summing up:

> "A lengthy delay between the time when an incident is said to have occurred and the time when the complaint is made and the matter comes to trial, is something that you should bear in mind when considering whether the Crown has proved its case or not. Necessarily, the longer the delay the harder it may be for someone to defend themselves because, as I have already said, memories will have faded and material that might have been of assistance may have been lost or destroyed. If you find that the delay in the case [has placed] Mr Hewitt at a material disadvantage in meeting the case against him, that is something that you should bear in mind in his favour."

Directions

Delay in making a complaint

7. Note that the complaint(s) which led to the criminal proceedings and any earlier complaint(s) are now admissible in evidence. (See CJA 2003, s.120(4), (7) and (8) and Chapter 14-12 below.)

8. Where there has been a substantial delay between the alleged offence(s) and the making of the complaint that led to the current criminal proceedings, the jury should be directed as follows:

   (1) The jury should consider the length of, and the reasons for, the delay in making the complaint and ask whether or not the delay makes the evidence in court of W more difficult to believe.

   (2) In a sexual case: the courts have found that victims of sexual offences can react in different ways. Some may complain immediately. Others may feel, for example, afraid, shocked, ashamed, confused or even guilty and may not speak out until some time has passed. There is no typical reaction.

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487 [2019] EWCA Crim 1225
488 [2020] EWCA Crim 1247

Every case is different. [See also Chapters 20-1 and 20-2 in relation to sexual cases.]

(3) The jury should not assume that a late complaint is bound to be false, any more than an immediate complaint would definitely be truthful. The jury should consider the circumstances of the particular case.

(4) The matters to be considered are (depending on the evidence and issues in the case):

(a) Any reason(s) given by W for not having complained earlier.

(b) Any reasons why W may have been put off from speaking out earlier (about which W did not give evidence) such as:

(i) W felt afraid of D;

(ii) W was shocked and/or ashamed and/or confused;

(iii) W blamed him/herself;

(iv) W had mixed feelings for D;

(v) W was worried that no-one would believe him/her;

(vi) W was worried about what would happen to him/her/D/the family if W spoke out.

(c) Whether or not D is said to have put pressure on W to keep quiet and if so, how.

(d) What triggered the eventual making of the complaint.

(e) The age and degree of maturity and understanding of W at the time/s it is said that the offence/s was/were committed.

(f) The difference in age and the relationship (if any) between W and D.

(g) The physical and/or emotional situation in which W was living at the time.

(h) Whether W had made earlier complaints that did not lead to criminal proceedings and if so when and, briefly, if relevant why they were not proceeded with.

(i) Any reasons for the delay suggested by or on behalf of D.

(5) It is for the jury alone to weigh up all these matters when deciding whether they are sure that W has given truthful and reliable evidence.

Delay: the effect on the trial

9. Where there has been a substantial delay between the alleged offence(s) and the current criminal proceedings, it will probably be necessary to direct the jury as suggested below. However, the length of the delay, the cogency of the evidence and the circumstances of the case may all affect the need for or the content of such a direction, which may well need to be discussed with the advocates in the absence of the jury before closing speeches. Thus, what follows should not be regarded as a blue-print.

(1) The passage of time is bound to have affected the memories of the witnesses.

(2) A person describing events long ago will be less able to remember exactly when they happened, the order in which they happened or the details of what happened than they would if the events had occurred more recently.

(3) A person's memory may play tricks, leading them genuinely to believe that something happened (to him/her) long ago when it did not. This will only arise in the rare case where it is suggested W suffers from Recovered Memory Syndrome, and expert evidence must always be called on this point.[489]

(4) The jury must therefore consider carefully whether the passage of time has made the evidence about the important events given by any of the witnesses concerned less reliable than it might otherwise have been because (depending on the evidence in the particular case) they cannot now remember particular details/they claim to remember events in unlikely detail/their memories appear to have improved with time.

(5) The passage of time may also have put D at a serious disadvantage. For example (again depending on the evidence in the particular case):

(a) D may not now be able to remember details which could have helped his/her defence.

(b) Because, after all this time, W has not been able to state exactly when and/or where D committed the crimes of which D is accused, D has not been able to put forward defences, such as showing that he/she could not have been present at particular places at particular times, which D may have been able to put forward but for the delay.

(c) D has not been able to call witnesses who could have helped his/her defence because they have died/cannot now be traced/cannot now remember what happened.

(d) D has not been able to produce documents which could have helped his/her defence because they have been lost/destroyed/cannot be traced.

(6) [If appropriate]: The fact(s) that:

(a) D is of good character, and/or

(b) no other similar allegations have been made in the time that has passed since the events alleged

is/are to be taken into account in D's favour.

(7) The jury should take all these matters into account when considering whether the prosecution have been able to prove, so that the jury are sure about it, that D is guilty.

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[489] For an interesting perspective on the topic of confabulation see G. Gudjonsson et al 'The Impact of Confabulation on Testimonial Reliability' [2021] Crim LR (issue 10).

Example

NOTE: Any direction dealing with delay is bound to be fact-specific, as is the example below. In a case involving sexual allegations see also Chapter 20-1 below.

You know that W first complained that D had repeatedly beaten and injured him/her at the care home about 20 years after W had left the home. You should take this into account in three ways.

First, the defence say that if W had really been beaten, W would have complained much earlier. However, when W was asked about the delay, W said that he/she was terrified of D while at the home and that, even after he/she left, it took W a long time to pluck up the courage to go to the police. W did so only when he/she was appalled to read a newspaper article describing D as a wonderful caring person. Take all this into account when considering whether W's complaints are true. Someone who delays making a complaint is not necessarily lying. Equally, someone who makes a prompt complaint is not necessarily telling the truth.

Secondly, bear in mind that the passage of time is likely to have affected the memory of each of the witnesses about exactly what happened all those years ago. {In an appropriate case – It may even have played tricks on their memories, leading them genuinely to believe that things happened when they did not.}

Thirdly, be aware that the passage of time may have put D at a serious disadvantage. D may not be able to remember details now that could have helped him/her, and D has told you that two workers at the care home, who D says would have supported his/her case, have since died.

[Where D is of good character]: Fourthly, the fact that no similar allegations have been made in the 20 years since the date of the alleged events which you are considering means that D is entitled to ask you to give significant weight to his/her good character when deciding whether the prosecution has satisfied you of his/her guilt.

You should take the long delay into account in D's favour each of these ways when you are deciding whether or not the prosecution have proved that D is guilty, so that you are sure of it.

10-5 Evidence of children and vulnerable witnesses

ARCHBOLD 8-49; BLACKSTONE'S D.14.1, 14.15 and F4.21

Legal summary

1. Special Measures and Intermediaries are dealt with in Chapter 3-6 and Chapter 3-7.
2. The approach to receiving the evidence of children has altered dramatically over recent years.
3. The competence of a child to testify is dealt with in s.53 YJCEA. The Court of Appeal in *Barker*[490] noted that the witness need not understand every single question or give a readily understood answer to every question. Dealing with the matter broadly and fairly, provided the witness can understand the questions put to them and can also provide understandable answers, he or she is competent.[491]
4. The approach to cross-examination of children and vulnerable witnesses[492] is markedly different from that in relation to adults. Ensuring that advocates adapt the style of cross-examination requires effective case management from the outset. The Court of Appeal has repeatedly emphasised that the judge has a clear obligation to control cross-examination of children and vulnerable witnesses.[493] In *Barker*[494] the Lord Chief Justice considered the circumstances in which very small children might give evidence in criminal trials. The Court acknowledged that whilst the right of the defendant to a fair trial must not be undiminished, the trial process must cater for the needs of child witnesses and that the forensic techniques had to be adapted to enable the child to give the best evidence of which he or she is capable.

Case management

5. The CrimPR[495] and CrimPDs[496] describe the way in which judges should deal with children and vulnerable witnesses: see in particular CrimPR Part 3, CrimPD Chapter 6 Vulnerable People and Witness Evidence. See also the Judicial College's Young Witness Bench Checklist 2012.
6. Central to the effective management of a case involving child witnesses will be the 'ground rules hearing' which should, amongst other things, establish the style limits and duration of questioning child witnesses, and seek to guard against protected repetitive cross-examination. In *Lubemba*,[497] at paragraphs 42-45, Hallett LJ (VP) summarised some of the key issues that should be

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490 [2010] EWCA Crim 4
491 *IA* [2013] EWCA Crim 1308. Noting that advocates need not turn 'every stone' in cross-examining a child or vulnerable witness para.73
492 *Dixon* [2013] EWCA Crim 465
493 *Barker* [2010] EWCA Crim 4. *W and M* [2010] EWCA Crim 1926; *Wills* [2011] EWCA Crim 1938; *E* [2012] EWCA Crim 563
494 [2010] EWCA Crim 4
495 CrimPR Parts 1, 3, 18, 23
496 CrimPD Chapter 6
497 [2014] EWCA Crim 2064. See also *Jonas* [2015] EWCA Crim 562

addressed. In *Dinc*,[498] the Court of Appeal reaffirmed that in appropriate cases, where the witness is young or suffers from mental disability or disorder, advocates may be required to prepare their cross-examination for consideration by the court. This applies to all cases, not just those in the s.28 pilot scheme. It was further said there is nothing inherently unfair in restricting the scope, structure and nature of cross-examination or in requiring questions to be submitted in advance when they concern a child witness or a witness suffering from a mental disability or disorder. It is the judge's duty to control questioning of any witness and to ensure it is fair both to the witness and the defendant. Such an approach focuses cross-examination. Furthermore, a list of admissions of behaviour or previous inconsistent statements that potentially undermine a complainant's credibility can be put before the jury to cover those issues on which questioning is restricted. In *RK*[499] the Vice President deprecated the avoidance of cross-examination altogether:

> "However, if a child is assessed as competent and the judge agrees the child is competent, we would generally expect the child to be called and cross-examined, with the benefit of the range of special measures we now deploy. There is no reason to distress her or cause her any anxiety and therefore no reason to avoid putting the defence case by simple, short and direct questions. Although this court has in the past doubted the *right* to put every aspect of the defence case to a vulnerable witness, whatever the circumstances, it has not questioned the general *duty* to ensure the defence case is put fully and fairly and witnesses challenged, where that is possible."

Further guidance has been provided on these topics in *PMH*[500] (on best practice in s.28 but relevant to vulnerable witnesses generally – see below) and *YGM*[501] (guidance on directions that should be given to jury when limitations are imposed on cross-examination).

Witness distress

7. In cases where the witness becomes distressed by questioning from the advocate, it may be necessary for the judge to ask the questions as drafted by the advocate: *S*.[502] Where a witness becomes so distressed that it is not possible to complete cross-examination that does not necessarily mean that the trial must be stopped.[503] The question will be whether the examination of the witness had been sufficient to allow the jury properly to assess the issues in dispute. Appropriate explanations to the jury will be necessary.

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498 [2017] EWCA Crim 1206
499 [2018] EWCA Crim 603
500 [2018] EWCA Crim 2452
501 [2018] EWCA Crim 2458
502 [2014] EWCA Crim 1730
503 *Pipe* [2014] EWCA Crim 2570; *Stretton and McCallion* (1988) 86 Cr App R 7; *PM* [2008] EWCA Crim 2787

Explanation to the jury

8. In *Wills*,[504] the Court of Appeal emphasised, as it has done in other cases, that when restrictions are placed on cross-examination, the judge where appropriate and in fairness to the defendant:

> "should explain the limitations to the jury and the reasons for them. It is also important that defendants do not perceive, whatever the true position, that the cross-examination by their advocate was less effective than that of another advocate in eliciting evidence to defend them on allegations such as those raised in the present case.
>
> 38. Secondly, we observe that if there is some lapse by counsel in failing to comply with the limitations on cross-examination, it is important that the judge gives a relevant direction to the jury when that occurs, both for the benefit of the jury and any other defendant. To leave that direction until the summing up will in many cases mean that it is much less effective than a direction given at the time.
>
> 39. Thirdly, this case highlights that, for vulnerable witnesses, the traditional style of cross-examination where comment is made on inconsistencies during cross-examination must be replaced by a system where those inconsistencies can be drawn to the jury at or about the time when the evidence is being given and not, in long or complex cases, for that comment to have to await the closing speeches at the end of the trial. One solution would be for important inconsistencies to be pointed out, after the vulnerable witness has finished giving evidence, either by the advocate or by the judge, after the necessary discussion with the advocates. This was, we think, envisaged by what the Lord Chief Justice said in *R v Barker* at [42]."

9. See also *Edwards*[505] where the judge made clear to the jury the difficulty D faced by the limits on cross-examination:

> "The jury knew that the defendant disputed the evidence of [W]. The judge clearly explained his decision as to cross-examination technique and why he had taken it. In addition, the jury was specifically directed "to make proper fair allowances for the difficulties faced by the defence in asking questions about this.""

10. In *PMH*[506] the Court of Appeal identified the following areas of best practice in s.28 (pre-recorded evidence) cases whilst accepting that best practice may evolve with experience:

    (a) At any ground rules hearing the judge should discuss with the advocates how and when any limitations on questioning will be explained to the jury.

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504 *Wills* [2011] EWCA Crim 3028
505 [2011] EWCA Crim 3028
506 [2018] EWCA Crim 2452, para 21

(b) If this has not happened, or there have been any changes, the judge should discuss with the advocates how any limitations on questioning will be explained to the jury before the recording of the cross-examination is played.

(c) The judge can then give the jury the standard direction on special measures with a direction on the limitations that the judge has imposed on cross-examination and the reasons for them before the cross-examination is played.[507]

(d) The judge should consider if it is necessary to have a further discussion with the advocates before their closing submissions and the summing-up on the limitations imposed and any areas where those limitations have had a material effect. In this way the advocates will know the areas upon which they can address the jury.

(e) In the summing-up the judge should remind the jury of the limitations imposed and any areas identified where they have had a material effect upon the questions asked.

(f) If any written directions are provided to the jury the judge should include with the standard special measures direction a general direction that limitations have been imposed on the cross-examination.

The Advocate's Gateway

11. In numerous cases the Court of Appeal has endorsed the report of the Advocacy Training Council of the Bar of England and Wales 'Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court'. The report contains recommendations in relation to cross-examination and refers to the use of a trial practice note/trial protocol on this aspect at paragraph 15 of part 5 of the report. The Court of Appeal has endorsed and the CrimPD make specific reference to the valuable toolkits published by the Inns of Court College of Advocacy on The Advocate's Gateway.[508]

Other materials

12. Other initiatives, with which judges need to be familiar, particularly in cases of sexual offences, include the DPP Guidelines on Prosecuting Cases of Child Sexual Abuse,[509] the publication of the 2013 Protocol and Good Practice Model: Disclosure of Information in Cases of Alleged Child Abuse and Linked Criminal

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507 See also *YGM* [2018] EWCA Crim 2458 in which a similarly constituted Court of Appeal stated that it was best practice for a judge to direct a jury before the cross-examination of a vulnerable witness that limitations had been placed on the defence advocate and to explain after cross-examination the type of issues which the defendant would have wished to explore in further detail. These directions should be repeated in the summing up.

508 See CrimPD 6.1.2; *Wills* [2011] EWCA Crim 3028; *Lubemba* [2014] EWCA Crim 2064 para.40

509 Child Sexual Abuse: Guidelines on Prosecuting Cases of Child Sexual Abuse (Crown Prosecution Service October 2013, updated 2018)

and Directions Hearings.[510] Judges should also bear in mind the guidance in the Equal Treatment Bench Book when dealing with vulnerable witnesses.

Procedure

Ground Rules Hearings

NOTE: This section is included because the Ground Rules Hearing and the orders made at it are so important to, and will inform, the directions to be given to the jury at the outset of the trial, before the child or vulnerable witness gives evidence and in summing up.

13. A Ground Rules Hearing (GRH) should be held in every case where there is a young or vulnerable witness.
14. Before the GRH the defence advocate must serve on the court and on the prosecution a copy of the list of proposed questions to be put to the young or vulnerable witness, together with a copy of the defence statement.
15. The GRH must, save in very exceptional circumstances, be held before the day of trial, with the trial advocates and any intermediary in open court (other than in exceptional circumstances). An intermediary is not a witness and should not be sworn.
16. The GRH should address the following topics:
    (1) How the advocates and judge, and any intermediary are going to interact with W/D, and with each other, including how each will be addressed.
    (2) The length of time after which a break/breaks must be taken.
    (3) The 'ground rules' for asking questions of W/D.
    (4) Any additional questions to be asked by the prosecution in examination in chief (if appropriate).
    (5) The overall length of cross-examination.
    (6) In a multi-handed case, who will conduct the cross-examination.
    (7) The language to be used in any questions put to W/D, including the type and length of questions.
    (8) The aids to communication, if any, to be used.
    (9) The questions/topics submitted by the advocates which may be put to W/D.
    (10) What the jury are to be told about the limitations imposed and when such an explanation is given (see *PMH*, above).
    (11) Whether, where W is to give evidence in chief by way of a pre-recorded interview, W should see the recording at the same time as the jury on the day of the trial or (almost always preferably) on the day before W is cross-examined, so that W need not come to court until shortly before he/she is due to be cross-examined.

[510] CPS Protocol and Good Practice Model

Directions at trial

17. Any special measures, including the use of an intermediary, should be explained: see Chapter 3-6 Special Measures and Chapter 3-7 Intermediaries.
18. Depending on the age of the child or the vulnerability of W, it may help the jury to explain how W's level of understanding, regardless of intelligence, may be limited. This may be done before W gives evidence.
19. It may also help the jury and be fair to all parties to explain to the jury, before such a witness is cross-examined, that the cross-examination will not be conducted in the same way as it would have been if the witness had been an adult/non-vulnerable adult: see Example 4 below.
20. Any particular difficulties which have arisen in the course of the case should be addressed in a manner which is fair to both/all parties.
21. Where offences are said to have occurred within the home, the jury should be alerted to the potential difficulties which a child may have perceived in reporting matters: see Example 2 below.
22. Where grooming is alleged to have occurred, the concept of grooming and the potential difficulties of a witness' realisation and/or recollection of innocent attention becoming sexual should be explained: see Chapter 20-3 Grooming of children.

Example 1 – Evidence of a child witness

W is a very young child aged {specify}. It is for you to decide whether he/she is reliable and has told the truth. The fact that a witness is young does not mean that his/her word is any more or less reliable than that of an adult and you should assess W's evidence in the same fair way as you assess any other evidence in the case.

Because this witness is so young you should bear a number of things in mind:

- A child does not have the same experience of life or the same degree of maturity, logic, perception or understanding as an adult. So, when a child is asked questions he/she may find the questions difficult to understand, may not fully understand what it is he/she is being asked to describe and may not have the words accurately or precisely to describe things.
- A child may be tempted to agree with questions asked by an adult, whom the child may well see as being in authority, particularly in a setting such as this. Also, if a child feels that what he/she is asked to describe is bad or naughty in some way, this may itself lead to the child being embarrassed and reluctant to say anything about it or to be afraid that he/she may get into trouble.
- A child may not fully understand the significance of some things that have happened (which may be sexual) at the time they happened and this may be reflected in the way he/she remembers or describes them [If applicable in later life].

- A child's perception of the passage of time is likely to be very different to that of an adult. A child's memory can fade, even in a short time, when trying to describe events, even after a fairly short period, and a child's memory of when and in what order events occurred may not be accurate.
- A child may not be able to explain the context in which events occurred and may have particular difficulty when answering questions about how he/she felt at the time or why he/she did not take a particular course of action

All these things go to a child's level of understanding rather than to his/her credibility and so you should be cautious about judging a child by the same standards as an adult. None of these things mean that this witness is or is not reliable: that is a matter for your judgment.

Example 2: Cases involving a family setting/familiar environment

W gave evidence about things which he/she said happened at {e.g. W's home/W's grandparent's home}. You should be cautious about assessing what W's family life was like by reference to your own experiences. A child relies upon and loves the people with whom he/she lives and will usually accept, without questioning, whatever happens within that home as the norm. As a result, events that others might think out of the ordinary may become routine and so are not particularly memorable. This may affect the way in which the child remembers events when some time later he/she is asked about what happened.

Also, a child may not always appreciate that what is happening to him/her at home is not normal and may only come to realise this as he/she grows older.

So when you are assessing W's evidence you should look at it in the context of W's home life as it has been described to you.

Example 3: A child's reason for silence

Experience has shown that children may not speak out about something that has happened to them for a number of reasons. A child may:

- be confused about what has happened or about whether or not to speak out;
- blame him/herself for what has happened or be afraid that he/she will be blamed for it and punished;
- be afraid of the consequences of speaking about it, either for him/herself and/or for another member of the family (such as {specify});
- may feel that he/she may not be believed;
- may have been told to say nothing and threatened with the consequences of doing so;
- may be embarrassed because he/she did not appreciate at the time that what was happening was wrong, or because he/she enjoyed some of the aspects of the attention they were getting;
- simply blank what happened out and get on with their lives until the point comes when they feel ready or the need to speak out {e.g. for the sake of a younger child who he/she feels may be at risk};
- may feel conflicted: loving the abuser but hating the abuse.

Example 4: Cross-examination of a child witness

Because W was so young {name of defence advocate} was not permitted to question and challenge W in the same way, or for the same amount of time, as {defence advocate} would have questioned and challenged an older witness. This does not mean however that W's evidence is not disputed. You are aware of the defence case however from {specify e.g. D/other witnesses/the defence statement.}.

Example 5: W's evidence has had to be curtailed before cross-examination has been concluded

You will remember that although {name of defence advocate} did ask W some questions, a point came when W was so upset that it would not have been right to ask him/her to continue giving evidence. If cross-examination had continued, W would have been asked about {specify points which the defence had identified at the GRH}. You do not know how W would have responded to those questions and you must not speculate about this.

NOTE: this direction may need to be amplified in light of any submissions or arguments raised in the defence closing speech about any resulting disadvantage to D.

11. GOOD CHARACTER

ARCHBOLD 4-484; BLACKSTONE'S F14.1

Legal summary

Defendant

1. Good character evidence may be admissible (i) to bolster the accused's credibility and (ii) as relevant to the likelihood of guilt. This has been accepted by the Court of Appeal, most prominently in *Vye*,[511] by the House of Lords in *Aziz*[512] and by the five-member Court of Appeal in *Hunter*.[513]
2. The judge should discuss with the advocates, in the absence of the jury and before closing speeches, the need for, and form of, any good character direction to be given.
3. Whenever a direction is given, the judge must adopt an appropriate form of words to convey the significance of the evidence of good character. For examples of language to avoid, see *Neumann*[514] and *Green*.[515] The words of Lord Steyn in *Aziz* should always be borne in mind: judges "should never be compelled to give meaningless or absurd directions." No direction should be given if it is "an insult to common sense" or misleading.

The Guidance in *Hunter* (2015)

4. In *Hunter*, the Court stated the principles derived from *Vye*[516] and *Aziz*[517] as follows (at para 68*):*

> "a) The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements. ['credibility limb']
>
> b) The general rule is that a direction as to the relevance of a good character to the likelihood of a defendant's having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or made pre-trial answers or statements. ['propensity limb']
>
> c) Where defendant A, of good character, is tried jointly with B who does not have a good character, a) and b) still apply.
>
> d) There are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance with *Vye.* The judge then has a residual discretion to decline to give a good character direction.

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511 [1993] 1 WLR 471
512 [1996] AC 41
513 [2015] EWCA Crim 631
514 [2017] EWCA Crim 1533
515 [2017] EWCA Crim 1774
516 [1993] 1 WLR 471; [1993] 3 All ER 241; [1993] 97 Cr.App.R.134
517 [1996] AC 41

e) A jury must not be misled.

f) A judge is not obliged to give absurd or meaningless directions." [para 68]

5. The Court in *Hunter* went on (at para 69) to note that *Vye and Aziz* did **not** say:

"a) that a defendant with no previous convictions is always entitled to a full good character direction whatever his character;

b) that a defendant with previous convictions is entitled to good character directions;

c) that a defendant with previous convictions is entitled to the propensity limb of the good character directions on the basis he has no convictions similar or relevant to those charged;

d) that a defendant with previous convictions is entitled to a good character direction where the prosecution do not seek to rely upon the previous convictions as probative of guilt.

e) that the failure to give a good character direction will almost invariably lead to a quashing of the conviction;" [69]

6. As to the proper procedure, the Court in *Hunter* noted that:

"as a matter of good practice, if not a rule, defendants should put the court on notice as early as possible that character and character directions are an issue that may need to be resolved. The judge can then decide whether a good character direction would be given and if so the precise terms. This discussion should take place before the evidence is adduced. This has advantages for the court and for the parties: the defence will be better informed before the decision is made whether to adduce the evidence, the Crown can conduct any necessary checks and the judge will have the fullest possible information upon which to rule. The judge should then ensure that the directions given accord precisely with their ruling" [101]

7. The Court went on to note that if defence advocates do not take a point on the character directions at trial and / or if they agree with the judge's proposed directions which are then given, these are good indications that nothing was amiss. [98]

8. The Court identified five distinct categories relating to good character, each requiring a tailored response.

The categories in *Hunter*

9. All directions on this topic must be crafted in accordance with the law as set out in the case of *Hunter*.[518] Hallett LJ VP gave the judgment of the Court. In paragraphs 76 to 88, from which the quotations below are citations, she set out the need, or potential need, for directions as to good character in the following five categories:

(1) **Absolute good character:** This category applies where "a defendant ... has no previous convictions or cautions ... and no other reprehensible conduct

[518] [2015] EWCA Crim 631

alleged, admitted or proven", whether or not the defendant has adduced evidence of positive good character.

It is **only** in this category that there is a **requirement** upon the trial Judge to give a full good character direction i.e. one containing both the 'credibility limb' (if D has given evidence or made an out of court statement on which D relies) and the 'propensity limb' (see paragraph 2(b) below). "The judge must tailor the terms of the direction to the case before him/her, but in the name of consistency, we commend the Judicial College standard direction in the Crown Court Bench Book[519] as a basis". See Examples 1 and 2 below. Example 1 replicates this standard direction verbatim. Example 2 and the subsequent examples use it as a basis.

(2) **Effective good character:** Where "a defendant has previous convictions or cautions recorded which are old, minor and have no relevance to the charge, the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character ... It is for the judge to make a judgment, by assessing all the circumstances of the offence/s and the offender, to the extent known, and then deciding what fairness to all dictates... If the judge decides to treat a defendant as a person of effective good character ...he/she must give both limbs of the direction, modified as necessary to reflect the other matters and thereby ensure that the jury is not misled". See Example 3 below.

(3) **Previous convictions/cautions adduced under section 101(1)(b) CJA 2003 by the defence:**

"Defendants frequently adduce previous convictions or cautions ... which are not in the same category as the offence alleged, in the hope of obtaining a good character direction on propensity from the judge."

A defendant in this position has no entitlement to either limb of the good character direction. The judge has a broad 'open textured' discretion whether or not to give any good character direction, and if so in what terms.[520] See Example 4 below, in which only the 'propensity limb' is referred to.

(4) **Bad character adduced under section 101 CJA 2003 relied on by the prosecution**

"Where a defendant has no previous convictions or cautions, but evidence is admitted and relied on by the Crown of other misconduct, the judge is obliged to give a bad character direction. He/she may consider that as a matter of fairness they should weave into their remarks a modified good character direction ...This too is a broad discretion ... Where the defendant has previous convictions and bad character is relied upon it is difficult to envisage a good character direction that would not offend the absurdity principle."

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519 The Crown Court Bench Book: Directing the Jury – March 2010

520 *Stokes* [2018] EWCA Crim 1350 [39]

(5) **Bad character adduced by the defence under section 101 CJA 2003 and not relied on by the prosecution**[521]

"That leaves the category of defendants who have no previous convictions but who admit reprehensible conduct that is not relied on by the Crown as probative of guilt." As in categories (3) and (4) above, the judge has a broad 'open textured' discretion whether or not to give any good character direction, and if so in what terms.

10. In *BQC*,[522] the court addressed the directions necessary in circumstances of alleged bad character evidence where a defendant is of otherwise good character. The court stated that the directions should make clear to the jury that the defendant was entitled to the full benefit of a good character direction, in both its limbs, unless the jury were sure that the bad character allegations were true.

Directions

11. A full good character[523] direction is as follows:
    (1) Good character is not a defence to the charge.
    (2) However, evidence of good character counts in D's favour in two ways:
        (a) D's good character supports D's credibility and so is something which the jury should take into account when deciding whether they believe D's evidence (the 'credibility limb'); and
        (b) D's good character may mean that D is less likely to have committed the offence with which D is charged (the 'propensity limb').
    (3) It is for the jury to decide what weight they give to the evidence of good character, taking into account everything they have heard about the defendant.
12. It is inadvisable to dilute the good character direction by extraneous words to the effect that everyone has good character to begin with. In *Neumann*,[524] the Court of Appeal said it would be rare that such a reference would be helpful, and it is possible that it could be positively unhelpful or even dangerous. The same point may also arise in respect of character witnesses called by a defendant – see *AB*.[525]

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521 See CrimPR, Rule 21.4(8) which states that a defendant who wants to introduce evidence of his or her own bad character must give notice in writing or orally as soon as reasonably practicable but before the evidence is introduced. Further, D is required at the same time to give notice in writing or orally of any direction about D's character that the defence wants the court to give to the jury under Rule 25.14.

522 [2021] EWCA Crim 1944

523 See *Bailey* [2017] EWCA Crim 35 as to the continuing entitlement to a good character direction in context of a bind over.

524 [2017] EWCA Crim 1533. In this case the trial judge observed that even the Krays once had good character.

525 [2019] EWCA Crim 875

13. A defendant of good character who has not given evidence is entitled to:

    (1) a full good character direction if relying on an out of court statement (usually to the police); or to

    (2) a good character direction limited to the 'propensity limb' if D has not made such a statement. It will be necessary to give the jury a direction at some stage of the summing up about the inferences that may, or must not, be drawn from D's not having given evidence: see Chapter 17-5. See Examples 5 and 6 below.

14. Where the prosecution relies on disputed evidence of previous misconduct on the part of a defendant otherwise entitled to a good character direction, the judge should direct the jury that:

    (1) if they are sure the evidence is true, they may take it into account as evidence of bad character, adding an appropriate bad character direction (as to which see Chapter 12 below); whereas

    (2) if they are not sure the evidence is true, they should disregard it, adding an appropriate good character direction.

    See Example 7 below.[526]

Managing co-defendants with different characters

15. Care is needed where the character of one co-defendant may require a different direction from another. This can arise in two situations:

    (1) If D1 merits a good character direction and D2 has a bad character (whether the jury have heard about it or not) it is incumbent on the judge to direct the jury about D1's good character: *Cain*.[527]

    (2) If D1 merits a good character direction and D2 does not qualify for a good character direction (but his bad character has not been revealed). There is a danger in this situation that a good character direction given in relation to D1 alone will lead the jury to speculate and conclude that D2 is likely to have a bad character. It is nevertheless incumbent on the judge to give the good character direction to D1, although the judge then has discretion as to what to say about D2. In most situations a warning against speculation is appropriate.

16. In practice, if a defendant who is entitled to receive a good character direction has a co-defendant about whom there is no evidence of character, the judge should discuss the timing and content of any directions with all advocates. As to timing, the good character direction for D1 might best be given when D1's evidence is dealt with. As to content, there should be discussion as to whether the jury should be directed 'not to speculate' about D2's character (see Example 8 below) or whether, as will commonly be the preferred option, no direction should be given. Practices differ as to whether, if a direction is to be given at all, such a direction is best given immediately after the good character direction or at

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526 In *Malim* [2019] EWCA Crim 1067 at [17] the judge outlined the issue between the parties by setting out the competing arguments as to character and by putting the character evidence in a case specific context.

527 [1994] 1 WLR 1449

some different point of the summing up. It is suggested that juries will have recognised by this stage of the case that whereas they have evidence about one defendant's good character they know nothing about the character of a co-defendant, and so any direction can properly be given immediately after the good character direction.

Non-defendant witnesses

17. In *Green*,[528] the Court of Appeal said that in the vast majority of cases, it will be undesirable to direct a jury that there was a 'level playing field' between the defendant and the prosecution witness in circumstances where there was no evidence of the latter ever having been in trouble with the police, committing an offence, or having a reputation for untruthfulness.

18. The issue was considered further in *Mader*[529] in which the Court of Appeal reviewed the position of good character evidence in respect of a non-defendant witness. At paragraph 32, the principles were summarised as follows:

    (1) The starting position is that generally, evidence is not admissible simply to show that a prosecution witness is of good character in the sense that he or she is a generally truthful person who should be believed.

    (2) However, evidence is admissible if it is relevant to an issue in the trial (unless excluded by one of the normal exclusionary rules of evidence)….

    (3) The category of issues to which evidence of disposition may be relevant is not closed. However, the issue of consent in a trial involving sexual conduct is an issue to which evidence of character or disposition may be relevant. A second category is if the accused's defence to a crime of violence is that he/she was defending themselves against an attack launched by the complainant. In that situation, the non-violent character of the complainant is no less relevant as a matter of logic than that of the accused.

    (4) If admitting evidence on the basis that it is "issue-relevant", then a trial judge should ensure that the issue to which it is relevant, and its limitations, are understood by the jury. The trial judge also has the responsibility of ensuring that the effect of admitting the evidence is not to water down the protection provided by the primary obligation upon the prosecution to prove its case and any good character direction that may be given for the defendant. The latter problem could be avoided by, for example, giving the direction before the good character direction of the defendant (as the trial judge did).

528 [2017] EWCA Crim 1774
529 [2018] EWCA Crim 2454

19. See Example 9 below.

Example 1 [category (1) above]: Standard direction – relevance to D's credibility and propensity – good character is a positive feature of D's case – weight is for the jury

You have heard that D has no previous convictions. Good character is not a defence to the charge(s) but it is relevant in two ways. First, the defendant has given evidence. D's good character is a positive feature which you should take into account in his/her favour when considering whether you accept what D told you. Secondly, the fact that D has not offended in the past may make it less likely that D acted as the prosecution alleges in this case.

What importance you attach to D's good character and the extent to which it assists on the facts of this particular case are for you to decide. In making that assessment you may take account of everything you have heard about D.

Example 2 [category (1) above]: D has no previous convictions/cautions and there is evidence from character witnesses

You know / it is agreed that D has no convictions or cautions for any criminal offence and you have also heard unchallenged evidence from witnesses who spoke about the defendant's personal qualities. {Here summarise the evidence or tell the jury that this will be summarised later.}

Obviously just because D is of previous good character does not mean that D could not have committed the offence/s with which he/she is charged. But his/her good character is something you should take into account in D's favour in two ways.

First: D gave evidence and you should take D's lack of convictions/cautions and D's personal qualities into account when you are deciding whether you believe D's evidence.

Secondly: the fact that D is now {specify} years old, that D has the qualities about which you have been told and that D has not committed any previous offence may mean that it is less likely that D would have committed the offence/s of {specify}.

You should take D's good character into account in D's favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

Example 3 [category (2) above]: D has spent convictions, but the judge has decided that D should be treated as someone of 'effective good character'

You know / it is agreed that the defendant has two convictions for {specify}. These offences, which are relatively minor, were committed more than 25 years ago when D was still a teenager.

Because of their nature and age, D is to be regarded as if he/she were a person of previous good character.

This does not mean that D could not have committed the offence/s with which he/she is charged but it should be taken into account in D's favour in two ways:

First: D gave evidence and the fact that D is to be treated as someone of good character is something that you should take into account when you are deciding whether you believe D's evidence.

Secondly: the fact that D is now {specify} years old and has not committed any offence for over 25 years [if appropriate: and has never committed any offence of {specify}] may mean that it is less likely that D would have committed the offence/s with which he/she is charged.

You should take the fact that D is to be regarded as a person of good character into account in D's favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

Example 4 [category (3) above]: D has introduced his/her previous convictions because they are dissimilar to the charges which he/she faces at trial. The judge decides to give a good character direction limited to the propensity limb

You know / it is agreed that D has convictions for offences of {specify}. D introduced this evidence because D wanted you to know that he/she has never been convicted of any offence involving {specify}.

How should you approach the fact that D has no previous convictions for any offence similar to the charge he/she now faces? This is obviously not a defence to the charge, but it may make it less likely that D has committed an offence of {specify}.

You should take this into account in D's favour. It is for you to decide what importance you attach to it.

Example 5: D is of good character; D has not given evidence but made an out of court statement on which he/she relies; direction on credibility and propensity limbs

You know / it is agreed that the defendant has no cautions or convictions for any criminal offence; D is a person of previous good character.

This does not mean that D could not have committed the offence/s with which he/she is charged but D's good character is something you should take into account in his/her favour in two ways.

First, although the D did not give evidence, D did give an account to the police when he/she was interviewed and D relies on that account in this case. You should take D's good character into account when you are deciding whether you accept what he/she said in that interview. Bear in mind however that this account was not given under oath or affirmation and was not tested in cross-examination.

Secondly: the fact that D has not committed any previous offence may mean that it is less likely that D would have committed the offence/s of {specify}.

You should take D's good character in his/her favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

NOTE: It will be necessary to give the jury a direction at some stage of the summing up about the inferences that may, or must not, be drawn from the defendant's not having given evidence – see Chapter 17-5 below.

Example 6: D is of good character; D did not make any out of court statement and has not given evidence; direction on propensity limb only

You know / it is agreed that D has no convictions or cautions for any criminal offence; D is of good character.

This does not mean that D could not have committed the offence/s with which he/she is charged but it may mean that it is less likely that D would have committed the offence/s.

You should take this into account in D's favour. It is for you to decide what importance you attach to it.

NOTE: It will be necessary to give the jury a direction at some stage of the summing up about the inferences that may, or must not, be drawn from the defendant's not having given evidence – see Chapter 17-5 below.

Example 7: D is charged with assaulting W; evidence that D is of positive good character, but the jury have also heard evidence, which D disputes, of previous bad character/misconduct

You know that D has no previous convictions or cautions for any criminal offences. Further, you have heard from witnesses who spoke about D's personal qualities {about which I will remind you in due course}. This does not mean that D could not have committed the offence/s with which he/she is charged but D's good character is something you should take into account in his/her favour in two ways.

First, D gave evidence and you should take D's lack of convictions/cautions and D's personal qualities into account when you are deciding whether you believe what he/she said.

Secondly, the fact that D has not committed any previous offence may mean that it is less likely that D would have committed the offence/s here alleged.

On the other hand, you have also heard evidence alleging that D assaulted W on a number of previous occasions, something which D denies.

How should you approach the evidence of these alleged previous assaults? If you are sure that one or more of these alleged previous assaults occurred, you would be entitled to consider whether this shows that D had a tendency to be violent towards W. In assessing whether you are sure these earlier assaults took place, and how evidence about them might support the prosecution case, you must always bear in mind the direction I have just given to you about D's good character.

If you are sure that D did have such a tendency you could treat this as some support for the prosecution's case. But this would only be part of the evidence against D and you must not convict D wholly or mainly on the strength of it. If you are not sure that D did have such a tendency, then D's previous conduct could not support the prosecution's case against D.

If, on the other hand, you are not sure that any of these alleged previous assaults occurred you must ignore them completely; the allegations would have no potential to support the prosecution case, nor to undermine in any way the significance that you consider should attach to D's good character and/or personal qualities.

You should take D's good character into account in his/her favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

Example 8: Co-defendant about whom there is no evidence of character (if any direction is required)

You have heard nothing at all about the character of the co-defendant and you must not speculate about it.

Example 9: Good character of a prosecution witness when D's defence is self-defence and W does not have any previous convictions

The prosecution's case is that D attacked W. D says that it was W who started the incident by threatening D with violence and then punching D. D says that he/she responded to the violence by using only such force as was reasonable in the circumstances of the threat as he/she perceived it to be.

You have heard that W does not have any previous convictions recorded against him/her. How might this evidence assist you? The fact that W does not have any previous convictions does not mean that he/she could not have threatened D or used unlawful violence. However, it is something that you may take into account when deciding whether you are sure that W is telling the truth when W says he/she did not threaten D, did not use any violence on D, and would not have done so.

I remind you that the prosecution must prove D's guilt. W's lack of previous convictions does not in itself do that. As I have said, it is something you may take into consideration when considering whether you accept W's evidence that he/she did not initiate violence towards D.

12. BAD CHARACTER

12-1 General introduction

ARCHBOLD 13-1, 4 and 5; BLACKSTONE'S F13.1 and 22; CrimPR 21

1. The admission of evidence of the bad character of defendants and non-defendants is governed by the statutory regime of CJA 2003, ss.98 – 113. Bad character is defined as "evidence of, or of a disposition towards, misconduct on his part, other than evidence which—
   (1) has to do with the alleged facts of the offence with which the defendant is charged, or
   (2) is evidence of misconduct in connection with the investigation or prosecution of that offence. (s.98)."
2. Judges must have in mind that no evidence is admissible unless it is relevant to the issues in the case and there is a duty to consider in advance all evidence that the parties propose to place before the jury.
3. When considering the admission of evidence, the court must look to its case management duties under the CrimPR and in particular r.3.2 (actively managing the case to ensure that the case is dealt with justly) and r.3.10 (ensuring the parties are ready for trial). This will involve consideration of the purpose for which it is proposed to admit evidence of bad character whether by agreement or otherwise before it goes before the jury. The court's discretion to extend the time limit under CrimPR 21.6 is not limited to exceptional cases: *R (Robinson) v. Sutton Coldfield Magistrates' Court*.[530] **The Court of Appeal emphasised in *AG*[531] that all bad character applications should be made in writing and a ruling giving reasons, which can be brief, always given.**
4. For the purposes of determining the admissibility of bad character evidence, its relevance or probative value is assessed on the assumption that it is true, but the court need not assume it is true if it appears, on the basis of any material before the court, that no court or jury could reasonably find it to be true: s.109. See also *Dizaei*.[532]
5. Evidence admitted under s.98(a) and (b) is admitted as evidence directly relevant to the offence rather than under the criteria of s.100 and any gateway under s.101. It will, nevertheless, be prudent to have in mind the statutory safeguards attaching to the admission of evidence under ss.100 and 101. Judges should consider appropriate directions to the jury on the use to which that evidence should be put and, if appropriate, the weight they should attach to it. Care needs to be taken when considering evidence that it is asserted 'has to do with the facts of the offence' as per s.98 to ensure that it is correctly so

530 [2006] EWHC 307 (Admin)
531 [2018] EWCA Crim 1393
532 [2013] EWCA Crim 88

categorised: *RJ.*[533] Cases such as *McNeill*,[534] *Hastings-Coker*,[535] *Ditta*,[536] *Sullivan*,[537] and *Oloyawang*[538] address this issue from a variety of perspectives.

6. This route is frequently relied upon where motive arises as an issue in the trial: see *Sule*[539] and *Abdi*.[540] There is no requirement for a trigger event for s.98(a) to be engaged: see *Heslop*.[541]

7. For guidance on what should be said to the jury about such evidence, see *RJ*,[542] *MA*[543] and *AAM*.[544]

8. Once evidence of a defendant or non-defendant's bad character is admitted it may, depending on the facts, be used by the jury for other purposes. As Lord Woolf noted in *Highton*:

> "A distinction must be drawn between the admissibility of evidence of bad character, which depends upon it getting through one of the gateways, and the use to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted. It is true that the reasoning that leads to the admission of evidence under gateway (d) may also determine the matters to which the evidence is relevant or primarily relevant once admitted. That is not true, however, of all the gateways. In the case of gateway (g), for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant is charged."

9. In every case the judge, when identifying the purpose for which evidence may be used, should also identify any potential misuse of such evidence arising e.g. from prejudice, and warn against such use. In a case where there is a trial involving multiple complaints or complainants it will always be necessary to direct the jury carefully as to how they may or may not use evidence that might appear to have some potential for cross-admissibility, see *Adams*.[545] A standard direction to the effect that the jury 'must give each count entirely separate consideration' is unlikely to suffice.

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533 [2017] EWCA Crim 1943
534 (2008) 172 JP 50
535 [2014] EWCA Crim 555
536 [2016] EWCA Crim 8
537 [2015] EWCA Crim 1565
538 [2021] EWCA Crim 1412
539 [2013] 1 Cr App R 3
540 [2022] EWCA Crim 315
541 [2022] EWCA Crim 897
542 [2017] EWCA Crim 1943
543 [2019] EWCA Crim 178
544 [2021] EWCA Crim 1720
545 [2019] EWCA Crim 1363 and in particular para [22]

10. Where the apparent weight of evidence admitted under these provisions comes to be diminished in the light of other evidence, careful directions must be given to the jury to assist them in assessing weight and deciding whether or not there is real significance to the evidence.

11. Where evidence of D's previous conviction/caution or sentence has been revealed in error, so not admitted under any of the 'gateways' in s.101, if the jury is not discharged, it will be usual, after considering the matter with the advocates, to direct the jury that it has no relevance to the issues before them and to ignore it.

12. The Supreme Court in the case of *Mitchell*[546] has addressed the issues for a jury when they are considering disputed evidence of bad character going to the issue of propensity: see Chapter 12-6 below. In *Gabanna*,[547] which considers the application of the reasoning that is the foundation for the principles advanced in *Mitchell*, Davis LJ observed that:

> "the standard of proof for the purposes of evidence admitted under any gateway in s. 101, where a disputed issue as to bad character arises for the jury to determine, surely must be the same for all gateways. And that standard, as Mitchell confirms (albeit specifically in the context of a propensity direction), is the criminal standard."

    But cf the position where the defence introduce bad character evidence and see *Labinjo-Halcrow*[548] referred to in 12-10 below.

13. In *Omotoso*,[549] the Court of Appeal stated that it is not objectionable for a judge to suggest that the prosecution should consider making a bad character application. If this is done, the judge must be scrupulous in not taking on the function of the prosecutor or appearing to do so. Any suggestion to the prosecution should be expressed carefully, especially given that a judge may not be aware of what has been agreed between the advocates.

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546 [2016] UKSC 55
547 [2020] EWCA Crim 1473, [103]
548 [2020] EWCA Crim 951
549 [2018] EWCA Crim 1394, para 47

12-2 Directions applicable to all CJA s.101(1) 'gateways'

ARCHBOLD 13-25; BLACKSTONE'S F13.1 and 15

Directions

1. In the case of disputed bad character evidence, the jury must be reminded of the evidence on both sides (whether it be prosecution and defendant or one defendant and a co-defendant). The jury must be directed both as to the potential use to which the evidence may be put and also how it should not be used: see *Hackett*[550] and *Adams.*[551] The jury must also be directed carefully about how to approach disputed evidence in relation to propensity, see *Mitchell*[552] and Chapter 12-6 below, including by reference to the standard of proof that may be applicable depending on whether the evidence is relied upon by the prosecution or the defence.[553]
2. Where D has disputed that he/she is guilty of an offence of which D has been previously convicted, where the conviction has been proved, it is to be presumed that D committed that offence unless the contrary has been proved on the balance of probabilities, see PACE s.74(3); *C*.[554] A bare assertion by D that he/she did not commit the earlier offence, does not trigger a requirement for the prosecution to prove that D was guilty of the earlier offence nor to assist D to prove that he/she was not guilty, or to call witnesses for either purpose. The evidential presumption is that the conviction truthfully reflects the fact that D committed the offence. The court in *C*, at para 15, contemplated the possibility of the prosecution postponing its decision as to whether to call evidence relating to the prior offence until after the defence had closed its case.
3. In many cases, evidence of bad character will have been admitted through more than one gateway or have become relevant to more than one issue; in such cases directions must be given in respect of all relevant matters in relation to each gateway.[555]
4. The issues to which the evidence is potentially relevant must be identified in detail and the jury directed about the limited purpose(s) for which the evidence may be used (explanatory of other evidence, relevant to an issue including propensity or 'hallmark', rebutting a defence, credibility, correcting a false impression etc.).

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550 [2019] EWCA Crim 983
551 [2019] EWCA Crim 1363
552 [2016] UKSC 55
553 *Labinjo-Halcrow* [2020] EWCA Crim 951 and *Gabanna* [2020] EWCA Crim 1473, [103]
554 [2010] EWCA Crim 2971 and in particular para 14 "...it is essential that the defendant should provide a more detailed defence statement in which, quite apart from setting out his case in relation to the offences with which he is presently charged, he should identify all the ingredients of the case which he will advance for the purposes of discharging the evidential burden of proving that he did not commit the earlier […] offences."
555 In some cases the prosecution makes an application to adduce under more than one gateway and it is important to seek clarification on how the prosecution is putting its case on the matter: see recently *McGowan* [2023] EWCA Crim 247

5. The jury must be directed to decide to what extent, if at all, the evidence establishes that for which the party relying upon it contends (e.g. propensity/credibility).
6. It is of equal importance to identify any purpose/s for which the evidence may **not** be used.
7. Depending on the nature and extent of the convictions or other evidence of bad character, consideration should be given to a direction on the effect of the bad character evidence on the credibility of D.

NOTES:

1. Examples of directions on the use to which evidence of bad character may and may not be put are set out in further sections of this Chapter relating to specific gateways.
2. Jury directions may be given at any stage of the trial. In addition to directing the jury in the summing up, it may help them at the time that the evidence is presented to tell them, in short form, of its relevance and the purposes for which they may, and may not, use it.

Example

You have just heard about/are about to be told of D's convictions/cautions/behaviour. The evidence **may** be relevant to the issues that you in due course will have to decide.

{identify issue(s) to which the evidence relates and give appropriate warnings against risk of prejudice}

Whether the evidence is relevant or not will be a matter for you to determine in the context of further legal directions that I will in due course provide, all the other evidence in the case and also by reference to the arguments of the parties.

You must be sure to keep an open mind until you have received all the evidence, arguments and legal directions.

12-3 S.101(1)(a) – Agreed evidence

ARCHBOLD 13-27; BLACKSTONE'S F13.16

Legal summary

1. See the General introduction at 12-1.
2. Section101(1)(a) allows for evidence of bad character of a defendant to be admitted by agreement between all the parties. Agreement can be tacit.[556]
3. Caution is required in admitting evidence under s.101(1)(a). Even in cases in which the evidence is agreed, it is wise for the judge to seek clarification from the advocates as to what is agreed, and for what purpose, so that the judge can consider how best to direct the jury in summing up. In a multi-defendant case, all parties must agree to the admission of the evidence.[557]
4. Where the Crown invites D1 to agree his/her convictions under s.101(1)(a), D2 may be put in an awkward position.[558]
5. It is expected that advocates will draw to the judge's attention any agreed bad character.[559] The matter of the uses to which that can be put by the jury and how they are to be directed can then be ventilated with advocates.
6. In some cases where bad character evidence has been admitted by agreement, it will be capable of being used as 'propensity evidence'. There must be a careful direction by the judge on the possible uses to which the bad character evidence can be put by the jury. Whether bad character evidence can be used to show propensity will depend on the nature of the evidence, the nature of the charge, the similarity of the bad character evidence with the nature of the offence charged, and all the other relevant circumstances of the case.

Directions

7. Identify the evidence of bad character.
8. Whenever the court is told that bad character is to be admitted by agreement, there should be an enquiry as to its relevance before the evidence goes before the jury. This will ensure the parties have considered all its implications and enable the judge to have in mind all relevant aspects of the evidence for summing up.
9. While evidence may be admitted by agreement, the court retains duties of case management: i.e. ensuring that any evidence that goes before the jury is relevant to the issues and presented in the shortest and clearest way (preferably in the form of Agreed Facts).
10. Agreed evidence of bad character will usually be evidence that would have been admitted, if contested, through another gateway and the jury must be directed accordingly: see the further sections of this Chapter.

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556 *Marsh* [2009] EWCA Crim 2696
557 *Ferdinand* [2014] EWCA Crim 1243
558 *Harper* [2007] EWCA Crim 1746
559 *Johnson* [2010] EWCA Crim 385

11. Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury, a direction as to the effect of the evidence on D's credibility may be required.
12. Where the evidence is relevant only to credibility, a direction should make it clear that it would be wrong and illogical to consider that the fact that D has been convicted or has behaved badly in the past means it is more likely that D did so on this occasion.
13. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) 'gateways'.

Example

You have heard about D's convictions/cautions/behaviour. This is/these are set out in {paragraph no. of} the Agreed Facts and the prosecution and defence agree that this is relevant evidence. There are certain ways in which you may use – and others in which you must **not** use – this evidence.

[Here give appropriate directions, depending on the issues to which the evidence is relevant: see other sections in this Chapter.]

12-4 S.101(1)(b) – Evidence of bad character adduced by the defendant

ARCHBOLD 13-28; BLACKSTONE'S F13.17

Legal summary

1. See the General introduction at 12-1. A defendant who wants to introduce evidence of his/her own bad character is required to give notice of that fact.[560]
2. Where the bad character evidence is admitted under s.101(1)(b) it may be used by the jury for any purpose for which it is relevant.[561]

   > "In our judgment it would be inappropriate in a gateway (b) situation for a defendant to have carte blanche to make such points as he wishes about his previous record, without facing the possibility that his record does him no favours where credibility is concerned": *Speed*.[562]

3. When summing up, the judge's task is to explain to the jury for what purpose the evidence may, and may not, be used.[563] The jury need careful direction on the uses to which evidence of previous convictions admitted under s.101(1)(b) might be put.[564]
4. In some instances, it may be inappropriate for the jury to use the evidence as evidence going to credibility: *Tollady*.[565] The guidance to the jury may need to include: warning against the danger of placing undue reliance on the bad character, that the evidence of bad character must not be used to bolster a weak case, and that the jury must ignore the bad character if they think the case against D is a weak one. The jury should also be told that they should not assume that D is guilty simply because of his/her bad character.
5. A defendant may choose to adduce evidence of his/her bad character irrespective of whether or not a co-accused agrees.
6. Where evidence of bad character is not intentionally adduced by D, (for example where it is blurted out in error) the jury must be directed to ignore the evidence unless it is admissible under one or more of the other gateways.

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560 See CrimPR 21.4(8)
561 *Highton* [2005] EWCA Crim 1985; *Edwards* [2005] EWCA Crim 3244; *Campbell* [2007] EWCA Crim 1472
562 [2013] EWCA Crim 1650
563 *Edwards* [2005] EWCA Crim 3244 at para.3; *Campbell* [2007] EWCA Crim 1472 at paras.37-38
564 *Edwards and Rowlands* [2005] EWCA Crim 3244 at para.104
565 [2010] EWCA Crim 2614

Directions

7. Identify the evidence of bad character.
8. If D elects to adduce evidence of his/her own bad character that would otherwise have been admissible through one of the other gateways of s.101(1), the jury must be given directions on the use(s) to which the evidence may and may not be put.
9. If D elects to adduce evidence of relatively minor bad character, for fear that the jury might speculate that it was something worse, the jury must be directed that they know about D's convictions only so that they know about all background and, if appropriate, that the character evidence does not make it more or less likely that D committed the offence.
10. If the evidence of bad character is minor and relates to matters of a completely different character from that with which D is being tried, the judge has a discretion, after consideration with the advocates, to give D the benefit of the 'propensity limb' of the good character direction: see Chapter 11.
11. Depending on the nature and extent of the convictions or other evidence of bad character, a direction as to the effect of the evidence upon D's credibility may be required.
12. Where the evidence is relevant only to credibility, a direction should make it clear that it would be wrong and illogical to consider that the fact that D has been convicted or has behaved badly in the past means it is more likely that D did so on this occasion.
13. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) 'gateways'.

Example

D has told you of his/her convictions for {specify}. There are certain ways in which you may use – and others in which you must **not** use – this evidence.

[Here give appropriate directions, depending on the issues to which the evidence is relevant: see other sections in this Chapter.]

12-5 S.101(1)(c) – Important explanatory evidence

ARCHBOLD 13-29; BLACKSTONE'S F13.18 and 28

Legal summary

1. See the General introduction at 12-1.
2. Section 101(1)(c) allows for the bad character evidence of D to be adduced by either the Crown or a co-accused where it is important explanatory evidence. There is no requirement for the prosecution to satisfy the interests of justice test under s.101(1)(3).
3. The gateway is a narrow one.[566] Section102 provides that:

   "Evidence is important explanatory evidence if

   (a) without it, the court or jury would find it **impossible or difficult properly to understand** the other evidence in the case, and

   (b) its value for understanding the evidence as a whole is substantial."[567]

   Care is needed to avoid too readily admitting evidence under s.101(1)(c) that ought to be admitted if at all under s.101(1)(d); "Gateway C is, we emphasise, not a substitute for gateway D. It is not possible to dress up a failed case of gateway D as gateway C."[568] The case of *Leatham and Mallett*[569] provides a helpful analysis of the correct approach when considering the admission of evidence via this gateway. Care is also needed to avoid satellite litigation,[570] particularly since it may often be necessary for a jury to receive evidence describing, perhaps in some detail, the context and circumstances of the incident amounting to bad character.[571]
4. The overlap with s.98 of the Act (allowing evidence to do with the facts of the alleged offence) should also be borne in mind.[572] See also *MckIntosh*[573] and *Lovell*.[574]
5. This section can be applied to adduce evidence of previous gang feuds: *Okokono*.[575] In the context of evidence concerning gang membership and related activities see *Rashid and Tshoma*[576] and also *Dixon-Kenton*.[577]

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566 *Gillespie* [2011] EWCA Crim 3152; *Lee* [2012] EWCA Crim 316
567 Emphasis added
568 See *D, P, U* [2012] EWCA Crim [22] per Hughes LJ. "There is an inevitable tension between admitting previous convictions of a defendant as important explanatory evidence and not for propensity": *Frain* [2007] EWCA Crim 397; *D* [2008] EWCA Crim 1156; *Saint* [2010] EWCA Crim 1924; see also *Sheikh* [2012] EWCA Crim 907
569 [2017] EWCA Crim 42
570 *Sawoniuk* [2000] 2 Cr App R 220
571 *Dabycharun* [2021] EWCA Crim 1923
572 See *Lunkulu* [2015] EWCA Crim 1350; *Sullivan* [2015] EWCA Crim 1565
573 [2006] EWCA Crim 193
574 [2018] EWCA Crim 19
575 [2014] EWCA Crim 2521
576 [2019] EWCA Crim 2018
577 [2021] EWCA Crim 673

6. The jury need more than simply a narration of the evidence. It is helpful to address with advocates, as soon as the admissibility of the evidence is raised, how it is proposed that the bad character evidence is to be used and how the jury is to be directed. Having an agreed account is helpful where possible. Evidence admitted under gateway (c) is capable of being used by the jury for any other purpose, and in some cases it will be necessary to give a specific warning as to the ways in which the evidence might assist the prosecution case.[578]

Directions

7. Identify the evidence of bad character.
8. Explain why the evidence is before them e.g. how the defendant came to be in prison or had contact with the complainant.
9. Explain any further purpose/s for which the conviction/s or reprehensible behaviour may be used and also any limitations on its use. If the bad character is being relied upon as such, then guidance to the jury may need to include a warning of the danger of placing undue reliance upon it, and that the jury should not assume that D is guilty simply because of his/her bad character. In *Fanta*,[579] a failure to provide that direction did not, on the facts, prove to be fatal to the conviction.
10. Depending on the nature and extent of the convictions or other evidence of bad character a direction as to the effect of the evidence upon the defendant's credibility may be required.
11. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) 'gateways'.

Example: Evidence admitted only as important explanatory evidence

You have heard that the {e.g. fight that you are considering} happened while D and W were in prison. You have been told they were in prison because it would have been impossible to understand events without knowing this.

But the fact that D was in prison does not make it more or less likely that D committed this offence and provides no support for the prosecution case, neither does it make it more or less likely that W attacked D.

[578] *Lee* [2012] EWCA Crim 316
[579] [2021] EWCA Crim 564

12-6 S.101(1)(d) – Relevant to an important matter in issue between the defendant and the prosecution

ARCHBOLD 13-37; BLACKSTONE'S F13.18 and 36

Legal summary

1. See the General introduction at 12-1.
2. Section 101(1)(d) allows for evidence of D's bad character to be admitted where it is relevant to an important matter in issue between D and the prosecution. One way in which a matter can be an important matter in issue between them is when the prosecution seeks to rely on the evidence of bad character to demonstrate a propensity to commit the offence. But s.101(1)(d) is not restricted to the admissibility of propensity evidence. Evidence of bad character may, for example, be relevant to prove D's presence or identity or knowledge[580] or to rebut coincidence, without engaging propensity: see *Richardson*;[581] *Cambridge*;[582] *Lanning*.[583] Where evidence is admitted as demonstrating propensity and as relevant to some other important matter in issue care will be needed in directing the jury. It may not always be necessary to direct the jury on both bases: see *Khan*.[584]
3. Where evidence is admitted as propensity evidence there are four sub-gateways within s.101(1)(d):
   (1) If it shows D has a propensity to commit "offences of the kind with which he is charged" (s.103(1)(a)).
   (2) The prosecution may use s.103(1)(a) to show that the defendant has a propensity to commit offences of the kind with which he/she is charged by showing the defendant has previously committed an offence "of the same description" as this offence.
   (3) The prosecution may use s.103(1)(a) to show that the defendant has a propensity to commit offences of the kind with which he/she is charged by showing the defendant has previously committed an offence "of the same category."
   (4) Section 103(2)-(5): Evidence of the defendant's bad character is admissible if it "shows he has a propensity to be untruthful" s.103(1)(b).
4. In *Hanson*,[585] the Court of Appeal offered general guidance on the questions to be addressed where propensity was sought to be established by previous convictions:
   (1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?

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580 *Bernard-Sewell and others* [2022] EWCA Crim 197
581 [2014] EWCA Crim 1785
582 [2011] EWCA Crim 2009
583 [2021] EWCA Crim 450
584 [2022] EWCA Crim 1592
585 [2005] EWCA Crim 824

(2) Does that propensity make it more likely that the defendant committed the offence charged?

(3) Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?

5. In *Mitchell*,[586] where propensity was sought to be established by disputed evidence, the Supreme Court decided as follows [43]:

> "The proper issue for the jury on the question of propensity in a case such as *Ngyuen* and the present appeal is whether they are sure that the propensity has been proved. In *Ngyuen* the only way in which they could be sure was by being convinced that the sole incident said to show propensity had been proved to the criminal standard. That does not mean that in cases where there are several instances of misconduct, all tending to show a propensity, the jury has to be convinced of the truth and accuracy of all aspects of each of those. The jury is entitled to - and should - consider the evidence about propensity in the round. There are two interrelated reasons for this. First the improbability of a number of similar incidents alleged against a defendant being false is a consideration which should naturally inform a jury's deliberations on whether propensity has been proved. Secondly, obvious similarities in various incidents may constitute mutual corroboration of those incidents. Each incident may thus inform another. The question impelled by the order is whether, overall, propensity has been proved."

6. If admitting evidence of alleged offending which resulted in an acquittal the fact of the acquittal will generally be irrelevant: see *Preko*.[587] There may be circumstances where the fact of the acquittal could be relevant, for example if the relevant witness's credibility is directly in issue, but there is an obvious danger that a jury may be being encouraged to speculate as to the reason for the acquittal: see *Hajdarmata*,[588] *Mellars*[589] and *Simpson* and *Benzahi*.[590] The latter case analyses the position where the assumption of truthfulness arises in the context of disputed acquittal evidence. See also *Golam-Rassoude*[591] which confirms the position as set out in *Mellars* that the fact of the prior acquittal (rather than the evidence adduced at the earlier trial leading to the acquittal) will only be admissible for very limited purposes such as the "effect of an acquittal on the credibility of a confession or the evidence of a prosecution witness" and see further *Terry*[592] referred to in the course of the judgment. Other evidence of bad character, e.g. coincidence was not considered in *Mitchell*. The fact of and/or extent of coincidence remains to be considered by the jury as set out in Chapter 13 paragraph 4(1) below.

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586 [2016] UKSC 55 and see also *Gabanna* [2020] EWCA Crim 1473 and 12-1 above
587 [2015] EWCA Crim 42
588 [2019] EWCA Crim 303
589 [2019] EWCA Crim 242
590 [2019] EWCA Crim 1144
591 [2020] EWCA Crim 704
592 [2005] QB 996

7. Bad character ought not to be adduced under s.101(1)(d) to bolster a weak case: *Darnley*[593] *McDonald*.[594] There is no rule that a case is weak simply because it is based on DNA evidence recovered from a movable object.[595]
8. The sentence for the earlier conviction is not usually helpful in determining admissibility: *Nelson*.[596] Judges should consider the age of convictions with care, particularly when offences many years before were committed when the defendant was a youth: *Richards*.[597]
9. There is no minimum number of events necessary to demonstrate a propensity: *Hanson*; *Brown*,[598] *Burdess*,[599] cf *Bennabou*,[600] *Ellis Cloud.*[601] See also *Spottiswood*[602] confirming that a: "single incident can be admissible to demonstrate propensity if there is a legitimate basis for contending that the circumstances of previous offending render it more likely than otherwise would be the case that the defendant was prepared to commit the crime before the court."
10. Large numbers of convictions can be admitted under this gateway provided they are relevant to a matter in issue and the judge has considered the potential unfairness: *Blake*.[603]
11. Particular care is needed where the bad character evidence is of a kind which itself requires additional caution such as identification evidence: *Dossett*,[604] *Eastlake*,[605] *Ngando*,[606] *Howe*.[607]
12. Care will be needed in directing the jury where evidence of bad character has been revealed inadvertently.[608]
13. Evidence of things done by D that are alleged to have occurred after the offences which are the subject matter of the trial, whether resulting in convictions or not, may be admitted under s.101(1)(d): *Adenusi*;[609] *Imiela*;[610] *A*.[611]

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593 [2012] EWCA Crim 1148
594 [2011] EWCA Crim 2933
595 *Belhaj-Farhat* [2022] EWCA Crim 115
596 [2012] All ER (D) 42 (May)
597 [2022] EWCA Crim 1470
598 [2011] EWCA Crim 80
599 [2014] EWCA Crim 270
600 [2012] EWCA Crim 3088
601 [2022] EWCA Crim 1668
602 [2019] EWCA Crim 949 at para 29
603 [2006] EWCA Crim 871
604 [2013] EWCA Crim 710
605 [2007] EWCA Crim 603
606 [2014] EWCA Crim 506
607 [2017] EWCA Crim 2400
608 *Bernard-Sewell and others* [2022] EWCA Crim 197
609 [2006] EWCA Crim 1059
610 [2013] EWCA Crim 2171
611 [2009] EWCA Crim 513

14. Particular care is needed in cases where bad character evidence of indecent image possession is relied on as evidence in sexual contact offences: *D*, *P*, *U*,[612] where Hughes LJ stated:

> "... Possession of child pornography may, depending on the facts of the case, demonstrate a sexual interest in children which can be admissible through gateway D upon trial for offences of sexual abuse of children. It will not always be so. There may be a sufficient difference between what is viewed and what is alleged to have been done for there to be no plausible link."

The Court of Appeal accepted that it would have been preferable if the details of the offences had been available, but concluded that since W was an immature teenager known to L since he was aged nine, L would have regarded him as a child. The images showed L's sexual interest in children and they were potentially relevant under s.101(1)(d). See also *Toner* (applying that principle).[613]

Directions

15. Identify the evidence of bad character.
16. Identify whether the evidence is admitted or in dispute. If in dispute give appropriate directions as to the burden and standard of proof.[614]
17. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.
18. Identify in detail the issue/s to which the evidence is and is not potentially relevant e.g. propensity, credibility, identity.
19. Give a tailored and fact-specific direction to the jury, indicating that it is for them to decide to what extent, if any, the evidence helps them to decide the issue/s to which it is potentially relevant: *Campbell*.[615] It may be helpful to bear in mind the words of Lord Phillips CJ in the same case as to the jury's assessment of weight.[616]
20. Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury a direction as to the effect of the evidence upon D's credibility may be required.
21. If the evidence is exclusively within the limits of s.101(1)(d), the jury should be warned against prejudice against D or over reliance on evidence of bad

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612 [2012] 1 Cr App R 8; see recently *Millis* [2022] EWCA Crim 1582
613 [2019] EWCA Crim 443
614 See *Mitchell* [2016] UKSC 55 and *Gabbana* [2020] EWCA Crim 1473
615 [2007] 2 Cr. App. R. 28
616 "What should a jury's common sense tell them about the relevance of the fact that a defendant has, or does not have, previous convictions? It may tell them that it is more likely that he committed the offence with which he is charged if he has already demonstrated that he is prepared to break the law, the more so if he has demonstrated a propensity for committing offences of the same nature as that with which he is charged. **The extent of the significance to be attached to previous convictions is likely to depend upon a number of variables, including their number, their similarity to the offence charged and how recently they were incurred and the nature of his defence**". (para 23, emphasis added)

character and that they must not convict D wholly or mainly on the basis of previous convictions or bad behaviour. If the evidence is in reality 'hallmark' evidence and directly relevant to the issue in the case, a warning not to convict wholly or mainly in reliance upon may be inappropriate but this is likely to be a rare factual scenario.

22. On a multi-count indictment, the issue of cross-admissibility should be considered, see Chapter 13.

23. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) 'gateways'.

Example 1: Evidence of previous convictions going to propensity

You have heard that D has previous convictions for {specify}. The prosecution say that they show that D has a tendency to commit offences of this type and so it is more likely that D was {specify: e.g. the aggressor in this incident/the person who was driving the car/the person who stole the goods}.

The defence say that the previous convictions are {specify: e.g. old/of a different nature} and do not show that D has a tendency to act as alleged.

You have to decide whether these previous convictions show that D has a tendency to behave in this way.

If you are not sure that D's previous convictions show that D has such a tendency then you must ignore them.

But if you are sure that they do show such a tendency then this may support the prosecution case. It is for you to say whether it does and if so to what extent. You must not convict D wholly or mainly because of them. The fact that someone has {specify} in the past does not prove that he/she did so on this occasion. D's previous convictions may only be used as some support for the prosecution case if, having assessed the evidence, you are satisfied that it is right so to do.

Example 2: Disputed evidence of alleged previous incidents going to propensity

[D is charged with assault occasioning actual bodily harm. The jury have heard evidence from W and from D about this, and also about 3 earlier alleged incidents (which were admitted by the judge as evidence of bad character going to the issue of propensity).]

You have been told that in the 6 months prior to the alleged assault W attended the A&E department of the local hospital on 3 occasions with {specify injuries}. On each occasion D accompanied W to hospital and on each occasion W told doctors that the injury had been sustained accidentally, giving reasons such as falling down stairs or tripping over children's toys.

W has given evidence that the injuries on previous occasions were not caused by accident but resulted from being struck by D and that D is a person who regularly used violence towards W. D has given evidence that the earlier injuries were caused in the way/s described by W to the doctors and that W's injuries on the occasion of the alleged assault were again caused by accident.

You must consider the evidence of W and D about the 3 earlier incidents in the round and the likelihood of W having sustained injuries by accident on those previous occasions. If you think that those injuries were or may have been accidental, they are of no relevance to your decision and you must ignore them.

If you are sure that the evidence shows that W has suffered injury in the past by being struck by D then this may show that D has a tendency to behave violently towards W and so support the prosecution case that D did so on this occasion.

If you are sure that D has a tendency to behave violently towards W then you are entitled to use the evidence of the earlier incident, together with W's account of the matters giving rise to the charge which D faces, when deciding whether you are sure W was assaulted on {specify day of charge}.

Just because someone has behaved this way in the past does not prove he/she did so on this occasion, but you may use it as some support for the prosecution case. You must not, however, convict D wholly or mainly on the evidence of what, if anything, you find D has done in the past.

Example 3: Evidence of previous convictions going to propensity to be untruthful – bearing only on D's credibility (not as propensity evidence)

D has said that … {specify}. It is for you to decide whether that is or may be true. When you are deciding this question you may take into account D's previous convictions for {specify e.g. perverting the course of justice, by giving a false name when driving whilst disqualified, and committing perjury, by making a false accusation that someone else had assaulted D's brother when in fact D had done so}.

The prosecution say that those convictions are significant because they show that D is prepared to tell lies to avoid responsibility for offences D has committed and has lied to you for the same reason.

The defence accept that D has these convictions but say they are irrelevant because … {specify: e.g. they happened many years ago}.

You should bear in mind that just because someone has told lies in the past does not mean that he/she is telling lies now. You must decide whether these convictions help you when deciding whether D's evidence is, or may be, true or whether you are sure that it is untrue, but you must not convict D wholly or mainly because of them.

Example 4: Evidence of previous convictions as potential support for evidence of identification

You have heard that D was picked out on a VIPER identification parade. [See Chapter 15-1 Visual identification.]

The prosecution say that the person picked out on that identification parade was the person who {e.g. burgled the house}. The defence say the identification was mistaken.

I have already told you about the risks surrounding evidence of identification and that you should look to see whether the evidence of identification is supported by other evidence. The prosecution say that the identification evidence is supported by D's previous convictions, which demonstrate that D {e.g. has committed three

other burglaries in the same street within the last two years} and the prosecution say that this makes it more likely that the identification evidence as to his/her presence at that location at the time of the alleged burglary is correct.

The defence accept that D has these convictions {e.g. for burglary} but they remind you that {e.g. the estate on which the burglary was committed was an area of high crime and that there are many other people who have committed burglaries in that area}.

The fact that D has {e.g. committed burglaries in the same street} cannot prove D did so on this occasion but it is evidence you may take into account as support for the prosecution case. How far it supports the prosecution case will depend on your view of (a) how much of a coincidence it is that the person identified as the burglar in this case has {e.g. committed burglaries on the same street in the past} and (b) the defence point about the number of other people who have {e.g. committed burglaries on this street}.

D's previous convictions may only be used as some support for the prosecution case. You must not convict D wholly or mainly because of them.

12-7 S.101(1)(e) – Substantial probative value in relation to an important matter in issue between a defendant and a co-defendant

ARCHBOLD 13-69; BLACKSTONE'S F13.67

Legal summary

1. See the General introduction at 12-1.
2. CJA 2003, s.101(1)(e) allows one defendant (hereafter D1) to adduce evidence of the bad character of another defendant (hereafter D2) if that evidence has "substantial probative value in relation to an important matter in issue between" them. This will usually arise when the defendants are engaged in 'cut-throat' defences. The approach to admissibility is set out clearly in *Phillips*.[617] The test for admissibility is quite different from that under s.101(1)(d), and there is no discretion to exclude the evidence if the conditions of s.101(1)(e) and s.104 are satisfied. If dealing with an application under this provision reference should be had to *Simpson and Benzahi*.[618]
3. Evidence that can be adduced under s.101(1)(e) is not limited to evidence directly suggesting that D2 is more likely to be the offender (e.g. evidence of D2's previous convictions for similar behaviour). It can include evidence that undermines D2's credibility where that is an important matter in issue,[619] even though the bad character evidence against D2 does not establish a propensity for untruthfulness. However, an allegation of criminality, even where that has involved police investigation,[620] but which has not resulted in a conviction will not, without further evidence, be admissible.
4. Where the sole purpose of the evidence is to balance D2's attempt to undermine D1's case the direction can be given quite shortly.[621] In *Phillips*, Pitchford LJ explained:

> "The judge has a responsibility to explain to the jury the issues upon which the evidence was relevant and the need for a sequential approach to it: (i) Is it true? (ii) Does it establish the propensity claimed? (iii) Does it assist in resolving the issues between the defendants? (iv) Does a resolution of the issue between the defendants assist the jury to reach their decision as to guilt of one or other or both of them. It does not seem to us that the admission of the pre-indictment evidence would have resulted in unfairness to the co-accused…" [622]

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617 [2011] EWCA Crim 2935. See also *Daly* [2014] EWCA Crim 2117
618 [2019] EWCA Crim 1144
619 *Lawson* [2006] EWCA Crim 2572; *Rosato* [2008] EWCA Crim 1243; *Simpson and Benzahi* [2019] EWCA Crim 1144
620 *Mohamedzai* [2022] EWCA Crim 162
621 *Rosato* [2008] EWCA Crim 1243 at para 26
622 [2011] EWCA Crim 2935

5. In *Passos-Carr*,[623] the Court of Appeal accepted that:

> "in an appropriate case, evidence of propensity to be violent can be evidence of substantial probative value as to issues between two defendants in a cut-throat case where two defendants blame each other."

However, considerable care will be needed not to confuse the jury.[624]

6. In *Turnbull*,[625] it was noted that in applying the test in *Phillips*:

> "the judge will need to bear in mind whether or not that evidence is disputed. If it is, and there is a risk that the jury may not accept that it constitutes evidence of bad character, then the judge may be depriving a co-accused of potentially substantial probative evidence if he relies on that evidence in order to exclude other bad character evidence in the event that the jury are not sure that it does demonstrate bad character. This is not a problem, however, where the evidence admitted takes the form of convictions."

Directions

7. Identify the evidence of D2's bad character.
8. If the evidence is relied on by the prosecution as part of their case against D2 then as regards the case against D2 the jury must be **sure** that it establishes the matter contended for: see Chapter 12-6 above.
9. In the case of D1:
   (1) it is for the jury to decide to what extent if at all the evidence may demonstrate the matter in issue is true (e.g. whether D2 has or may have a propensity to commit offences of the type charged or to be untruthful);
   (2) the jury should be warned against prejudice against D2 arising from the evidence and against over-reliance on it; and directed that they must not convict D2 on the basis of it; and
   (3) depending on the nature and extent of the evidence, there may have to be a direction as to the effect of the evidence on D2's credibility.
10. The direction is likely to be complex, should be discussed with the advocates before it is given, and should be provided to the jury in writing.
11. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) 'gateways'.

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623 [2009] EWCA Crim 2018
624 *Najib* [2013] EWCA Crim 86
625 [2013] EWCA Crim 676 at para.24

Example 1: Undisputed evidence of D2's bad character

D1 and D2 are jointly charged with an offence of violence. Each accepts that he/she was present at the scene, but says that the other committed the offence alone. On the application of D1, you have heard evidence that D2 has previously been convicted of offences of violence. D1 says that they show that D2 has a tendency to use unlawful violence and it was D2 alone who used the violence on this occasion.

How should you approach this question? Your approach to this will be different depending on whether you are considering the case for D1 or the case against D2. When considering D1's case: if having regard to all the evidence about D2's convictions {if appropriate: including what D2 him/herself has told you}, you decide that they show that D2 has, or may have, a tendency to use unlawful violence, you may use this as support for D1's case that the offence was committed by D2 alone and that D1 was not involved.

You must adopt a different approach when considering the case against D2. Because it is for the prosecution to prove D2's guilt, it is only if you are **sure** that D2's convictions show that D2 has a tendency to use unlawful violence that you may use this as some support for the prosecution's case.

The amount of support provided by any such tendency is for you to decide. You must remember that such a tendency would only form part of the evidence. You must not convict D2 wholly or mainly because of it or allow D's previous convictions to prejudice you against D2.

Finally, in D2's case, if you are not sure that D2 has a tendency to use unlawful violence his/her convictions are of no relevance and you must ignore them.

Example 2: Disputed evidence of D2's bad character

D1 and D2 are jointly charged with an offence of violence. Each accepts that he/she was present at the scene, but says that the other committed the offence alone. You have heard evidence from D1 him/herself and from a witness called on D1's behalf that D2 has committed numerous past assaults with which D2 has never been charged. D2 disputes this evidence.

D1 says that this evidence shows that D2 has a tendency to use unlawful violence and it was D2 alone who used the violence on this occasion. D2 disputes that he/she has committed any assault in the past or that D2 has such a tendency.

Your approach to this will be different depending on whether you are considering the case for D1 or the case against D2. When considering D1's case you must decide whether the evidence of past assaults by D2, when assessed in the context of all the evidence in the case, shows that D2 has or may have a tendency to use unlawful violence. If you find that D2 has, or may have such a tendency, you may use this as support for D1's case that the offence was committed by D2 alone and that D1 was not involved.

When considering the case against D2 the position is different. In D2's case you must decide whether you are **sure** that the evidence of past assaults, when in the context of all the evidence in the case, proves that D2 has a tendency to use unlawful violence. If you are sure that it does show that D2 has such a tendency, you may use it as support for the case against D2.

The amount of support provided by any such tendency is for you to decide. You must remember that such a tendency would only form part of the evidence. You must not convict D2 wholly or mainly because of it or allow it to prejudice you against him/her.

Finally, if you are not sure that D2 has a tendency to use unlawful violence then this is of no relevance and you must ignore it.

NOTE: If D1 is otherwise of good character see also Chapter 11 Good Character: Directions paragraph 14 and Example 7.

12-8 S.101(1)(f) – Evidence to correct a false impression given by the defendant about him/herself

ARCHBOLD 13-73; BLACKSTONE'S F13.77

Legal summary

1. See also the General introduction at 12-1 above.
2. CJA 2003, s.101(1)(f) governs the admissibility of bad character evidence by the prosecution against D to correct a false impression D has sought to create in interview, under caution, or in evidence by D him/herself or by another at the invitation of the defence.[626] Merely denying the offence will not trigger s.101(1)(f). Section 101(f) only applies if D has given a false impression: *Rahim*.[627]
3. For the purposes of s.101(1)(f) the question whether the defendant has given a 'false impression' about him/herself, and whether there is evidence which may properly serve to correct such a false impression within s.105(1)(a) and (b) is fact-specific.
4. Section 105(3) allows D to avoid being deemed responsible for a relevant assertion "if, or to the extent that, he withdraws it or disassociates himself from it,"[628] but merely by conceding in cross-examination that he/she had lied, a defendant did not dissociate him/herself.
5. *Thompson*[629] has provided recent guidance and a reminder that a trial judge's 'feel' for the case is usually the critical ingredient of the decision at first instance. Context is vital. The citation of previous cases will represent no more than observations on a previous fact-specific decision (see *Renda,* para 3). A decision to admit previous convictions does not mean that all of an accused's previous convictions have to be admitted to correct the false impression. In respect of the discretion to exclude bad character evidence under this gateway, the observations by the Court of Appeal in *Renda*, paragraph 3, had equal applicability to s.78 Police and Criminal Evidence Act 1984.
6. *Cleere*[630] is a recent example where the court agreed with the judge's conclusion that D had created a false impression but concluded that the judge was wrong to admit the evidence of bad character as a consequence. *Gabbana*[631] is another recent decision on this section where the court reached the opposite conclusion – D had created a false impression and the evidence was properly admitted albeit the court made important observations on how the judge should have directed the jury.
7. Particular care will be needed if the admission of evidence under s.101(1)(f) might impact on a co-accused.[632]

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626 CJA 2003, s.105. see e.g. *Verdol* [2015] EWCA Crim 502
627 [2013] EWCA Crim 2064
628 *Renda* [2005] EWCA Crim 2826 para.19
629 [2018] EWCA Crim 2082, paras. 42-48
630 [2020] EWCA Crim 1360
631 [2020] EWCA Crim 1473
632 *Hickinbottom* [2012] EWCA Crim 783

8. Recent examples include *Verdol*;[633] *Garrett*;[634] *Ovba*;[635] *Thompson*;[636] *Fender*[637] and *Omotoso*.[638] In *Omotoso*, the Court of Appeal expressed the view that an application to introduce bad character evidence arising from the appellant's evidence about professional work, ought properly to have been made whilst the appellant was still giving evidence rather than after cross-examination had been concluded and the defence had closed their case. If by so doing the 'false impression' could thereby be corrected, then the need for D's previous convictions to be admitted into evidence could be obviated appropriately. Care needs to be taken in order to ensure that any evidence admitted to correct a false impression "**goes no further than is necessary**" in order to do so – s.105(6).
9. The court in *Khan*[639] referred to the need to consider s.105(6) and the potential to edit assertions contained in a police interview so as to obviate the necessity for bad character evidence to be admitted.

Directions

10. Identify the evidence of bad character.
11. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.
12. Identify in detail the issue(s) to which the evidence is and is not potentially relevant. Since the evidence has been admitted to correct a false impression this is likely to include a direction as to the effect upon credibility.
13. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) 'gateways'.

Example: Evidence to correct a false impression given by the defendant, going to credit and propensity

In his/her evidence D said that he/she was not the sort of person who would {specify}. The prosecution say that statement was designed to create a false impression about D in respect of this issue. In order for you to assess that claim the prosecution were allowed to present evidence that in the past D had been convicted of {specify relevant evidence admitted to address the alleged false impression}.

What use can you make of that evidence?

The prosecution say that the evidence of D's convictions shows that D was trying to mislead you when D said he/she would never {specify}. The defence say that it was not misleading because {specify}. If you are sure D was trying to mislead you about this/these things that does not mean D was trying to mislead you about

633 [2015] EWCA Crim 502
634 [2015] EWCA Crim 757
635 [2015] EWCA Crim 725
636 [2018] EWCA Crim 2082
637 [2018] EWCA Crim 2829
638 [2018] EWCA Crim 1394
639 [2020] EWCA Crim 163

everything, but it is evidence that you can use when deciding whether or not D was a truthful witness. If you are not sure D was trying to mislead you then D's previous convictions will not help you to decide whether or not what D said in evidence was true.

The prosecution also say that the evidence of D's previous convictions can help you in another way. They say that those convictions for {specify} show that D is a person who is more likely to {specify}. The defence say that the convictions are {e.g. so old, not really of the same kind} and so do not show D would be more likely to {specify}.

If you are not sure that they show that D has such a tendency, you should ignore them: they would be irrelevant.

If you are sure that they show that D has such a tendency, you may use them as some support for the case against D. How much support, if any, they provide is for you to decide, but remember that the convictions only form a part of the evidence in the case and you should not convict D only or mainly because he/she has been convicted in the past. Neither should you be prejudiced against D because of D's past record.

12-9 S.101(1)(g) – Defendant's attack on another person's character

ARCHBOLD 13-78; BLACKSTONE'S F13.77

Legal summary

1. See also the General introduction at 12-1 above.
2. CJA 2003, s.101(1)(g) allows for the Crown to adduce evidence of a defendant's bad character where the defendant has attacked the character of another person whether by statements made in interview or by asking questions in cross-examination intended or likely to elicit such evidence or by giving evidence. Admissibility is subject to the discretion in s.103. If the attack made by D (particularly if made in interview) is on the character of a non-witness who was also a non-victim it would be unusual for evidence of D's bad character to be admitted.[640] Criticism of an investigating officer's investigation in the absence of a jury and for the purpose of an abuse of process argument does not fulfil s.101(1)(g).[641] Criticism of an officer suggesting bias or improper motive to secure a conviction can trigger gateway (g). There is no requirement that the 'attack' on the character of another is based on D having 'personal knowledge' of the matters that constitute the attack.[642]
3. In *Molliere*[643] D unexpectedly supported his defence of consent to sexual assaults allegedly committed in the course of a photoshoot with an allegation that C's online profile showed her to be involved in creating 'adult' content. This was regarded as an allegation of 'scurrilous' behaviour sufficient to trigger gateway (g), but the Court added that a mere allegation that C had lied to the jury when she said she was unhappy about a naked photoshoot would have had the same effect.
4. It may be that evidence is admitted under gateway (g) which the Crown had initially unsuccessfully sought to adduce under gateway (d), but which becomes admissible because of the way the defence is run. Once the evidence is admitted, it might, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant was charged.[644] The jury will need careful direction on the uses to which it may be put.
5. If the evidence is relevant only to credibility, that needs to be made clear. If the evidence is relevant to a matter in issue between the Crown and defence other than credibility (e.g. propensity) the jury will need to be directed accordingly. In *Lafayette*,[645] the Court of Appeal explained:

> "In many cases at least some of the bad character evidence admitted under gateway (g) will also be admissible under gateway (d) and thus entitle the

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640 *Nelson* [2006] EWCA Crim 3412
641 *Omotoso* [2018] EWCA Crim 1394 para. 53. There was some criticism that the trial judge failed in his ruling on bad character, to identify examples of attacks that went beyond the issues in the case (para. 59)
642 *Yaryare* [2020] EWCA Crim 1314
643 [2023] EWCA Crim 247
644 *Highton* [2005] EWCA Crim 1985 para. 10
645 [2008] EWCA Crim 3238; *Williams* [2011] EWCA Crim 2198

judge to give a propensity direction (see *Highton* [2005] EWCA Crim 1985). What is the position to-day if the evidence which is admissible under gateway (g) is not admissible under gateway (d) to show propensity? For example, what should the judge say if the evidence under gateway (g) showed only previous convictions for offences of dishonesty and/or drugs offences and/or offences of violence, from any of which the jury would **not** be entitled to conclude that they showed on the part of the defendant a propensity to commit the kind of offences with which he is charged? We think that the better course is for the direction to be so fashioned in a "gateway (g) only case" that the jury understand that the relevance of these kinds of previous convictions goes to credit and they should not consider that it shows a propensity to commit the offence they are considering, at least if there is a risk that they might do so. That is not to say that the words 'credit' and 'propensity' should be or need to be used."

Directions

6. Identify the evidence of bad character.
7. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.
8. Direct the jury that where a defendant makes an attack upon another person's character, the jury are entitled to know of the character of the person making the attack so that they can have all the information about that person and the defendant when deciding where the truth lies.
9. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) 'gateways'.

Example: Evidence relating to attack made by the defendant on a prosecution witness

You have heard that D has previous convictions for {specify}. The reason you heard about them was because D has alleged that W is/has {specify} and you are entitled to know about the character of the person who makes these allegations when you are deciding whether or not they are true.

[Here specify the arguments of the prosecution and the defence.]

You should bear in mind that just because D has previous convictions, this does not necessarily mean that D is telling lies. You must decide whether these convictions help you when you are considering whether or not D is telling the truth; but you must not convict D of this offence just because D has been convicted in the past.

12-10 S.100 – Non-defendant's bad character

ARCHBOLD 13-11; BLACKSTONE'S F15.1

Legal summary

1. The admissibility of evidence of a non-defendant is governed by CJA 2003, ss.98 and 100.
2. Where evidence of the non-defendant's behaviour is to do with the facts of the alleged offence or misconduct in the investigation, it can be admitted under s.98 even if the behaviour amounts to bad character. This can encompass evidence of motive – see *Stanton.*[646] Otherwise evidence of bad character of a non-defendant is admissible only under s.100. There are three gateways:
   (1) by agreement between the parties;[647]
   (2) where the bad character evidence is important explanatory evidence;[648]
   (3) where the bad character is of substantial probative value in relation to matter which:
      (a) is a matter in issue in the proceedings; and
      (b) is of substantial importance in the context of the case as a whole[649] having regard to s.100(3).
3. Applications will often be made by D in relation to a prosecution witness. The application may more rarely be made by the prosecution, for example, in a money laundering case in which D's unexplained income coincides with proven drug dealing by a close business associate. It is important to avoid the impression of simple 'guilt by association' and the exclusionary discretion under s.78 PACE 1984 will apply where the prosecution seeks to adduce the evidence. For a discussion of the principles involved in a prosecution application to adduce such evidence, see *Boxall*.[650]
4. This final gateway allows for evidence to be adduced which goes to the issue (e.g. D accused of ABH claims he/she was acting in self-defence against W's aggression and adduces W's record for violence) or where it goes to the non-defendant's credibility alone.[651] The types of evidence adduced as bad character ought to be strictly monitored. Rarely will mere allegations as opposed to convictions or cautions be admitted.[652] That is not to say that such material will

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646 [2021] EWCA Crim 1075

647 Such agreements should be drawn to the attention of the judge: *Johnson* [2010] EWCA Crim 385. Where evidence has been admitted by agreement it will be difficult to argue on appeal that it was wrongly received: *Roe* [2023] EWCA Crim 316

648 This is a narrow gateway when read in conjunction with s.100(2). Section100(2) "without it...the jury would find it impossible or difficult properly to understand other evidence in the case, and its value for understanding the case as a whole is substantial.

649 *Garnham* [2008] EWCA Crim 266

650 [2020] EWCA Crim 688

651 The test to be applied in such cases is set out in *Brewster* [2010] EWCA Crim 1194. See also *Weir (Yaxley-Lennon)* [2005] EWCA Crim 2866 at para.73

652 *Miller* [2010] EWCA Crim 1153; *Braithwaite* [2010] EWCA Crim 1082

never be admissible. It is of course vital to assess to what issue the bad character is relevant: *Luckett*.[653]

5. "It is important to keep in mind that both section 100(1)(a) and section 100(1)(b) impose a higher threshold to admissibility than mere relevance."[654]
6. In determining whether allegations of bad character against a non-defendant are sufficiently probative to be admitted, regard should be had to the likely difficulty the jury would face in understanding the remainder of the evidence if such allegations against a non-defendant were adduced.[655] For recent examples of the refusal to admit non-defendant bad character evidence resulting in a conviction being held to be unsafe, see *Umo and Benjamin*[656] and *Hussain*.[657] By contrast, *Andrews*[658] underlines the need for 'substantial probative value' to be established.
7. Where non-defendant bad character evidence is adduced by the defence it falls to be considered in the context of the burden and standard of proof. The defence are not required to prove the bad character evidence to the criminal standard, a point made very clearly by the court in *Labinjo-Halcrow*.[659] If the jury consider that it may be true then they can act upon it in D's favour.
8. If the bad character relates to a complainant in a sexual case YJCEA 1999 s.41 applies.[660]
9. Avoidance of satellite litigation is a relevant consideration. Where it is contended that a witness has been disbelieved after making a similar accusation in the past, particular care must be taken in deciding whether this provides evidence that false evidence has been deliberately given, as there may be other reasons for the outcome of the proceedings (*Portman* [2022] EWCA Crim 1200)

Directions

10. Identify the evidence of bad character.
11. Identify the issue/s to which the evidence is potentially relevant.
12. The jury should be directed that it is for them to decide the extent to which, if any, the evidence of bad character of the non-defendant assists them in resolving the potential issue/s.

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653 [2015] EWCA Crim 1050

654 *Ibrahim* [2021] EWCA Crim 1935. Care should be taken to avoid myths and stereotypes in assessing bad character evidence: *W* [2022] EWCA Crim 1438 (D charged with rape seeking to adduce evidence that complainant had sought his assistance on a theft charge as evidence incompatible with her having been a rape victim).

655 *Dizaei* [2013] EWCA Crim 88

656 [2020] EWCA Crim 284

657 [2021] EWCA Crim 870

658 [2022] EWCA Crim 1252

659 [2020] EWCA Crim 951 (currently subject to reporting restrictions)

660 The CrimPR require a judge in any case where a s.41 application is made to examine the questions it is proposed to be asked with the same degree of scrutiny as that applied in the course of a GRH preceding the cross-examination of a vulnerable witness. CrimPR 22 identifies the timescale in which applications must be made.

13. Depending on the nature and extent of the convictions or other evidence of bad character, there may need to be a direction as to the effect on the credibility of the person if he/she was a witness.
14. If the basis upon which the evidence was admitted ceases to exist then it is permissible to direct the jury to ignore the bad character of the non-defendant.[661]

Example

You have heard that W has convictions for offences of violence namely {specify}. D says that this supports his claim that it was W who started this incident.

The fact that W has these convictions does not mean that W must have used unlawful force on this occasion. It is something that you may take into account when you are deciding whether or not you are sure that it was D, and not W, who started the violence and that D's use of force was unlawful.

[661] *Wilkinson* [2018] EWCA Crim 2419

13. CROSS-ADMISSIBILITY

ARCHBOLD 13-11 and 44; BLACKSTONE'S F13.57; CrimPR 21

Legal summary

1. If the indictment against D comprises more than one count, the issue may arise as to whether the evidence relating to one count is 'cross-admissible' in relation to another, and if so to what uses it may legitimately be put by the jury.
2. Cross-admissibility is not an appropriate term to describe the admissibility of evidence from a previous incident that does not form part of the indictment.[662]
3. CJA 2003 s.112(2) provides: "Where a defendant is charged with two or more offences in the same criminal proceedings, this Chapter (except s.101(3)) has effect as if each offence were charged in separate proceedings; and references to the offence with which the defendant is charged are to be read accordingly."[663]
4. The leading authority is *Freeman and Crawford*[664] which confirms that evidence may be cross-admissible in one or both of the following ways:[665]
   (1) The evidence may be relevant to more than one count because it rebuts coincidence, as for example, where the prosecution asserts the unlikelihood of a coincidence that separate and independent complainants have made similar but untrue allegations against the defendant. The jury may be permitted to consider the improbability that those complaints are the product of mere coincidence or malice (i.e. a complainant's evidence in support of one count is relevant to the credibility of another complainant's evidence on another count-an important matter in issue: s.101(1)(d)); and/or
   (2) The evidence may be relevant by establishing a propensity to commit that kind of offence, the jury may proceed to consider whether the accused's propensity makes it more likely that he/she committed an offence of a similar type alleged in another count in the same indictment (evidence of propensity: s.101(1)(d) and s.103(1)(a)).
5. In both categories the evidence which is being adduced is evidence of bad character against the defendant under CJA 2003, s.101,[666] see Chapter 12. It follows that notice of a bad character application must be given by the prosecution under Crim PR, Rule 21.1 and 21.4; see *Adams*[667] and *Gabbai*.[668]
6. Whichever approach is employed, the jury must reach separate verdicts on each count and for each defendant.

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662 *Suleman* [2012] EWCA Crim 1569
663 *Wallace* [2007] EWCA Crim 1760; *Chopra* [2006] EWCA Crim 2133
664 [2008] EWCA Crim 1863. See also the very helpful analysis in *McAllister* [2008] EWCA Crim 1544 para.13
665 *N(H)* [2011] EWCA Crim 730 para.31
666 *McAllister* [2008] EWCA Crim 1544 para.13
667 [2019] EWCA Crim 1363
668 [2019] EWCA Crim 2287

7. Under the **coincidence approach**:

   (1) Cross-admissibility of evidence does **not** involve 'propensity' evidence in the way in which that term is used under CJA 2003. The jury is not being invited to reason from propensity; they are merely being asked to recognise that the evidence in relation to a particular offence on an indictment may appear stronger and more compelling when all the evidence, including evidence relating to other offences, is looked at as a whole.[669] In *H*[670] Rix LJ observed: "the reality is that independent people do not make false allegations of a like nature against the same person, in the absence of collusion or contamination of their evidence."

   (2) The jury will need to exclude collusion or contamination as an explanation for the similarity of the complainants' evidence before they can assess the force of the argument that they are unlikely to be the product of coincidence.[671] The jury is being invited to consider the improbability that the complaints are the product of mere coincidence or malice.[672] The more independent sources of evidence, the less probable the coincidence. That is so only if the sources are genuinely independent. The jury are not being invited to reason from propensity. If they conclude that D is guilty on other counts, they may also conclude that D has a relevant propensity, but they are not being invited to reason from a propensity that they have found to D's guilt.

8. Under the **propensity approach** evidence from one count is admissible against another under s.101 as if the counts were being tried in separate trials. The jury is being invited to reason that if D is guilty of one incident that demonstrates D has a propensity for such offending and that propensity may be relevant when they consider a further count. They are reasoning from a propensity they have found to liability for other counts. As was observed in *Field*[673] however, where there are a number of incidents that bear some similarity one with the other, the probative force will depend upon the jury concluding that D was involved in at least one of the contested events. In *Richards*,[674] the Court of Appeal held that a propensity approach (in addition to the absence of coincidence) was appropriate when an issue in the case was whether the appellant had a sexual interest in boys and where propensity evidence post-dated the alleged offences. The first count the judge directed the jury to consider was that of voyeurism and was chronologically some years after many of the contact offences alleged by numerous victims. In the context of the facts of the case, later conduct was capable of establishing a propensity which was relevant to the jury's consideration of allegations of earlier offending.

669 *McAllister* at [14]
670 *H* [2011] EWCA Crim 2344 para.24
671 [2011] EWCA Crim 730
672 *Cross* [2012] EWCA Crim 2277
673 [2016] EWCA Crim 385
674 [2018] EWCA Crim 2374

9. In some rare cases it may be appropriate to direct the jury that the evidence that is cross-admissible is capable of being used for propensity type reasoning **and** to rebut coincidence.[675] The leading case is *N(H)*.[676] Care should be taken by the judge before giving both directions. It is important to avoid double accounting – i.e. the jury cannot use evidence from count 1 to rebut coincidence that D committed count 2 and then, having become sure of guilt on count 2, use that as propensity evidence to convict D on count 1. The issue of whether it is appropriate for both limbs of the direction to be given was considered in *BQC.*[677] The court stated that where such was to be done what was needed was a "**clear, concise and well-tailored direction**". The court further identified that for a jury to follow such a direction they needed "**a clear written document to assist**".

10. Latham LJ in *Freeman and Crawford* said:[678]

> "In some of the judgments since *Hanson*, the impression may have been given that the jury, in its decision making process in cross-admissibility cases should first determine whether it is satisfied on the evidence in relation to one of the counts of the defendant's guilt before it can move on to using the evidence in relation to that count in dealing with any other count in the indictment. A good example is the judgment of this court in *S*.[679] We consider that this is too restrictive an approach. Whilst the jury must be reminded that it has to reach a verdict on each count separately, it is entitled, in determining guilt in respect of any count, to have regard to the evidence in regard to any other count, or any other bad character evidence if that evidence is admissible and relevant in the way we have described. It may be that in some cases the jury will find it easier to decide the guilt of a defendant on the evidence relating to that count alone. That does not mean that it cannot, in other cases, use the evidence in relation to the other count or counts to help it decide on the defendant's guilt in respect of the count that it is considering. To do otherwise would fail to give proper effect to the decision on admissibility."

11. In *Adams*[680] the court allowed an appeal in circumstances where the evidence had the potential to be considered as being cross-admissible but the prosecution did not seek to rely upon it as being so and the judge simply directed the jury to give separate consideration to each of the counts/complainants. Leggatt LJ (as he then was) stated at paragraph [22]:

> "Looking at the matter more broadly, the general tendency of the criminal law over time has been towards a gradual relaxation of rules of evidence and an increasing willingness to trust to the good sense and rationality of juries to judge for themselves whether particular evidence is relevant to an issue they have to decide and if so in what way. But we have not yet reached the point where evidence of a defendant's bad character can be left as a free for all. The particular ways in which evidence that a person has committed one

675 See *Gunning* [2018] EWCA Crim 677, *Richards* [2018] EWCA Crim 2374
676 [2011] EWCA Crim 730 para.31
677 [2021] EWCA Crim 1944
678 [2008] EWCA Crim 1863 para.20
679 [2008] EWCA Crim 544
680 [2019] EWCA Crim 1363

offence may or may not be relevant in deciding whether that person is guilty of another offence are not always immediately obvious even to legal professionals and have had to be worked out by the courts in a number of cases. Lay jurors are entitled to assistance on these questions and cannot be expected to work out the approach which the courts regard as proper for themselves. It therefore seems to us to be essential that, in a case of this kind, the jury should be given clear directions on whether, and if so how, evidence relating to one count may be taken into account in deciding guilt on another count."[681]

12. Where the prosecution are not relying upon cross-admissibility as between counts it may be sufficient simply to give the jury a separate consideration direction: see *Cloud*.[682] The court did emphasise, however, that had a cross-admissibility direction been sought by the prosecution in that case it was likely one would have been given and further that early consideration of that issue may avoid problems of the kind that arose in *Adams*.

Directions

13. The terms 'coincidence approach' and 'propensity approach' are used here in the sense explained in the Legal summary above.

14. In any case in which a cross-admissibility direction is contemplated, it is essential to discuss with the advocates in the absence of the jury and before closing speeches the need for and form of any such direction. While the Examples in this chapter are expressed as oral directions, the jury will inevitably be assisted by some form of written direction.

15. In a 'coincidence approach' case, the jury should be directed as follows:

    (1) They must consider each count separately.

    (2) The similarities between the evidence of the complainants that the prosecution relies on should be identified for the jury.

    (3) If the complainants have, or may have, concocted false accusations against D, any such similarities would count for nothing, and the jury should reject each complainant's evidence.

    (4) If there was no concoction but a complainant had or may have learned what the other/s had said or were going to say about D, and had or may have been influenced by this, consciously or unconsciously, when making his/her own accusations, any such similarities would count for nothing, and the jury should take this matter into account when deciding how far they accept the evidence of the complainant concerned. Depending on the issues in the case, it will sometimes be essential to direct the jury on the difference between collusion and innocent contamination/unconscious influence and that both have to be excluded.

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681 See also *Gabbai* [2019] EWCA Crim 2287, paras [83]-[88]. In both *Gabbai* and *Adams (*above*)*, the requirement for prosecution notice was emphasised.

682 [2022] EWCA Crim 1668

(5) If the jury are sure that there has been no such concoction/influence they should consider how likely it is that two (or more) people would, independently of each other, make similar accusations and yet both/all be lying/mistaken. If the jury thought this unlikely, they could, if they thought it right, treat the evidence of each of the complainants as mutually supportive.

(6) When deciding how much support, if any, the evidence of one complainant gives to another, the jury should take into account how similar their accusations are, since the jury might take the view that the closer the similarities the more likely it is that the complainants were telling the truth.

NOTE: The directions in paragraphs (3) and (4) above should only be given if the issue has arisen in evidence. If the issue has not arisen, the direction in paragraph (5) should be modified accordingly. See Example 1 below.

16. In a 'propensity approach' case the jury direction should be based on Chapter 12-6: Bad Character s.101(1)(d). See also Example 1 in that chapter; and Example 2 below. Consistent with bad character directions, the jury should be directed to the effect that an adverse finding on one count can only provide some support for the prosecution case on another count and not to convict the defendant solely or mainly on that finding.[683]

17. Depending on the evidence and issues in the case, a direction based on both propensity and coincidence approaches may be appropriate. However, such a direction is likely to be complex and, unless great care is taken, confusing. It is suggested that such a direction be given, if at all, only in cases where the evidence on one or more counts is significantly stronger than that on the other(s), and in which the jury might therefore convict on the stronger count(s) first, and then treat that as establishing a propensity on D's part to commit offences of the kind charged in the other count(s). Examples would be where there is a recording of D's committing one of the offences charged in the indictment; where one or more witnesses say that they saw D committing one of the offences charged; or where D is said to have confessed to committing one of the offences charged.[684]

18. If a direction based on both approaches is given, then, to avoid the risk of the impermissible double counting, it is suggested that the jury be directed to consider the propensity approach first: see Example 3 below.

19. It is suggested that directions on cross-admissibility should ideally be given to the jury in writing, although a failure to do so is of itself unlikely to prove fatal to the safety of the conviction: see *N*[685] on the value to be gained from providing

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683 See *Richards (*above*),* para. 80 and 81

684 See the case of *Gunning* [2018] EWCA Crim 677. The Court of Appeal confirmed that *M(H)* (above) did not positively forbid the giving of both limbs in an appropriate case but that it would be a rare case where both limbs would be given. In *Gunning*, it was appropriate for both limbs to be left because the evidence on one count was considerably stronger than the other.

685 [2019] EWCA Crim 2280

the jury with written directions generally and the potential consequences of not providing a jury with a complex direction in writing.

Example 1: The 'coincidence' approach

D is charged in count 1 with a sexual assault on W1 and in count 2 with a similar sexual assault on W2. The only prosecution evidence comes from W1 and W2 themselves. D claims that W1 and W2 have concocted false accounts.

I have already told you that you must consider each count separately.

However, the prosecution rely on the similarities between the allegations made by W1 and W2. [Set out the similarities e.g. in relation to the nature, circumstances, periods of time and locations of the alleged offences.]

D claims that the allegations are similar because W1 and W2 have got together to make up false accusations against D. If you decide that this has or may have happened, the similarities would obviously count for nothing, and you would reject the evidence of both W1 and W2.

Even if you are sure that W1 and W2 have not made up false allegations together, you should consider whether either W1 or W2 might have learned what the other was saying about D and have been influenced, knowingly or unknowingly, when making his/her own allegations. If you decide that this has or may have happened, the similarities between that complainant's evidence and the evidence of the other complainant would not take the prosecution's case any further, and you would have to take any influence of that kind into account when deciding how far you accepted that complainant's evidence.

However, if you are sure that there has been no such concoction or influence, you should consider how likely it is that two people, independently of each other, would make allegations that were similar but untrue. If you decide that this is unlikely, then you could, if you think it right, treat W1's evidence as supporting that of W2, and vice versa.

When deciding how far, if at all, the evidence of each supports the other, you should take into account how similar in your opinion their allegations are. This is because you could take the view that the more similar independent allegations are, the more likely they are to be true.

Example 2: The 'propensity' approach

D is charged in count 1 with a sexual assault on W1 and in count 2 with a sexual assault on W2. The prosecution evidence on count 1 is (a) the account given by W1 and (b) a video recording which the prosecution say was made by D as he/she committed the offence. The prosecution evidence on count 2 is only the account given by W2. D claims that W1 and W2 have concocted false accounts and denies that he/she is the person shown in the recording.

I have already told you that you must consider each count separately.

However if, but only if, you are sure that the person shown in the recording of events in count 1 is D and that D committed that offence, you should next consider whether that shows that D has a tendency to commit offences of the kind charged in count 2.

If you are not sure that D has such a tendency then your conclusion that D committed the offence charged in count 1 does not support the prosecution's case on count 2. But if you are sure that D does have such a tendency then you may take this into account when you are deciding whether D is guilty of count 2.

Bear in mind however that even if a person has a tendency to commit a particular kind of offence, it does not follow that he/she is bound to do so. So if you are sure that D does have a tendency to commit offences of the kind charged in count 2, this is only part of the evidence against D on that count, and you must not convict D wholly or mainly on the strength of it.

Example 3: Both approaches

D is charged in count 1 with a sexual assault on W1 and in count 2 with a similar sexual assault on W2. The prosecution evidence on count 1 is (a) the account given by W1 and (b) evidence given by W1's foster carer that he/she saw D sexually assaulting W1. The prosecution evidence on count 2 is only the account given by W2. D claims that W1 and W2 have concocted false accounts and that W1's foster carer is lying.

I have already told you that you must consider each count separately.

However there are two ways in which the evidence on one count might support the prosecution's case on the other. You should consider these two ways in the following order.

First consider count 1, where the prosecution rely not only on the evidence of W1 but also on that of W1's foster carer. If, having considered their evidence, you are sure that D is guilty of count 1, you should go on to consider whether that shows that D has a tendency to commit offences of the kind charged in count 2.

If you are not sure that D has such a tendency, then your conclusion that D committed the offence in count 1 does not support the prosecution's case on count 2. But if you are sure that D does have such a tendency then you may take this into account when you are deciding whether D is guilty of count 2.

Bear in mind however that even if a person has a tendency to commit a particular kind of offence, it does not follow that he/she is bound to do so. So if you are sure that D has a tendency to commit offences of the kind charged in count 2, this is only part of the evidence against D on that count, and you must not convict D wholly or mainly on the strength of it.

The second way in which the evidence on one count might support the prosecution's case on the other is this. The prosecution also rely on similarities between the allegations made by W1 and W2, [Set out the similarities e.g. in relation to the nature, circumstances, periods of time and locations of the alleged offences.]

D claims that the allegations are similar because W1 and W2 have got together to make up false accusations against him/her. If you decide that this has or may have happened, the similarities would obviously count for nothing, and you would reject the evidence of both W1 and W2.

Even if you are sure that W1 and W2 have not made up false allegations together, you should consider whether either W1 or W2 might have learned what the other was saying about D and have been influenced, knowingly or unknowingly, when

making his/her own allegations. If you decide that this has or may have happened, the similarities between that complainant's evidence and the evidence of the other complainant would not take the prosecution's case any further, and you would have to take any influence of that kind into account when deciding how far you accepted that complainant's evidence.

However, if you are sure that there has been no such concoction or influence, you should consider how likely it is that two people, independently of each other, would make allegations that were similar but untrue. If you decide that this is unlikely, then you could, if you think it right, use W1's evidence as support for the evidence of W2. For the same reason, if you had not already reached a conclusion on count 1 on the basis of the evidence of W1 and W1's foster carer, you could use the evidence of W2 as support for their evidence.

When deciding how far, if at all, the evidence of each complainant supports the other, you should take into account how similar in your opinion their allegations are. This is because you could take the view that the more similar independent allegations are, the more likely they are to be true.

14. HEARSAY

14-1 Hearsay – General

ARCHBOLD 11-1; BLACKSTONE'S F16.1 and F17.1; CrimPR 20

Legal summary

1. Any party who wishes to adduce a hearsay statement must serve a notice in accordance with CrimPR 20. Even where hearsay is apparent on the face of an ABE interview transcript and the defence have not requested that it be edited out this does not obviate the need for written notice.[686]
2. A hearsay statement does not have to be verified from an independent source in order to be admissible. The duty of the judge is therefore not to look for independent verification that it is reliable. The task of the trial judge in examining the appropriate statutory route to admissibility is to consider whether there is enough evidence on which a jury could be satisfied that the hearsay is reliable.[687] Although it is permissible to rule a hearsay statement admissible and give reasons later in the trial, the detailed ruling should be given before the advocates make their speeches so that they can tailor their submissions accordingly.[688] Section 125 CJA 2003 provides that, where the case is based wholly or partly on a hearsay statement and the judge is satisfied at any time after the close of the prosecution case that the evidence in the statement is so unconvincing that D's conviction would be unsafe, the judge must direct the jury to acquit or, if of the view that there ought to be a re-trial, discharge the jury.[689] The test to be applied in such a case is to assess the whole of the evidence and involves a more rigorous evaluation than a typical submission of no case.[690]
3. The task of the jury is to assess the probative value (weight) and reliability of evidence admitted as hearsay. The Court of Appeal has on several occasions reminded judges of the need for care in crafting directions in order to ensure that hearsay evidence is considered fairly and that the jury are warned about the limitations of such evidence. The strength of the warning depends on the facts of the case and the significance of the hearsay evidence in the context of the case as whole. In general, a warning should be given prior to the hearsay evidence being adduced as to what have been described as the three key limitations of such evidence namely: the inability of the jury to assess the demeanour of the witness; the fact that the statement was not made on oath and the lack of any opportunity for the evidence to be tested on oath. The warning should be

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686 *Smith* [2020] EWCA Crim 777 but see also *Turner* [2020] EWCA Crim 1241 paras 58 and 59 in which failure to object to hearsay surveillance evidence appears to have been taken as tacit agreement to its admissibility without formal notice, although the court declined to decide whether the notice procedure technically applies to evidence admitted by agreement of the parties.

687 Confirmed in *Roberts* [2021] EWCA Crim 1672 and *Henry* [2022] EWCA Crim 284

688 *Kiziltan* [2017] EWCA Crim 1461. See also *Nguyen* [2020] EWCA Crim 140

689 *Riat* [2012] EWCA Crim 1509 paras 28 and 29; *Townsend and Metcalfe* [2020] EWCA Crim 1343

690 Ibid

repeated in the summing up.[691] In *Wilson*[692] the court emphasised that the strength of the warning that ought to be given to the jury depends upon the facts of the case and the significance of the hearsay to the case as a whole.

4. When summing up the judge should not refer to the statutory provisions under which hearsay came to be admitted; and whereas in many cases it is possible for the jury to know the reason for admitting the evidence (e.g. a witness has died) or the reason why a witness could not be expected to remember the information recorded, in some cases (e.g. fear) generally this cannot be done.

5. Any consideration of hearsay should encompass the learning to be found in the judgment in *Riat and Ors*[693] which is essential reading in this field. As the Court noted recently in *Spraggon* "the guidance in *Riat* is comprehensive and is applied up and down the country in Crown Courts every week to the benefit of the criminal justice system."[694]

Directions

6. Directions should include the following:

   (1) Whether the evidence is agreed or disputed and, if disputed, the extent of the dispute.

   (2) The source of the evidence should be identified (e.g. a deceased witness or business records) and the jury reminded of any evidence about the maker of the statement so that they may be assisted in judging whether the witness was independent or may have had a purpose of their own or another to serve.

   (3) Where the statement is oral, evidence about the reliability of the reporter should be identified.

   (4) Any other evidence which may assist the jury to judge the reliability of the evidence should be identified (e.g. any mistakes that had been found elsewhere in the business records or information as to the circumstances in which the statement was made).

   (5) Reference should not be made to the statutory provisions under which hearsay came to be admitted.

   (6) In some cases it is possible for the jury to know the reason for admitting the evidence (e.g. the witness has died) or the reason why a witness could not be expected to remember the information recorded, in other cases this cannot be done (e.g. fear).

   (7) Where it is the defence who are seeking to rely on hearsay evidence the directions must be tailored to reflect the fact that the burden of proof is on the prosecution.

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691 *Daley* [2017] EWCA Crim 1971
692 [2018] EWCA Crim 1352
693 [2013] 1 WLR 2592; [2013] Cr App R 2
694 [2022] EWCA Crim 128, [11]

(8) It is suggested that as well as giving a direction about hearsay in the summing up, it is helpful to give the jury a summary of the direction, by way of explanation, just before such evidence is adduced.

(9) The jury need to be directed that hearsay evidence may suffer from the following limitations when compared with evidence given on oath by a witness at trial.[695]

(a) There has usually been no opportunity to see the demeanour of the person who made the statement.

(b) The statement admitted as hearsay was not made on oath.

(c) There has been no opportunity to see the witness's account tested under cross-examination, for example as to accuracy, truthfulness, ambiguity or misperception, and how the witness would have responded to this process. In some cases, the credibility of the absent witness and/or their consistency will have been challenged under s.124 of the Act. In such cases, the jury needs to be reminded of those challenges and of any discrepancies or weaknesses revealed.

[695] *Grant v The State* [2006] UKPC 2

14-2 Hearsay – Witness absent – s.116

ARCHBOLD 11-15; BLACKSTONE'S F17.7

Legal summary

1. Section 116 governs admissibility of first hand hearsay statements (i.e. those which the absent witness could have made if testifying)[696] from identified witnesses who do not testify for one of the specified reasons. The court must be satisfied on admissible evidence (to the criminal standard if the prosecution relies on the evidence and on the balance of probabilities if it is the defence application to rely on the hearsay) that the witness is: (a) is dead, (b) is unfit to be a witness, (c) is outside the UK and it is not reasonably practicable to secure attendance, (d) cannot be found after reasonable steps have been taken, or (e) it is in the interests of justice to admit the statement from a witness who, through fear, has either not testified at all or not testified on the matter in his/her statement. The witness must have been competent at the time of making the statement: s.123.
2. Admissibility in such cases is also dependent on other safeguards including checks on the likely reliability of the evidence and the means by which the jury can assess its reliability.[697] Section 114(2) provides a checklist for the judge to use when (a) considering the admissibility of the evidence, and (b) if it is admitted, identifying factors to the jury for their consideration in their determination of the reliability of the evidence and the weight it deserves (although, when addressing the jury, reference to the section is not desirable). The provision of the reasons for a ruling as to admissibility should be undertaken prior to speeches in order that the parties can understand how the jury may be directed as to their approach to the evidence in advance of that stage.[698]
3. Some recent examples of the application of the relevant principles can be found in *Sylvester*[699] (fact that W attends voir dire to explain why they were too frightened to give evidence did not mean the judge was wrong to admit the account as hearsay under s.116(2)(e)); *Barnes*[700] (to decide whether a witness is in fear the court has to do its best on the evidence with which it is provided although that evidence is, of necessity, incomplete and may not include the receipt of evidence directly from the witness in fear); *Jurecka*[701] (proper exercise of discretion to admit evidence under s.116(2)(b) of witness too ill to attend court where judge reached the decision by reference to the s.114 factors); *Akhtar*[702] (proper exercise of discretion to admit under s.116(2)(b) evidence of a disputed identification), *Sohal*[703] (evidence from absent witnesses was wrongly admitted under s.116(2) when their statements were ambiguous in important respects –

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696 See also *Smith* [2020] EWCA Crim 777
697 *Riat* [2012] EWCA Crim 1509
698 *Kiziltan* [2017] EWCA Crim 1461
699 [2018] EWCA Crim 511
700 [2020] EWCA Crim 959
701 [2017] EWCA Crim 1007
702 [2018] EWCA Crim 2872
703 [2019] EWCA Crim 1237

e.g. as to the language spoken – and were identically worded); *Spraggon*[704] (proper exercise of discretion to admit under s.116(2)(a) evidence of a deceased witness); *W*[705] (a dead witness).

4. The section does not permit evidence from unidentified witnesses. Nor does s.116 provide for the admissibility of multiple hearsay. A hearsay statement will not be admissible under this section where the specified reason for absence under s.116(2) was caused by a person who seeks to use the statement to support their case in order to prevent the witness giving oral evidence: s.116(5). A complainant is not such a person and hence, if they died by suicide before trial, hearsay evidence which is otherwise admissible under s.116(2)(a) does not fall to be excluded under s.116(5).[706]

5. Care is needed to ensure that prejudice does not arise from any assumption that D is the cause of the absence of the witness. This may be especially true of cases in which the witness cannot be found or is in fear. It will not be appropriate to disclose the reason for the absence of the witness unless D has introduced that in evidence.[707] Section116 applies in cases of frightened witnesses who do not testify at all and in cases of witnesses who do not, through fear, testify in connection with the subject matter of the statement. In the latter case, particular care is needed to avoid prejudice. In exceptional cases, hearsay evidence giving D's account may be admissible where D is involuntarily absent from the trial.[708]

Directions: see General directions at 14-1 above

Example 1: Statement of absent witness read as part of the prosecution case

The statement made by X, who could not/did not give evidence in court [in an appropriate case: because X is {e.g. dead}], was read to you. But the fact that this {particular} statement was read does not mean that the prosecution and the defence agree that it/all of it is true. In particular it is disputed that {specify}.

You must decide how much importance, if any, you give to this evidence and when you are doing so you must bear in mind that this evidence has a number of limitations.

First: Although X signed a formal declaration at the beginning of the statement that it was true and that X knew he/she could be prosecuted if he/she deliberately put something into the statement which was false, X's statement was not made under oath or affirmation.

Secondly: if X had given evidence in court X could have been cross-examined, and you do not know how X, and X's evidence, would have stood up to that.

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704 *Spraggon* [2022] EWCA Crim 128
705 [2022] EWCA Crim 1438
706 *BC* [2019] EWCA Crim 623
707 *Jennings and Miles* [1995] Crim. L.R. 810. Decided under the equivalent provision in CJA 1988.
708 *Hamberger* [2017] EWCA Crim 273: Subject to the limitation in s.128(2) that nothing in the Act (other than under s.76A of PACE) allows for confession evidence to be admitted if it would not be admissible under s.76 PACE.

[If applicable: Thirdly: when you are deciding whether or not you can rely on what X said in his/her statement you should also take account of what you know about X, namely {specify … e.g. matters relating to credibility adduced under s.124}.]

Finally, when you are deciding how much importance, if any you give to X's evidence, you must look at it in light of the other evidence in the case. You will remember that when N gave evidence, N's account differed from X's because {specify}. Also, when D gave evidence, D contradicted X's evidence by saying {specify}. So, you should take account of N's and D's evidence when deciding whether X's account was truthful, accurate and reliable.

You must also keep X's evidence in perspective. It only relates to one issue in the case, namely {specify} and this is not the only issue, or even one of the main issues, in this case.

You do not have a copy of X's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single X's evidence out by having a copy of it.

[Where other witness statements have been read by agreement and their contents **are** agreed it will be necessary to add: The position in the case of X's statement is different from that relating to the statements of {specify witnesses}. The contents of those statements, which were read to you by agreement, **are** agreed and so, as I explained when the first of those statements was read, they are not in dispute.]

Example 2: Additional considerations when the accuracy of the 'reporter' of hearsay evidence is in issue

When another witness, W, gave evidence W said that X, who is not available to give evidence him/herself, told W that {specify}. The fact that X said this is disputed, so you must consider whether what W said about this is true and accurate.

When you are considering this you must bear in mind:

- W's reaction, both in what W said and how W said it, when it was put to W that {specify};
- all that you know about W, namely that {specify}; and
- that when X is alleged to have spoken to W, X was some distance away from W and running away from the scene, apparently in some distress. This could, depending on what you make of the situation, cut both ways. On one hand, the fact that this is alleged to have been said immediately after the incident may make it less likely that X was inventing what he/she said. On the other hand, if X was in distress, this may have affected how X could take in what had just happened. You should also consider whether the distance between X and W, and the fact that X was running away from the place where W was standing, had any bearing on W's ability to hear clearly and to remember accurately what X said.

Example 3: Statement of absent witness read as part of the defence case

D is charged with s.20 wounding; identification evidence is in issue; W gave evidence that a third party, X, admitted committing the offence.

When another witness, W, gave evidence he/she said that X, who has not given evidence him/herself, told W that {specify}. The prosecution do not accept that X said this or that, if X did say it, it is true. It is for you to decide whether W's evidence is, or may be, true or whether you can be sure that it is not; and if it is, or may be, true whether what X told W was, or may have been, in fact the truth or whether you can be sure that it is not. [Here summarise any arguments raised by the parties.]

It may not surprise you that X has not been at court, so that X could be asked to incriminate him/herself by admitting this offence. But the fact remains that you have not had the opportunity of seeing and hearing X for yourselves and this is something which may affect the significance which you attach to this evidence. This is because when you see and hear a witness give evidence and be cross-examined you may get a much better idea of whether what they are saying is honest and accurate.

When you are deciding what importance, if any, you attach to this evidence you must look at it in light of all of the other evidence in the case.

14-3 Hearsay – Business documents – s.117

ARCHBOLD 11-26; BLACKSTONE'S F17.25

Legal summary

1. CJA 2003 provides several exceptions by which hearsay statements can be admitted when a witness does not testify. The statute provides the relevant criteria for admissibility in such cases.
2. Section 117 governs the admissibility of documentary statements created or received in the course of a trade or business.
3. In many cases there will be no need for a statutory reason for the absence of the witness; it is sufficient that the statement was created/received in the trade or business. "Business records are made admissible . . . because, in the ordinary way, they are compiled by people who are disinterested and, in the ordinary course of events, such statements are likely to be accurate; they are therefore admissible as evidence because prima facie they are reliable": *Horncastle*.[709]
4. In other cases (where the document was prepared for the purpose of pending or contemplated proceedings other than evidence obtained from overseas) the witness must be absent for one of the statutory reasons specified in s.116(2) [see above] or the witness cannot reasonably be expected to have any recollection of the matters dealt with having regard to the time since the statement was made. The section does not specify that the source of the statement needs to be identified (cf. s.116).
5. Admissibility in such cases is also governed by other safeguards including a requirement that the maker of the statement was competent at the time it was made (s.123(2)); checks on the likely reliability of the evidence[710] and the means by which the jury can assess its reliability.[711]
6. Section 117 may lead to statements being admitted which involve multiple hearsay, provided each person through whom the information was supplied received it in the course of a trade or business (s.117(2)(c)).[712] In such a case the jury will need a warning regarding the special care appropriate to such statements. The jury may need to be reminded of the different status of the s.117 statements from other non-hearsay documentary evidence they have received.

Directions

7. The judge should identify for the jury:
   (1) whether the evidence is agreed or disputed and, if disputed, the extent of the dispute;
   (2) the source of the evidence and the jury should be reminded of any evidence about the maker of the statement so that they may be assisted in judging

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709 *Horncastle* [2009] EWCA Crim 87 CACD
710 CJA 2003, s.117(7)
711 CJA 2003, s.124
712 *Wellington v DPP* (2007) 171 JP 497

whether the witness was independent or may have had a purpose of his/her own or another to serve;

(3) any other evidence which may assist the jury to judge the reliability of the evidence e.g. any mistakes that had been found elsewhere in the business records or information as to the circumstances in which the statement was made;

(4) the difficulties, if any, which the other side may have in challenging or rebutting the evidence. For an example of a case where no warning as to the limitations on hearsay evidence was required because it was not disputed that a complainant had made the statement to the person compiling the note, see *Johnson*.[713]

Example – Business document – person who recorded information cannot reasonably be expected to have any recollection – accuracy of document questioned

As part of the prosecution's case, you were shown records made by a number of people who worked in {specify business} in/on {specify type of record/exhibit). Obviously, whilst the people who made entries in/on that record knew the facts which they were recording at the time, it would not be reasonable to expect those people to remember any specific transaction now. Because of this, nobody who made those entries was called to give evidence; and it is the entries themselves which provide the evidence that {specify}.

All of the entries were made as part of the routine process of {specify business} and it is not suggested that any entry was deliberately falsified. What **is** suggested is that a number of entries are inaccurate. In some of those cases, you have seen other documents {specify} which show different details. In light of all of this evidence, you must decide whether or not you can safely rely on the entries in these records as being accurate.

[713] [2019] EWCA 1730

14-4 Hearsay – Introduced by agreement – s.114(1)(c)

ARCHBOLD 11-3c; BLACKSTONE'S F17.6

Legal summary

1. Hearsay evidence can be admitted by agreement between the parties under CJA 2003 s.114(1)(c).
2. The jury needs to be directed as to the approach they should take and the use they can make of the evidence: *Brown*.[714]
3. In many cases under s.114(1)(c) it will be possible for the jury to know the reason for the non-availability of a witness or the reason why a witness could not be expected to remember the information recorded.
4. Where s.114(1)(c) is used to adduced an agreed account of an unavailable witness (otherwise admissible under s. 116) the jury should be reminded that it has not been possible to cross-examine that witness.[715]

Directions: see General directions at 14-1 above

Example: Although the statement of the absent witness is read by agreement, the contents of the statement are in dispute

The statement made by X, who could not/did not give evidence in court [in an appropriate case: because X is {e.g. dead}], was read to you. Both/all parties agreed that this should be done. But the fact that it was done by agreement does not mean that both/all parties agree with everything in the statement.

[Where other witness statements have been read by agreement and their contents **are** agreed it will be necessary to add: This situation is different from that relating to the statements made by {specify witnesses}. Both the prosecution and the defence agree with the contents of those statements, so they are not in dispute.]

You must decide how much weight, if any, you give to this evidence and when you are doing so you must bear in mind that this evidence has a number of limitations.

First: Although X signed a formal declaration at the beginning of the statement that it was true and that X knew he/she could be prosecuted if he/she deliberately put something into the statement which was false, X's statement was not made under oath or affirmation.

Secondly: if X had given evidence in court X could have been cross-examined, and you do not know how X, and his/her evidence, would have stood up to that.

[If applicable: Thirdly: when you are deciding whether or not you can rely on what X said in his/her statement you should also take account of what you know about X, namely {specify … e.g. matters relating to credibility adduced under s.124}.]

Finally, when you are deciding how much weight, if any you give to X's evidence, you must look at it in light of the other evidence in the case. You will remember that when N gave evidence, N's account differed from X's because {specify}. Also,

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[714] [2008] EWCA Crim 369. *GJ* [2006] EWCA Crim 1939
[715] *Da Costa* [2022] EWCA Crim 1262

when D gave evidence, D contradicted X's evidence by saying {specify}. So, you should take account of N's and D's evidence when deciding whether X's account was truthful, accurate and reliable.

You must also keep X's evidence in perspective. It only relates to one issue in the case, namely {specify} and this is not the only issue, or even one of the main issues, in this case.

You do not have a copy of X's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single X's evidence out by having a copy of it.

[Where other witness statements have been read by agreement and their contents **are** agreed it will be necessary to add: The position in the case of X's statement is different from that relating to the statements of {specify witnesses}. The contents of those statements, which were read to you by agreement, **are** agreed and so, as I explained when the first of those statements was read, they are not in dispute.]

14-5 Hearsay – Interests of justice – s.114(1)(d)

ARCHBOLD 11-3d; BLACKSTONE'S F17.34

Legal summary

1. Section 114(1)(d) allows for any hearsay statement to be admitted where it is in the interests of justice. In ruling on admissibility, regard should be had to[716] the factors listed in s.114(2) and any other relevant circumstances. Those factors will also be useful when identifying factors for the jury to consider in their determination of the reliability of the evidence and the weight it deserves (although reference to the sections is not desirable). A failure to engage with CrimPR rules concerning identification of issues relating to the evidence of a particular witness is not, of itself a reason to admit that witness's statement as hearsay. The court should consider all the s.114(2) factors.[717]
2. The breadth of the subsection means that it has the potential to apply in a very diverse range of circumstances. In some the witness will be absent.[718] In such a case the jury will need to be warned against speculating as to the reason for absence.
3. In other cases the witness may be present and testifying, but the hearsay adduced under s.114(1)(d) is supplementing that account.[719]
4. Section 114(1)(d) may, in an appropriate case, lead to statements being admitted of accusation by one D against another, see *Burns and Brierly*.[720] Particular care will be needed in directing the jury in such cases.[721]
5. Section 114(1)(d) does not permit anonymous hearsay to be adduced where, for example, the protection afforded by s.124 of the Act would be ineffective because the maker of the statement cannot be identified. However, that is not a relevant consideration where, given the circumstances in which the statement was made, there would be no realistic scope for questioning the credibility of the maker even if that person's identity or personal details were known.[722]
6. In a case in which the witness is unidentified but has not sought anonymity, the statement made by the witness may be admissible subject to the criteria in the relevant hearsay exception (s.116 will not be possible but ss.114(1)(d) and s.118(4) res gestae may be).[723]
7. If multiple hearsay is involved, see Chapter 14-16.

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716 *Taylor* [2006] 2 Cr App R 14
717 *Randell v DPP* [2018] EWHC 1048 (Admin)
718 Appropriate steps to call the witness should be made where possible before seeking to rely on s.114(1)(d): *Inglis* [2021] EWCA Crim 1545
719 *Turner* [2012] EWCA Crim 1786
720 [2015] EWCA Crim 2542 and *Nguyen* [2020] EWCA Crim 140
721 *Mclean* [2008] 1 Cr.App.R. 11
722 *Mayers* [2009] EWCA Crim 2898; *Ford* [2011] Crim LR 475; *Horncastle* [2009] UKSC 14;*Nico Brown* [2019] EWCA Crim 1143
723 See *Nico Brown* [2019] EWCA Crim 1143

Directions: see General directions at 14-1 above

Examples: see examples at 14-2 above

14-6 Hearsay – Previous inconsistent statement – s.119

ARCHBOLD 11-33; BLACKSTONE'S F6.47

Legal summary

1. Under CJA 2003 previous **inconsistent** statements may be admissible, not only to show inconsistency but to prove the truth of the facts stated.
2. Under s.119(1)(a) if "a person gives oral evidence and – (a) he admits making a previous inconsistent statement, … the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible." W must give **some** evidence, and secondly, W must **admit** the inconsistency (though not necessarily accepting the truth of the earlier account). If W claims simply to have 'forgotten', but refuses to admit the making of the earlier statement, s.119(1)(a) is not applicable. Although in such circumstances W might have satisfied the common law test of hostility, the terms of s.119(1)(a) are not met.
3. The Court of Appeal has repeatedly stated that if evidence is admitted under s.119, the jury must be given a proper warning as to how to approach this material: *Bennett and another.*[724]
4. Under CJA 2003, a statement retracted by a witness, even a hostile witness [see Chapter 15-7 below], could be evidence of its truth: s.119. It is for the jury to determine whether its contents and the circumstances in which it was made were such that it could safely be relied upon, notwithstanding its retraction.
5. In a rare case where the jury retire with the documentary evidence of the earlier statement, they should be directed not to place undue weight on that by comparison with the other evidence.[725]
6. The Court of Appeal in *Nguyen*[726] has held that s.119 is not a route by which statements in interview made by one D (inconsistent with their testimony at trial) should be admitted as evidence of truth to incriminate a co-D; they are admissible against the person making the statement.

> "The section refers to the previous inconsistent statement being 'admissible as evidence of any matter stated of which oral evidence by him would be admissible' but does not say that the evidence in question - the previous inconsistent statement - is treated in every respect as if he did give that evidence. We consider that under the section the previous inconsistent statement is admissible against the person making the statement as evidence against him of the truth of its contents, thus reversing the common law rule enacted in section 5 of the Criminal Procedure Act 1865 that the statement only went to the witness's credibility: see Archbold paragraph 8-270."[62]

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724 [2008] EWCA Crim 248
725 *Hulme* [2007] EWCA Crim 1471
726 [2020] EWCA Crim 140

Directions

7. The inconsistency and W's final position (either agreement or disagreement with the statement) should be identified in the course of the review of the evidence.
8. The jury should consider whether a particular inconsistency is significant. If they find that it is not significant, they should ignore it.
9. If they find that it is significant, they should consider whether they accept the explanation (if any) which the witness gave for the inconsistency. If they accept the explanation, then the inconsistency is unlikely to affect their view of the reliability of W's evidence (as a whole or on this point, depending on the nature and extent of the inconsistency).
10. If they do not accept any explanation given by W, then they should consider what effect this has on their view of the evidence of W (as a whole or on this point, depending on the nature and extent of the inconsistency).
11. It is entirely for the jury to decide the extent to which any inconsistency in W's evidence affects their judgement of his/her reliability.
12. Those parts of the statement which were introduced in the course of W's evidence form part of the evidence in the case. The jury do not have to accept either the account given by the witness in the witness box or the account given in the statement but if they find that what W said in the statement is [or if relied on by the defence, may be] true/accurate and what W said in the witness box is not they are entitled to rely on what W said in the statement rather than what W said in the witness box – and vice versa.
13. It is helpful to explain to the jury that they do not have the statement (subject to the provisions of s.122 CJA 2003) and the reason for that: namely that if they have that part of the evidence in writing it may, albeit unwittingly, be given undue prominence.

Example

What W said about {specify} (a) when W was in the witness box and (b) in the witness statement about which W was cross-examined is all evidence. But it is obvious that these things are different.

It is for you to decide how different they are and whether or not this is important. If you decide that the differences are not important, then you should ignore them. But if you think that the differences are important you should consider the reason W gave for his/her inconsistency, namely {specify e.g. his/her memory was fresher at the time he/she made the statement and it is the statement which is correct and true}.

If you are sure that the explanation W gave for his/her inconsistency is valid, you may accept what W said in {specify either the evidence given in the witness box or the witness statement, depending on the circumstances}. But if you reject W's explanation or you are not sure that it is true you should treat both what W said in his/her statement and what W said in the witness box with caution. If, having done so, you are sure that one of these two versions of events is accurate, then you may take it into account when you are deciding whether {specify e.g. D is guilty, D

did/said …}. If you are not sure whether either version is accurate, then you should not take either into account.

You do not have a copy of W's witness statement. This is because you do not have a copy any other witness's statement, and it is important not to single out W's evidence by having W's statement.

[If the jury have a/part of W's witness statement (as an exhibit): The fact that you have W's evidence/part of W's evidence in writing does not make it any more or less important than any other evidence in the case.]

14-7 Hearsay – Previous inconsistent statement of hostile witness – s.119

ARCHBOLD 8-253; BLACKSTONE'S F6.54

Legal summary

1. Under CJA 2003, s.119, a previous statement made by a hostile witness is admissible as evidence of its truth.
2. The section is only triggered if: the witness gives oral evidence, is proved to be hostile (applying the common law test of hostility in *Gibbons*[727]) and has previously made a statement which is now proved to be inconsistent (under the Criminal Procedure Act 1865).[728]
3. In *Muldoon*,[729] two witnesses declined to answer any questions (other than as to certain preliminary matters) when in the witness box. The first accepted that he had provided a written statement to the police but refused to answer any questions as to its contents. In cross-examination, he refused to answer any questions other than seeming to shake his head when it was suggested that he had framed an innocent person. The Court concluded that s.119 did not apply as the witnesses were essentially silent, however, it was in the interests of justice that their statements were admitted as hearsay evidence under s.114(1)(d) of the 2003 Act.
4. For s.119(1)(b) to apply to a witness who has 'forgotten' W must be (i) adjudged to be hostile and (ii) the party calling W must be able to show an inconsistent statement. See for an example of the application of s.119 in this not unlikely scenario in domestic abuse: *Griffiths v CPS.*[730] See also *Smith*[731] for an example where the prosecution were entitled to call a witness even though they only relied on some parts of the evidence the witness could give and sought to controvert others.
5. Where a witness has given evidence in examination in chief, his/her earlier inconsistent statement(s) may be put in cross-examination. If W declines to answer questions in cross-examination, s.119(1)(b) applies and the previous inconsistent statement can be put to the witness under ss.4 or 5 of the 1865 Act.
6. The judge retains a discretion to exclude any s.119 statement relied on by the Crown (PACE, s.78) and by the defence (CJA 2003, s.126).

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727 [2008] EWCA Crim 1574
728 S.3 hostile witness, ss.4 and 5 previous statements relative to the subject matter of the indictment.
729 [2021] EWCA Crim 381
730 [2019] 1 Cr App R 18 (229)
731 [2019] EWCA Crim 1151

7. The importance of judicial guidance to the jury as to the use to which any previous inconsistent statement/s may be put was also emphasised in *Croft*[732] and *Coates*.[733] The burden of proof must be reflected in the direction: *Billingham and Billingham*.[734]

8. In a rare case where the jury retire with the documentary evidence of the earlier statement, they should be directed not to place undue weight on that by comparison with the other evidence.[735]

Directions

9. The jury should be reminded of any particular features of the way in which W came to give his/her second account in the witness box (e.g. obvious unwillingness to answer questions).

10. They should be directed that they heard about the (first) statement that the witness made {e.g. to the police/defence solicitor} because although the witness was called by one party on the basis of what he/she said in that statement the evidence which the witness gave did not support their case but effectively supported the case of the other/another party. By saying one thing in the statement and another/the opposite in the witness box the witness effectively changed sides.

11. Both what the witness said in the witness box and what the witness said in the statement are evidence for the jury to consider and it is for them to decide what, if anything, of that witness' evidence they accept.

12. They should take account of the witness' change of account and any explanation the witness gave for it when considering his/her reliability as a witness. It is for them to judge the extent and importance of any change and what the significance of that is although, in reality, for a witness to have been turned hostile the change must have been significant.

13. They jury are entitled, depending on what they make of the witness' change and any reason the witness gave for it, not to rely on any of the witness' evidence at all, but if after careful consideration they are sure that what the witness said, either in the statement or when he/she was in the witness box, was (or in the case of a defence witness, was or may have been) true, they may take account of it in reaching their verdict/s.

14. It is good practice to explain to the jury that they do not have the statement (subject to the provisions of s.122 CJA 2003) and the reason for that: namely that if they have that part of the evidence in writing it may, albeit unwittingly, be given undue prominence.

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732 [2007] EWCA Crim 30 para.41
733 [2007] EWCA Crim 1471
734 [2009] EWCA Crim 19
735 *Hulme* [2007] EWCA Crim 1471

Example

Although the {prosecution/defence} called W to give evidence, the evidence W gave did not support their case. Because of this the {prosecution/defence) were allowed to cross-examine W to show that W had previously said something that was different from what W said in court. In effect, W has changed sides.

You should look at everything that W said when he/she gave evidence and remember how W reacted when W was reminded of what he/she had said originally and the reason/s W gave for changing his/her story.

Because W has given two different versions, you must look at all that W said with caution.

If you are sure that one of the versions W gave is true, you can act on it. But if you are not sure which, if either, version is true, you should not take account of anything that W has said, either originally or in court.

[If the jury have a/part of W's witness statement (as an exhibit pursuant to s.122 CJA 2003): The fact that you have W's evidence/part of W's evidence in writing does not make it any more or less important than any other evidence in the case.]

14-8 Hearsay – Statement to refresh memory – ss.139 and 120(3)

ARCHBOLD 11-37; BLACKSTONE'S F6.16

Legal summary

1. A witness is entitled to refresh their memory from an earlier document or recording before testifying.[736] If mention of this is made in the course of the evidence the jury should be directed that this is normal practice.
2. A witness may be permitted to refresh their memory from an earlier document or recording made or verified by him/her at an earlier time if:[737]
   (1) the witness states in his/her oral evidence that the document records his/her recollection of the matter at that earlier time; and
   (2) the witness' recollection of the matter is likely to have been significantly better at that time than it is at the time of his/her oral evidence.
3. The judge retains a discretion as to whether a witness should be permitted to refresh his/her memory.[738] It is not necessary for the witness to have faltered before he/she is permitted to do so.[739] It is nonetheless important for the correct procedure to be adopted, the case of *Campbell*[740] being an example of a Recorder adopting a somewhat interventionist approach to the issue.
4. If the witness refreshes his/her memory during the course of, or in a break in, testifying the earlier document may, in some circumstances become admissible as evidence of the truth of its contents independently of the testimony. The statement will only be admissible if:
   (1) the witness has succeeded in refreshing his/her memory from an earlier document or recording; and
   (2) the witness has been cross-examined about the contents of the document from which he/she has refreshed memory; and
   (3) the content has therefore been received in evidence.[741]
5. The jury may inspect a memory-refreshing document if necessary.[742]
6. If the jury will find it difficult to follow the cross-examination of the witness who has refreshed his/her memory without having the record, this may be provided to them.[743]

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736 *Richardson* [1971] 2 QB 484
737 CJA 2003, s.139
738 *McAfee* [2006] EWCA Crim 2914
739 *Mangena* [2009] EWCA Crim 2535
740 [2015] EWCA Crim 2557
741 *Pashmfouroush* [2006] EWCA Crim 2330; *Chinn* [2012] EWCA Crim 501
742 *Bass* [1953] 1 QB 680
743 *Sekhon (1986) 85* Cr *App R 19*

7. A document exhibited under s.120(3) should not accompany the jury when they retire, other than in exceptional circumstances (e.g. it would help following translated text).[744] If the jury do retire with the document they need to be warned not to attach disproportionate weight to it.[745]

8. The relevant legal principles relating to s.139 and what remains of the 'best evidence' rule were reviewed in detail in *Sugden*.[746]

Directions

9. Sometimes a witness may refresh his/her memory from his/her witness statement before giving any evidence about a particular topic. In this event, if the witness adopts what he/she said in his/her statement (assuming that the statement/part of the statement is read out in court) that is the witness's unequivocal evidence. It will rarely be necessary to give any direction about this. For this reason, no Example is given below.

10. On other occasions a witness gives some evidence about a topic, then refreshes his/her memory from the statement and, in the light of the statement, changes his/her account. In this event a direction should follow the Example in 14-6.

744 CJA 2003, s.122
745 *Hulme* [2007] EWCA Crim 1471
746 [2018] EWHC 544 (Admin). No reference was made to s.133 of the Act.

14-9 Hearsay – Statement to rebut an allegation of recent fabrication – s.120(2)

ARCHBOLD 11-36; BLACKSTONE'S F7.67

Legal summary

1. Under CJA 2003, s.120(2) "If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible." The previous statement will commonly have been made orally. A witness may include a defendant who gives evidence.747 A statement admitted under s.120(2) does not have to satisfy the requirements of s.120 (4) and (7).748 A statement may be admitted under s.120(2) without the complainant having given oral evidence of the previous complaint.749
2. If the witness has made a previous statement consistent with the account given at trial and the earlier account was provided reasonably recently after the events, the previous consistent statement may be admitted as evidence of its truth. In *Athwal*[750] the court addressed the basis upon which such a previous statement may be admitted and in particular the degree of relevance arising from the timing of the previous statement i.e. did it have to be 'recent'. The court commented that they did not think it should be "confined within a temporal straitjacket".
3. Unless it is obvious to the jury that the earlier statement lacks independence, this should be drawn to their attention.[751]
4. If the s.120(2) criteria are not capable of being met, the evidence may nevertheless be admissible under other statutory gateways: *Gilloley*.[752]

Directions

5. It should be explained to the jury that the reason that they heard about W's previous statement was because it was suggested to W that he/she had invented his/her evidence and it is relevant to the question whether W has in fact done so and whether W's evidence is true or false. It is implicit that the statement will have been made before the point at which the witness is alleged to have invented the evidence.
6. It is for the jury to decide, depending on what they make of the statement whether it rebuts the suggestion that W's evidence is invented.
7. The jury should be directed that the statement, or that part of it which has been used for this purpose, is evidence of the matter/s stated in it and they are entitled to use it to decide whether or not W has been consistent and, if they are

747 *Hodge* [2018] EWCA Crim 2501
748 *KH v R* [2020] EWCA Crim 136
749 *Cousins* [2021] EWCA Crim 1664
750 [2009] EWCA Crim 789
751 *Berry* [2013] EWCA Crim 1389
752 *Gilloley* [2009] EWCA Crim 671

satisfied that W has been, that is something they may keep in mind when deciding whether or not W's evidence is truthful.

Example

When W was cross-examined it was suggested to W that he/she had made up his/her account of the incident. Because of that suggestion, which W rejected, {advocate for the party by whom W was called} asked W about the statement that W made on {date}, in which W gave the same/a similar account to the one W has given today.

The reason you heard about W's statement is to help you decide whether W has made up what he/she said in the witness box or whether it is true. Both what W said in the statement and what W said in the witness box are evidence of {specify} for you to consider when you are deciding (a) whether W has been consistent in what he/she has said about the incident; (b) whether W's statement shows that the suggestion that W made up what he/she said when he/she gave evidence in the witness box is wrong and (c) whether W's evidence is true.

You do not have a copy of X's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single X's evidence out by having a copy of it.

14-10 Hearsay – Statement as evidence of person, object or place – s.120 (4) and (5)

ARCHBOLD 11-38; BLACKSTONE'S F6.36

Legal summary

1. Under CJA 2003, s.120(4) and (5), where a witness is testifying at trial, and confirms that they made an earlier statement and that to the best of their belief it was true and in the earlier statement the witness identified a person, object or place, that earlier statement is admissible as evidence of its truth.
2. What constitutes an identification of a person, object or place is to be broadly construed so as to admit, as evidence of its truth, contents of the document other than the evidence of a bare identification of 'a person, object or place': *Chinn*.[753]

Directions

3. The situations in which a specific direction about such evidence will be necessary are likely to be rare and very fact specific. Any direction must be tailored to the facts of the case and discussed with the advocates before speeches.
4. It should be explained to the jury that the statement (or part of it) was put into evidence because W said that, to the best of his/her belief, he/she made the statement and, to the best of his/her belief, it is true.
5. The jury should be directed that if they accept W's evidence that he/she made the statement (which is unlikely to be in issue) and W's evidence about his/her state of mind (which may be in issue) then the statement is evidence about the person/object/place which they may take into account.
6. If the jury do take the statement into account they should judge the accuracy and reliability of W's recollection at the time W made the statement rather than at the time W was asked to recall matters in court.

Example 1

You have heard evidence that {specify person/object/place and circumstances/significance}. This evidence came from W's witness statement which, when W gave evidence, W said he/she made on {date} and to the best of his/her belief is true.

[If the evidence is adduced in the prosecution case: The defence do not dispute that W made the statement, but they do not agree that what W said in it is true. So the first thing to decide is whether or not what W said in his/her statement is true. If you are not sure that it is true, you must ignore it. But if you are sure that it is true, it is evidence of {person/object/place}.]

[753] [2012] EWCA Crim 501

[If the evidence is admitted in the defence case: The prosecution do not dispute that W made the statement, but they do not agree that what W said in it is true. So the first thing to decide is whether or not what W said in his/her statement is true. If you think it is more likely than not that the statement is not true, you must ignore it. But if you think it is more likely than not that it is true, it is evidence of {person/object/place}.]

When deciding whether or not W's statement is true, you should bear in mind that this was W's recollection when he/she made the statement on {date} and not when W was asked about this in court.

You do not have a copy of W's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single W's evidence out by having a copy of his/her.

[Where this evidence is confirmed by another witness: Another witness, X stated that on {date} W told X that {specify}. You can take account of X's evidence when you are deciding whether what W said about {specify} is true, but you will appreciate that X's evidence is not independent because it is only evidence of what W told X. X has no personal knowledge about {specify}. The reason you heard about what W said to X is so that you can consider it when you are deciding whether or not W's statement about this was true.]

Example 2

Following a robbery, W made a 999 call in which he/she gave the registration number of the getaway car. When giving evidence W said that he/she had done this but could not remember the number which he/she saw. The recording of the 999 call was put in evidence.

The prosecution/defence do not agree that, when W made the 999 call, W correctly relayed the registration number of the car. It would be unreasonable to expect W to recall the number now {x months} after the event. A trial should not be a memory test for witnesses. You should assess the accuracy of W's observation of the number and W's relaying of it in the 999 call at the time of the incident.

[Here summarise any arguments made by the parties]

[If adduced in the prosecution case: If you think that W's observation and report were or might have been inaccurate then you will ignore this evidence. If you are sure that W's observation and report were accurate, then you will take what W said in the 999 call into account as evidence in the prosecution's case.]

[If adduced in the defence case: If you think that W's observation and report were or may have been accurate then you will take what W said in the 999 call into account in support of the defence case. If you are sure that W's observation and report were inaccurate, then you will ignore this evidence.]

14-11 Hearsay – Statement of matters now forgotten – s.120 (4) and (6)

ARCHBOLD 11-39; BLACKSTONE'S F6.23

Legal summary

1. Under CJA 2003, s.120(4) and (6), where W is testifying at trial and confirms that he/she made an earlier statement when matters were fresh in his/her memory, and that to the best of his/her belief it is true but that he/she cannot now recall the contents, that earlier statement may be admissible as evidence of its truth.
2. If there is an issue about whether W can reasonably be expected to recall events, it may be necessary to hold a voir dire. If W cannot reasonably be expected to recall, the statement is admissible as evidence of its truth.

> "In such a case when the judge sums up he will explain shortly why the jury can consider the written material, stating why, in the case of this matter and this witness, she could not reasonably be expected to remember that matter well enough to give oral evidence in the proceedings. No reference to hearsay evidence or the statute itself need be necessary. The judge will also, of course, direct the jury to consider the reliability of the witness' earlier recollection of the subject matter of the statement that has been admitted and emphasise that it is for the jury to decide on the weight that they attribute to the evidence in the previous statement."[754]

Directions

3. The situations in which a specific direction about such evidence will be necessary are likely to be rare and very fact specific. Any direction must be tailored to the facts of the case and discussed with the advocates before speeches.
4. It should be explained to the jury that the statement (or part of it) was put into evidence because W said that, to the best of his/her belief, he/she made the statement and it is true, that it was made when matters were fresh in his/her memory and that he/she can no longer remember them.
5. The jury should be directed that if they accept W's evidence about the statement and W's state of mind (which usually will not be in issue) then the statement is evidence which they may take into account.
6. If the jury do take the statement into account they should judge the accuracy and reliability of W's recollection at the time W made the statement rather than at the time W was asked to recall matters in court.

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[754] *Chinn* [2012] EWCA Crim 501

Example

You have heard evidence that {specify}. This evidence came from a witness statement that W made on {date}. When W gave evidence W said that, although he/she cannot remember these things now, when he/she made the statement they were fresh in his/her mind and, as far as he/she knows and believes, the statement is true.

[If the evidence is adduced in the prosecution case: The defence do not dispute that W made the statement or that W could not be expected to remember now things that happened on/in {date}, but they do not agree that what W said in the statement is true. So the first thing to decide is whether or not what W said in his/her statement is true. If you are not sure that it is true, you must ignore it. But if you are sure that it is true, it is evidence of {specify}.]

[If the if the evidence is admitted in the defence case: The prosecution do not dispute that W made the statement or that W could not be expected to remember now things that happened on/in {date}, but they do not agree that what W said in the statement is true. So the first thing to decide is whether or not what W said in his/her statement is true. If you think that it was or may have been true it is evidence of {specify}. But if you are sure that it is untrue, you must ignore it.]

When deciding whether or not W's statement is true, you can bear in mind that this was W's recollection on {date}, which was much closer to the time of the incident than now.

You do not have a copy of W's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single W's evidence out by having a copy of his/hers.

14-12 Hearsay – Statement of complaint – s.120 (4), (7) and (8)

ARCHBOLD 11-40; BLACKSTONE'S F6.33

Legal summary

1. Under CJA 2003. s.120(4), (7) and (8), where the complainant gives evidence in connection with the alleged offence and confirms that he/she made an earlier statement amounting to a complaint of the offence alleged and that to the best of his/her belief that statement is true, that earlier statement is admissible as evidence of its truth provided it was not made as a result of a threat or promise. In contrast, where evidence of a complaint is introduced not as evidence of what was stated but for some other reason, e.g. as evidence of the complainant's inconsistency, the criteria in s.120(4) and (7) do not have to be met.[755]

Directions

2. It should be explained to the jury that the statement (or part of it) was put into evidence because W said that, to the best of his/her belief, he/she made the statement and it is true and that the jury are entitled to hear evidence about a complaint which a person made before proceedings started.
3. The jury must be directed about the following:
   (1) The complaint itself falls to be judged as part of the evidence of W.
   (2) Evidence of W's complaint is evidence about what W has said on another occasion and so originates from W him/herself. Consequently it does not provide any independent support for W's evidence.
4. The jury should also be directed about the following, as appropriate:
   (1) The context in which the complaint was made.
   (2) The length of time which elapsed between the subject matter of the complaint (the event/s complained of) and the making of the complaint.
   (3) The explanation for any delay in making the complaint. For a direction on delay see Chapter 10-4.
   (4) The consistency/inconsistency of the complaint with W's evidence (and sometimes any other complaint made by the same witness). Points of consistency and/or inconsistency should be specified. The jury are entitled to consider this/these when they are deciding whether or not the witness is accurate, reliable and truthful.
5. If it has been suggested that a complaint has been made up, evidence of a complaint made to another person nearer the time of the alleged event may be used as evidence to rebut that suggestion and the jury should be so directed: see Chapter 14-9.
6. Evidence of a statement of complaint may also be given by a witness to whom the statement, whether oral or written, was made. This often applies in cases in which a complainant has made an oral complaint to a friend or relative.

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[755] *Hollings* [2020] EWCA Crim 1363

Example 1: Complainant's written statement

You have heard evidence that in a statement made to {specify person} on {date} W complained that {specify}. W gave evidence that to the best of his/her belief he/she made this statement and that to the best of his/her belief it is true.

It is not in issue that W made the statement but it is in issue that what W said in it is true. In deciding whether what W said is true or not you should look at all the surrounding circumstances and in particular:

- The fact that, it is not disputed, the complaint was made within minutes of the time when, if it happened, this incident is said to have occurred. In the light of this you should decide whether or not W had time to invent the account which W gave when he/she made the complaint.
- [Alternatively: The fact that, as is accepted, the complaint was not made for a number of months after the time when, if it happened, this incident (is said to have) occurred. In relation to this delay you should consider the reason/s which W gave for not complaining any sooner: see Chapter 20-1 below.]
- The context in which the complaint was made namely {specify}.
- Any consistency/inconsistency which you find to exist between what W said in the statement and the account which W gave to you in his/her evidence. In particular {specify}.

If, having looked at all the circumstances, you are sure that what W said in the statement is true then you can take this into account as supporting the evidence that W gave in court. If you are not sure that what W said in the statement is true, or sure that it is not true, this would undermine the evidence that W gave in court.

You do not have a copy of W's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single W's evidence out by having a copy of his/hers.

Example 2: Evidence of W's complaint from another witness

X gave evidence that on {date} W told X {specify}. You can take account of this when you are deciding whether W's allegation is true, but you must be aware that this is not independent evidence about what happened between W and D. This is because it is only evidence about what W told X about what W said happened between W and D. X was not there and so did not see what did or did not happen.

The reason you heard about what W said to X is so that you can consider it when you are deciding whether or not W has been consistent in what he/she has alleged, and whether or not W has told you the truth. When deciding this you should consider: [here adapt points in last example as appropriate].

It is for you to say whether the evidence of W's complaint to X helps you to decide whether W has been consistent and whether W's evidence is true, but I remind you that this is not extra or independent evidence of what did or did not happen between W and D.

NOTE: It is often the case that a complainant will have shown distress when making a complaint to a third party. In this event the jury must be directed about how they should approach evidence of distress: see Chapter 20-1.

14-13 Hearsay – Res Gestae – Spontaneous Exclamation – s.118(1) and (4)

ARCHBOLD 11-70 and 74; BLACKSTONE'S F17.49

Legal summary

1. CJA 2003, s.118, provides for the admissibility of hearsay statements which fall within the common law hearsay *res gestae* exception. The basis for admissibility under this exception is that hearsay can be regarded as more likely to be reliable if the statement was made spontaneously. To be admissible such a statement must:
   (1) have been made by a person 'so emotionally overpowered' by an event that the possibility of concoction or distortion can be disregarded; or
   (2) have accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement; or
   (3) relate to a physical sensation or mental state such as intention or emotion.
2. The law governing admissibility is stated in *Andrews.*[756] It is not always necessary to give a specific direction about the risks in mistaken identification if the speaker was dying at the time of making the statement: *Mills v The Queen.*[757]
3. In some circumstances a *res gestae* statement can be adduced under s.118 when a witness is available but not called: *Barnaby v DPP*.[758] *S*ee also *A-G's Ref (No. 1 of 2003)*.[759]
4. It may be possible to be able to rely on a *res gestae* account from a missing witness who is not identified, provided they have not expressed a desire for anonymity and the other conditions for admissibility are met.[760]
5. Where the utterance is that of a very young child who is unaware of the significance of the events narrated reliance should be placed on s.114.[761]

Directions

6. Depending on the reason for the statement having been admitted in evidence the jury should be reminded of the evidence about the statement, in the context of the situation in which it was made.

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[756] [1987] A.C. 281 p.300-301
[757] [1995] UKPC 6
[758] [2015] EWHC 232 (Admin)
[759] [2003] 2 Cr App R 453
[760] See *Nico Brown* [2019] EWCA Crim 1143.
[761] *QD* [2019] NICA 7

7. The jury should be directed that:

   (1) before they may rely on the statement they must be sure:

      (a) that the statement has been reported accurately;

      (b) that the statement was spontaneous and genuine and not the result of {insert as appropriate: deliberation, invention, distortion, rehearsal, malice or ill-will};

      (c) that, if sure that it was genuine and spontaneous, it was not made as a result of a mistake as to the circumstances in/about which it was made;

      (d) and if they cannot be sure about these things they must ignore the statement completely;

   (2) if, having considered these factors, they are sure that they can rely on the statement, they must decide what weight/significance they should attach to it, bearing in mind any limitations revealed by the evidence e.g. that the maker of the statement is unidentified or is dead and so has not given evidence in relation to the subject matter of the statement or been tested by cross-examination.

Example: Arson with intent to endanger life: see over

W was one of the police officers at the scene. W gave evidence that when the house was completely engulfed in flames, a woman ran from the back door coughing uncontrollably and obviously distressed. W said that this woman turned and pointed at the door and screamed "Jason's inside. He's the one you want". She then ran away up the street and has not been seen since. Within moments, D appeared at the door, badly affected by the smoke but otherwise uninjured.

W then arrested D. W accepts that he/she did not make any note of what the woman said until he/she made his/her witness statement.

When you are looking at this evidence you must bear these points in mind:

- First, before you can rely on W's evidence of what the woman said, you must be sure that W's recollection is accurate. If you are not sure that W's recollection of what the woman said is accurate, you must ignore this evidence.
- If you are sure that W's recollection is accurate, you must next decide whether, when she said "He's the one you want", the woman was saying that D was responsible for the fire. If you are not sure that the woman was saying this, you must ignore this evidence.
- If you are sure that the woman was saying that D was responsible for the fire, you must then decide whether her words were spontaneous – that is to say they just came out – and whether they reflected the situation as she genuinely believed it to be, or whether she had any other reason for saying what she did, such as to make a false accusation against D. If you are not sure that what she said reflected the situation as she genuinely believed it to be you must ignore this evidence.

- If you are sure that what the woman said was spontaneous and genuine, you must next consider whether she was, or may have been, mistaken in believing that D was responsible for the fire. If you decide that she made, or may have made, a mistake, you must ignore what she said.
- If you are sure that she wasn't mistaken, you may take account of this evidence when you are deciding whether the prosecution have proved that D is guilty.

However, when considering what importance you should give to this evidence, you must keep in mind that, because the woman has never been identified, she has not given evidence about this herself. So, you have not been able to see her and do not know how her evidence might, or might not, have stood up to cross-examination. Obviously, if she had given evidence in line with what W told us she said, this would have been challenged in court.

14-14 Hearsay – Statements in furtherance of a common enterprise – s.118(1) and (7)

ARCHBOLD 33-63; BLACKSTONE'S F17.70

Legal summary

1. The common law exception admitting hearsay statements made in furtherance of a common enterprise is preserved by the CJA 2003, s.118(1). In short, the acts and declarations of a person engaged in a joint enterprise and made in pursuance of that enterprise may be admissible against another party to the enterprise, but only where the evidence shows the complicity of that other in a common offence or series of offences.[762]
2. Once admitted, the evidence may be considered by the jury when deciding upon the existence of the conspiracy, its objects and purpose, and when deciding whether the defendant was a conspirator.
3. The jury will need direction on several matters:
   (1) It is for them to decide whether the acts and declarations were made by a conspirator.[763] The hearsay evidence may be used when considering whether there was a conspiracy and whether the actor/speaker was a conspirator.
   (2) The jury must not convict D solely on the basis of this evidence: they may only convict D if there is other evidence which implicates him/her and they are sure on all of the evidence that D is guilty.
4. The jury will also need careful direction to guard against the risk that they will treat the statement as primary evidence of D's involvement without regard to the limitations of the hearsay evidence.[764] These include for example that D was not present when the statement was made and so was not in a position to respond, challenge or disagree with it at the time that it was made; the statement may be ambiguous or incomplete; D will not have had any opportunity to test the evidence in cross-examination where the maker was unknown or was not a witness (or a co-defendant) who gave evidence.

Directions

5. A statement, whether made orally or in writing, by one party to a common enterprise may, if a reasonable interpretation is that it was made in furtherance of the common enterprise, be put in evidence to prove that a D who was not party to the statement participated in the common enterprise; provided that there is some other evidence of D's involvement. Such evidence commonly arises out of telephone communication (text or speech) between alleged co-conspirators.
6. The purpose for which the evidence was adduced must be explained to the jury.

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762 *Gray* [1995] 2 Cr App R 100; *Murray* [1997] 2 Cr App R 136; *Williams* [2002] EWCA Crim 2208
763 *King* [2012] EWCA Crim 805**;** *Smart and Beard* [2002] EWCA Crim 772 at [30]
764 *Jones* [1997] 2 Cr App R 119; *Williams* [2002] EWCA Crim 2208

7. The limitations of the evidence must also be explained: for example:
   (1) D was not present when the statement was made and so was not in a position to respond, challenge or disagree with it at the time that it was made;
   (2) the statement may be ambiguous or incomplete;
   (3) D will not have had any opportunity to test the evidence in cross-examination where the maker was unknown or was not a witness (or a co-D) who gave evidence.
8. This evidence is only part of the evidence and the jury must consider the evidence as a whole.
9. The jury must not convict D solely on the basis of this evidence: they may only convict D if there is other evidence which implicates him/her and they are sure on all of the evidence that D is guilty.

Example

You have heard evidence from W that {D1} said {specify evidence of what was said by alleged conspirator}.

This evidence is disputed and so the first question for you to answer is whether or not this evidence is true. If you are not sure that it is true, you must ignore it. But if you are sure that it is true you can use this evidence when you are deciding:

(a) whether the alleged conspiracy actually existed; and

(b) whether any particular defendant was involved in any such conspiracy.

On the question of whether the alleged conspiracy actually existed, you should look at exactly what was said and decide whether it must have been said in order to carry out the alleged conspiracy or whether it could have been said for some other reason. If you are not sure that it was said in order to carry out the alleged conspiracy, you must ignore it.

[In the case of an incomplete sentence or message: Also, the sentence/message is obviously incomplete and you must not guess or make assumptions about what might have been said in the rest of the sentence/message.]

If you are sure that it was said, that may provide some evidence that the conspiracy existed but on its own what was said cannot prove that there was a conspiracy. Your conclusion about whether or not there was a conspiracy depends on what you make of all of the evidence, not just what was said.

If you are sure, on all of the evidence, that there was a conspiracy, you can take account of the evidence of what was said when you are deciding whether or not a particular defendant was involved in it.

In the case of D1, you will have to decide whether or not D1 is the person who said {specify what was said}. When you are deciding this, you must consider [here give a direction about identification by voice: see Chapter 15-7 below]. If you are sure that D1 was the person W heard, you can take account of what D1 said, along with the other evidence, when you are deciding whether D1 is guilty of the conspiracy with which D1 is charged.

In the cases of D2 and D3, although the person speaking referred to both of them by name, you must be cautious about it and aware that this evidence has a number of limitations. In particular, there is no evidence that either D2 or D3 was present when the person said what he/she did, so neither was there to respond, whether to agree or to disagree with what was said.

Although D1 gave evidence, D1 said that he/she was not the person speaking and so cannot provide any explanation of what was said; and if you think that the person speaking was someone other than D1, it follows that D2 and D3 have not had any opportunity to challenge what was said by having the speaker cross-examined.

[If applicable, having regard to the evidence: You should also consider whether, if you are sure that {specify what was said} was said by someone involved in the conspiracy (whoever that was) it may have been said falsely and maliciously in order to implicate others who were not involved in it.]

Finally you must not convict D2 or D3 just because of this evidence. You can only convict either one of these defendants if there is other evidence that implicates him/her and you are sure, on all of the evidence, that he/she is guilty.

14-15 Hearsay – Out of court statements made by one defendant (D1) for or against another (D2)

ARCHBOLD 11-3d and 49; BLACKSTONE'S F18.27

Legal summary

1. The normal direction is that what one D says out of court is evidence in D's case only and not in that of any other D.
2. "The conventional direction ... that has historically been given to juries [is] that what defendant A says to the police is evidence only when considering his case and is to be ignored when considering the case of defendants B, C or D. The reason why that has always been the direction given is that what A says to the police is hearsay so far as B, C or D are concerned."[765]
3. Section 76A PACE 1984 provides for a confession made by D1 to be given in evidence for D2, so long as they are "charged in the same proceedings", so far as it is relevant to any matter in issue in the proceedings, so long as it is not to be excluded on the grounds of (a) oppression or (b) something said or done which is likely to render it unreliable: see s.76A(2) and (3).
4. Section 114(1)(d) is wide enough to allow for D1's statement about D2 to be admitted in other circumstances.[766] *Burns and Brierly*[767] should be considered in this regard. In particular, where D1 seeks to rely on D2's hearsay statement that D2 was the offender where they are not charged in the same proceedings (usually because D2 has pleaded guilty) or where D1 seeks to rely on D2's hearsay statement that D1 was not involved in the offence (that statement not being a confession and hence not admissible under s.76A), if such a statement is admitted under s.114(1)(d), the trial judge should **not** give the jury the normal direction. See also the case of *Trought*[768] where the trial judge's decision to admit the confession of D2 on arrest that he was conspiring with D1 (who denied the existence of any such conspiracy) notwithstanding that D2 had pleaded guilty and thus took no part in the trial.
5. In *McLean* Hughes LJ said:[769]

> "If hearsay evidence is admitted in the interests of justice the jury is by law entitled to consider it, to determine its weight and to make up its mind whether it can or cannot rely upon it. It would be a plain nonsense to suggest that such hearsay evidence could be admissible, yet still the jury should be directed that it was not evidence except in the case of [the maker]. There is no doubt that if and when hearsay evidence of this kind is ruled admissible it becomes evidence in the case generally."

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765 *McLean* [2007] EWCA Crim 219, at [20] to [21]
766 *Y* [2008] EWCA Crim 10; *Horsnell* [2012] EWCA Crim 227; *Nguyen* [2020] EWCA Crim 140
767 [2015] EWCA Crim 2542
768 [2017] EWCA Crim 1701
769 Ibid [20] to [21]

6. In *Sliogeris*[770] the Court declined to resolve the further ground of appeal:

> "whether, once evidence of a confession by a defendant is properly admitted in favour of a co-defendant, it can in principle thereafter be used against all defendants and not merely the maker of the statement. In the light of the purpose behind the provision [s. 114], there is a cogent case for saying that it should not be treated as evidence in the case generally but only in favour of a co-defendant. That would require the judge to direct the jury that it should not treat that statement as evidence against a co-defendant (other than the party making the confession) but that the jury may treat it as evidence in favour of the co-defendant who has successfully applied for it to be admitted. However, we leave that issue to be decided on another occasion."

Directions

7. Unless D1's out of court statement (usually made in interview) has been admitted against D2 under one or more of the hearsay provisions, the jury must be directed that what D1 said about D2 is not admissible in D2's case and they must disregard it, because D2 was not present when the co-D made the statement and so was not in a position to comment, challenge or rebut what the co-D said.
8. If D1's out of court statement has been admitted as evidence against D2 the jury must be warned about the possible dangers of relying on the statement because:
   (1) D2 was not present when the statement was made and so was not in a position to comment, challenge or rebut it at that time; and they do not know, and must not speculate about, what D2 might have said if he/she had been present;
   (2) D1 was being accused of a criminal offence and so had his/her own position to look after when he/she was being interviewed and this may, or may not, have best been served by diverting attention towards, and putting blame on, the other defendant.
9. If the statement was admitted as an inconsistent statement made by D1, the jury should only rely on it as evidence against D2 if they are sure that what D1 said in his/her interview was the truth and that what D1 said in evidence was untrue. The evidential status of D1's account in interview as against D2 was considered in *Nguyen*[771] where it was held proper to admit it under s.114 but not under s.119.
10. If the statement was made by D1 to a third party, before the jury could rely on it they would have to be sure that the third party's evidence about what D1 said is true, accurate and reliable both as to the fact that the conversation took place and to its contents.

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[770] [2015] EWCA Crim 22
[771] [2020] EWCA Crim 140

11. If D1 has given evidence the jury should be directed that D1's evidence is relevant and admissible and that they may have regard to it in D2's case, because the evidence was given in D2's presence and D2 has had the opportunity to comment, challenge and rebut the co-defendant's account.

Where the confession of D1 has been admitted in evidence as evidence for D2

12. Where the confession of D1 has been admitted as evidence for D2 because it exonerates D2, it will also provide evidence against D1. It is possible that in the course of the s.76A application to admit/exclude it there will have been evidence about oppression and/or things said or done which render it unreliable. Where such issues are explored on the voir dire and are explored again in front of the jury, the judge must give careful directions which will invariably be case-specific: see also Chapter 16-1.

13. Directions should include the following:

    (1) When considering the case of D2, if the jury find:

        (a) that the statement was not, or may not have been, obtained by oppression or anything said or done which is likely to render it unreliable [cf. the burden of proof for the admission of such a statement, which is on a balance of probabilities]; **and**

        (b) that it is or may be true,

        the statement is capable of supporting D2's case.

    (2) When considering the case of D1:

        (a) Unless the jury are sure that the statement was not obtained by oppression or anything said or done which is likely to render it unreliable, they must disregard it.

        (b) If they are sure that it was not obtained by oppression or anything said or done which is likely to render it unreliable and they are sure that the statement is true, they may use it as evidence of that defendant's guilt.

Example 1: D1's out of court statement implicates D2

In D1's interview with the police D1 said that he/she was not responsible for {specify} but that it was D2. This was mirrored in D2's interview: D2 said that he/she was not responsible but that it was D1.

What one D said about the other in his/her interview is not evidence against that other D, because the other D was not present at the interview and so had no opportunity to comment on what was said or challenge or explain it.

Also, when each D was being interviewed they were being accused of {specify} and so may have had a reason to protect their own interests by blaming the other defendant.

In addition, depending on whether D1 and/or D2 gave evidence:

But, both Ds give evidence in which each repeated what they said in their interview. What each D said in evidence **is** evidence against the other because each has heard what the other said in evidence and has had the opportunity to challenge and explain what the other D said.

Or

D1 chose to give evidence but D2 chose not to. What D1 said in his/her evidence about D2 is evidence against D2 because D2 heard what D1 said in court and was able to challenge it through his/her advocate. Also, if he/she had wanted to do so, D2 could have challenged and explained it by giving evidence.

The fact that D2 did not give evidence however means that what D2 said in his/her interview about D1 is still not evidence against D1: and you have no evidence from D2 by which D2 either exonerates himself or implicates D1.

Example 2: D1's out of court statement admitted under s.76A as D1's confession and exonerating D2; D1 alleges unreliable because of inducement offered

In his/her interview with the police D1 admitted that he/she had {specify}. If what D1 said is true it is a confession that D1 committed the offence and so is guilty. Also, given the circumstances in this case, if what D1 said is true, it must mean that D2 could not have committed this offence and so D2 is not guilty.

When he/she gave evidence D1 accepted that he/she did say that, but told us that it was not true and he/she only said it because {e.g. just before the interview D1 was told that the offence was not very serious and if D1 admitted it he/she would be given bail and could go home}.

Your approach to this evidence will be different depending whether you are considering the case of D1 or D2.

In the case of D1: Because the prosecution must prove the case against D1 so that you are sure of it, if you think that D1's explanation for saying what he/she did in his/her interview is, or may be, true, you must ignore what D1 said in the interview: it does not provide any evidence against him/her. If, on the other hand, you are sure that D1's explanation is untrue and that what D1 said in his/her interview is true, you can consider what D1 said in the interview as evidence which supports the prosecution's case that D1 is guilty.

In the case of D2: Because the defence do not have to prove anything to you, if you think that D1's explanation for saying what he/she did in his/her interview is, or may be, untrue and that what D1 said in the interview is, or may be, true, you can consider this as evidence which supports D2's case that he/she is not guilty.

Example 3: D1's out of court statement exonerating D2 admitted under s.114(1)(d)

When D1 was interviewed he/she told the police that D2 was not responsible for {specify} because {specify}. This is evidence which you can consider in support of D2's case that he/she is not guilty.

It is for you to say what significance you attach to this evidence, bearing in mind that you have not heard D1 say this in the witness box, when D1 would have been under oath or affirmation to tell the truth; and you do not know how D1 would have responded if he/she had been cross-examined. You must also bear in mind that D2 does not have to prove that he/she is not guilty; it is the prosecution to prove that D2 is.

Example 4: D1's out of court statement implicating D2 admitted under s.114(1)(d)

When D1 was interviewed he/she told the police that D2 was responsible for {specify} because {specify}. This is evidence which you can consider as evidence which supports the prosecution's case that D2 is guilty.

You must bear in mind that when D1 was being interviewed he/she was being accused of {specify} and so may have had a reason to protect his/her own interests by blaming D2.

It is for you to say what significance you attach to this evidence, bearing in mind that you have not heard D1 say this in the witness box when D1 would have been under oath or affirmation to tell the truth, and you do not know how D1 would have responded if he/she had been cross-examined.

See also Chapter 17-5: Defendant's silence at trial.

14-16 Hearsay – Multiple hearsay – s.121

ARCHBOLD 11-41; BLACKSTONE'S F17.84

Legal summary

1. CJA 2003, s.121, governs the admissibility of multiple hearsay. The restrictions are strict because multiple hearsay poses greater risks of unreliability. Judges are advised to use the factors in s.114(2) as a guide to potential reliability. [772]
2. Multiple hearsay is not admissible unless one of the statements involved in the chain is:
   (1) admissible as a business document (s.117); or
   (2) a previous statement by a witness in the case; or
   (3) all parties to the proceedings agree; or
   (4) where the court is so convinced by the value of the evidence that it can invoke the additional 'safety valve' in s.121(1)(c) in which case the court should identify a relevant statutory exception which would apply to admit the first chain of hearsay (e.g. s.116 or 114(1)(d)) before considering whether it is the further chain(s) are admissible: *Walker*.[773]
3. In the rare cases in which multiple hearsay is admitted it will be incumbent on the judge to give a very clear jury warning about the enhanced dangers. The jury will need to be directed about each link in the chain of hearsay.[774]

   > "it is important to underline that care must be taken to analyse the precise provisions of the legislation and ensure that any route of admissibility is correctly identified. In any case of multiple hearsay, that should be done in stages so that each link in the multiple chain can be tested."[775]

4. In some cases s.121 will render admissible statements made by one accused that incriminated both him/herself and his/her co-accused. Particular care is needed in such a case.[776]
5. The case of *Usayi*[777] is an example of the court having to consider s.121 although as the judgment identified there was "much less to this case than might first have met the eye."

Directions

6. If multiple hearsay has been admitted, in addition to the direction/s relating to the purpose for which it has been admitted, further directions tailored to the specific facts of the case must be given, including a 'Chinese whispers' direction setting

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772 See recently *A'Hearne* [2022] EWCA Crim 1784 where the value of the evidence was so high that the interests of justice required admissibility (D confessed to X (absent through fear) who related that to Y, a police officer (unfit to attend).
773 [2007] EWCA Crim 1698
774 See *Friel* [2012] EWCA Crim 2871 [22]; *Scorah* [2008] EWCA Crim 1786 [34]
775 Per Leveson J *Maher v DPP* [2006] EWHC 1271 (Admin) [26]
776 *Thakrar* [2010] EWCA Crim 1050 and see also *Burns and Brierley* [2015] EWCA Crim 2542 and *Ruby & Ors* [2020] EWCA Crim 961
777 [2017] EWCA Crim 1394

out each stage of the transmission of the information and to direct the jury that they must consider the risks, if any, of a failure to transmit the information in its original form.

Example

When D was arrested by PC A, a number of others were present including X and Y. In his/her evidence PC A said that having arrested D, X told PC A that Y had told X that Y had seen D covered in blood and D had said to Y that this had come from W's head wound. PC A made a note of what X told him/her in his/her pocket book and X signed it as being an accurate record, but neither X nor Y have given evidence: the only evidence of D being covered in blood and what D is alleged to have said has come from PC A.

[Having reviewed the evidence]

You must decide what significance, if any, to give to this evidence, but you should bear in mind that it is not agreed: D says that he/she was not at the scene and so could not have been covered in W's blood.

In these circumstances you must approach this evidence with caution because PC A and X did not witness the incident; and this evidence is of what Y allegedly told X, and then what X told PC A.

You will appreciate that when information is passed from one person to another, and then from that person to someone else, there is a risk that the final version will not be accurate and reliable. So PC A's evidence has a number of limitations.

First, although nobody has suggested that PC A's note of what X said to him/her was inaccurate, and it is accepted that X signed that note to confirm that the note was accurate, this does not mean that what X said to PC A was itself accurate. Also, X could not know, from his/her own observation, whether Y saw D or whether, if Y did see D, D had blood on him/her so X cannot say that what Y said to X was accurate.

Secondly, X and Y did not give evidence in court and so you do not know how each of them would have responded when cross-examined.

When you are deciding what weight, if any, you should give to this evidence, you must look at it in the light of the other evidence in the case. You must also keep PC A's evidence in perspective, because it only relates to three particular issues in the case: namely whether D was at the scene, whether, if D was, D had blood on him/her and, if D did have blood on him/her, whether D said what is alleged.

Also, whilst these issues are obviously important, they are by no means the only issues in the case.

15. IDENTIFICATION

15-1 Visual identification by a witness/witnesses

ARCHBOLD 13.1; BLACKSTONE'S F19.1

Legal summary

1. The risk of honest but mistaken visual identification of suspects is well established. To guard against that risk, investigators must comply with the carefully prescribed safeguards in Code D of the Police and Criminal Evidence Act 1984.[778]
2. Code D sets out four possible visual identification procedures:
   (1) Video identification.
   (2) Identification parades.
   (3) Group identification.
   (4) Confrontation.
3. Video identification is the preferred procedure, but an identification parade may be offered if video identification is not practicable or if a parade is both practicable and more suitable than video identification.[779] Group identification may be offered initially only if the officer in charge of the investigation considers it more suitable than either video identification or an identification parade and the identification officer[780] considers it is practicable to arrange.[781] Confrontation is the last resort, only to be used if all other options (including covertly recorded video etc.) are impracticable.[782] Photographs or composite images for identification purposes should not be shown to witnesses for identification purposes if there is a suspect already available to be asked to take part in an identification procedure.[783]
4. There is a need for judges, when determining admissibility, to be alert to the dangers of identification evidence. Breach of the procedures provided by Code D may form the basis of an application to exclude the identification evidence under s.78 PACE. Breaches of Code D do not inevitably lead to the exclusion of the evidence: *Selwyn*.[784] The judge must determine whether the alleged breaches may have caused any prejudice to the defendant and, if so, whether the adverse effect would be such that justice requires the evidence to be excluded: *Malashev*;[785] *Cole*;[786] *Lariba*.[787] If evidence obtained in breach of

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778 Code D, para 1.2. Archbold Supplement, Appendix A; Blackstone Appendix 1
779 Code D, para 3.14
780 An officer not below the rank of inspector who is not otherwise involved in the investigation: Code D, para 3.11
781 Code D, para 3.16
782 Code D, para 3.23
783 Code D, para 3.21 to 3.24
784 [2012] EWCA Crim 2968
785 [1997] EWCA Crim 471
786 [2013] EWCA Crim 1149
787 [2015] EWCA Crim 478

Code D is nonetheless admitted, the jury should be told that the defendant had not received the protection to which the defendant was entitled and the possible prejudice in consequence of the breach should be explained.[788]

5. Judges are also required to examine the state of identification evidence at the close of the prosecution case and to stop the case if it is poor and unsupported.[789]

6. In a case where the identifying witness has made an identification from social media such as Facebook prior to the identification procedure, that does not render the subsequent identification procedure inadmissible. In such a situation, it will be necessary for the police to obtain as much detail as they can about the initial identification through social media. The jury should have as much material as possible (i.e. the original social media material), so as to enable them to assess the circumstances in which the earlier identification was made. The court should consider, and the jury be directed, as to how the earlier identification was made so that strengths and weaknesses can be assessed. A warning to the jury might be necessary, if for example a person showing the social media image had drawn the witness's attention to the apparent perpetrator as if by confirmation.[790] In *Phillips*[791] the decision of the trial judge to admit the evidence was upheld.

   > "The issue of whether [the witnesses] were identifying the person that they had seen in the Facebook photograph which they had been shown as opposed to the person that they had seen on the night was an issue for the jury, and there was available to the jury sufficient material on which they could make this critical judgment of fact."

   In any event the judge has a duty to direct the jury carefully so that they are alert to the risks such evidence carries: *Turnbull*.

7. In *Crampton*[792] the complainant's Facebook identification of D was properly admitted in evidence despite the failure to conduct a VIPER (Video Identification Parade Electronic Recording) procedure, in breach of Code D.

8. An e-fit is hearsay evidence and for admissibility purposes is to be treated in the same way as a written description provided by the witness: *Thomasson*.[793]

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788 *Gojra* [2010] EWCA Crim 1939 para.75, where the investigating officer decided not to require an identification procedure for a witness; *Preddie* [2011] EWCA Crim 312, where the judge failed to explain the significance of the Code D infringements.

789 *Turnbull* [1977] QB 224; *Fergus (Ivan)* [1994] 98 Cr App R 313; *Gray* [2018] EWCA Crim 2083 "The quality of the identification evidence being poor, it follows that the judge was under a duty to withdraw the case from the jury unless there was other evidence which supported the correctness of the identification" para [40] but also "The Court in *Turnbull* said that "odd coincidences can, if unexplained, be supporting evidence" para [44].

790 *Alexander and McGill* [2012] EWCA Crim 2768*;* see also *McCullough* [2011] EWCA Crim 1413 and *LT* [2019] EWCA Crim 58

791 [2019] EWCA Crim 720, para 39

792 [2020] EWCA Crim 1334

793 [2021] EWCA Crim 114

9. If an impermissible 'dock identification' takes place in the course of a trial directions to the jury are unlikely to be sufficient to result in a safe conviction: see *Long*.[794]

Directions

10. Where the prosecution case depends on visual identification evidence (which may include a situation in which the defendant admits presence but denies being the person who acted as alleged by the identification witness) a *Turnbull* direction must be given. It may be helpful to give a summary direction at the outset of the case (see Chapter 2-2).

11. The jury must be warned that:

    (1) there is a need for caution to avoid the risk of injustice;

    (2) a witness who is honest and convinced in his/her own mind may be wrong;

    (3) a witness who is convincing may be wrong;

    (4) more than one witness may be wrong (see paragraph 16 below);

    (5) a witness who is able to recognise the defendant, even when the witness knows the defendant very well, may be wrong.

12. The jury should be directed to put caution into practice by carefully examining the surrounding circumstances of the evidence of identification, in particular:

    (1) the time during which the witness had the person he/she says was D under observation; in particular the time during which the witness could see the person's face;

    (2) the distance between the witness and the person observed;

    (3) the state of the light;

    (4) whether there was any interference with the observation (such as either a physical obstruction or other things going on at the same time);

    (5) whether the witness had ever seen D before and if so how many times and in what circumstances (i.e. whether the witness had any reason to be able to recognise D);

    (6) the length of time between the original observation of the person said to be D (usually at the time of the incident) and the identification by the witness of D the police (often at an identification procedure);

    (7) whether there is any significant difference between the description the witness gave to the police and the appearance of D.

13. Any weaknesses in the identification evidence must be drawn to the attention of the jury, for example those arising from one or more of the circumstances set out above, such as:

    (1) the fact that an incident was unexpected/fast-moving/shocking or involved a (large) number of people so that the identifying witness was not observing a single person;

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[794] [2022] EWCA Crim 444

(2) anything said or done at the identification procedure including any breach of Code D.

14. Evidence which is capable and, if applicable, evidence which is not capable of supporting and/or is capable of undermining the identification must be identified. Coincidences, whether or not they fall short of traditional corroboration, could support the correctness of an identification: *Dickens*.[795]

15. The jury may also use evidence of description, if they are sure that it comes from a witness who is honest and independent, as support for evidence of identification given by an/other witness/es.

16. Particular care is needed if the defendant's case involves an alibi: see Chapter 18-2 below.

17. Where more than one witness gives evidence of identification the jury should be told that they must consider the quality of each witness' evidence of identification separately and must have regard to the possibility that more than one person may be mistaken. However, as long as the jury are alive to this risk, they are entitled to use one witness' evidence of identification, if they are sure that that witness is honest and independent, as some support for evidence of identification given by an/other witness/es.

18. In every case, the direction must be tailored to the evidence and to the arguments raised by the parties in respect of that evidence.[796]

Example

NOTE: Not all of the following directions need to be given in every case, as shown by the headings. It is suggested that the order is logical but it is for the judge to decide which directions are appropriate and the order in which they should be given.

In every case

You must be cautious when considering this evidence because experience has shown that any witness who has identified a person can be mistaken even when the witness is honest and sure that he/she is right. Such a witness may seem convincing but may be wrong.

[**In a 'recognition' case:** This is true even though a witness knows a person well and says that he/she has recognised that person. The witness could still be mistaken.]

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795 [2020] EWCA Crim 1661; If each of two witnesses independently identifies one of two defendants who were not only known to each other, but each claimed that at the time the offence was being committed they were in the same place at some distance from the scene of the crime, this constitutes a potential unexplained 'odd coincidence' within the terms of *Turnbull* that can be supporting evidence for the identification of each accused.

796 "In any identification case the judge must set out the matters which are relevant to the cautious approach to be taken by the jury" *Gray* above para [61]

You can only rely on the identification evidence if you are sure that it is accurate. You need to consider carefully all the circumstances in which D was identified.

So you must ask yourselves:

- For how long could W see the person W says was D and, in particular, for how long could W see the person's face?
- How clear was W's view of the person, considering the distance between them, the light, any objects or people getting in the way and any distractions.
- Had W ever seen D before the incident? If so, how often and in what circumstances? If only once or occasionally, had W any special reason for remembering D?
- How long was it between the time of the incident and the time when W identified D to the police?
- Is there any significant difference between the description W gave of the person and D's appearance?

You should also think about whether there is any evidence which, if you accept it, might support the identification. In particular you should consider {specify}.

However the evidence of {specify} cannot support the identification because {explain}.

You will also have to look to see if there are any weaknesses in any of the identification evidence, or if there is any evidence which, if you accept it, might undermine the identification evidence. In particular, you should consider {specify}.

In a case where there has been evidence of identification *and* description

In this case you have identification evidence and description evidence.

Identification evidence is where a witness has identified a specific person by {e.g. naming the person / pointing the person out (whether in the street or at an identification procedure)}.

Description evidence is where a witness has given a description which may or may not be similar to the appearance or clothing of a particular person. However, the description alone does not identify that person, so it can only go to support other evidence, including evidence of identification.

Where there has been an issue arising from a VIPER identification procedure

You have heard that D was picked out on a VIPER identification procedure from a number of images that had been selected by D and D's solicitor. {Summarise issue/s arising and evidence relating to those issues.}

Where the defence is alibi

I have already explained how you should consider the evidence of D's alibi [see Chapter 18-2].

If you decide that D lied about where he/she was, this does not prove that W's identification must be right. But if you decide that D had no innocent reason for putting this alibi forward, you may treat D's false alibi as some support for W's identification.

Of course, if you are sure that W's evidence of identification is reliable, it would follow that D's alibi is false.

Where there has been a breach of Code D

The fact that no identification procedure took place broke the rules that should be followed in cases involving disputed identification. These rules, known as the Code of Practice, are designed to provide safeguards for a suspect whom a witness says he/she can identify, and to test the ability of the witness to identify the suspect.

The failure to hold a formal identification procedure has deprived D of an important safeguard which would have tested W's ability to make an identification under formal and fair conditions. You must bear that in mind when considering the reliability of W's identification.

As no identification procedure was carried out in this case, W's ability to identify a suspect was not tested in this way and D has not had the advantage D might have had if W had failed to pick D out or had picked out another person.

You should take all this into account when you decide whether or not you can be sure that W's identification of D was reliable, and you should ask yourselves whether the fact that there was no formal identification procedure puts the identification evidence in doubt.

15-2 Identification from visual images: comparison by the jury

ARCHBOLD 14-63; BLACKSTONE'S F19.19

Legal summary

CCTV evidence generally

1. The proliferation of CCTV cameras has led to the increased reliance on images which purportedly record relevant events as a means of identification.
2. In Attorney General's Reference (No 2 of 2002),[797] Rose LJ held that there were at least four circumstances (*Ozger*[798] explicitly recognising that the list is non-exhaustive) in which, subject to a sufficient warning, the jury could be invited to conclude that D committed the offence on the basis of a photographic image from the scene of the crime which is admitted in evidence:[799]
   (a) "where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock": *Dodson and Williams*:[800]
   (b) where a witness knows the defendant sufficiently well to recognise the defendant as the offender depicted in the photographic image, the witness can give evidence of this: *Fowden; Kajala v Noble; Grimer; Caldwell;* and *Blenkinsop*;[801] and this may be so even if the photographic image is no longer available for the jury: *Taylor v Chief Constable of Cheshire*.[802] In *Selwyn*[803] it was held that a *Turnbull* warning will be necessary in such circumstances.
   (c) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, the witness can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury;[804]
   (d) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury."[805]

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797 [2002] EWCA Crim 2373
798 [2022] EWCA Crim 1238
799 [2002] EWCA Crim 2373 at para.19. The prosecution case was that the defendant was recorded in a CCTV film of indifferent quality taking part in a riot.
800 [1984] 1 WLR 971
801 *Fowden* [1982] Crim LR 588, *Kajala v Noble* (1982) 75 Cr App R 149, *Grimer* [1982] Crim LR 674, *Caldwell* (1994) 99 Cr App R 73 and *Blenkinsop* [1995] 1 Cr App R 7.
802 (1987) 84 Cr App R 191. Ralph Gibson LJ at p.199 held that where a recording is not available or produced, the court "must hesitate and consider very carefully indeed before finding themselves made sure of guilt upon such evidence".
803 [2012] EWCA Crim 2968
804 *Clare* [1995] 2 Cr App R 333
805 *Stockwell* (1993) 97 Cr App R 260; *Clarke* [1995] 2 Cr App R 425; *Hookway* [1999] Crim LR 750

CCTV comparison by the jury

3. In the first category of case, the recording is shown as real evidence and may provide the court with the equivalent of a direct view of the incident in question. In *Dodson & Williams*[806] it was held that although the exercise required of the jury is not expert in nature, the jury should still be warned of the dangers of mistaken identification and of the need to exercise great care in attempting to make an identification from a CCTV recording.[807] A full *Turnbull* warning may not always be appropriate.[808]

4. The recording in question (or photograph taken from it) must be of sufficient clarity.[809] Where D's appearance has changed since the suspect's image was captured on CCTV, the jury should be provided with a photograph of D which was taken contemporaneously with the CCTV image. Other factors which the jury may need to be made aware of in seeking to make a comparison include the extent to which the facial features of the suspect are exposed in the recording or photograph and the opportunity and period of time the jury has had to look at D in the dock.[810] In *Walters*,[811] the court emphasised that the jury's attention should be drawn to the kind of factors that might make recognition from CCTV stills unreliable.

5. In *McNamara*[812] it was held that where a D refused to comply with a jury's request during summing-up to stand up and turn around so they could make comparisons with video evidence, the jury should not be invited to draw an adverse inference from such a refusal. The effect of such a direction would be to reverse the burden of proof.

6. There is no invariable rule that the jury must be warned of the risk that they might make a mistaken identification.[813] The nature of any direction to be given will depend on the facts of the particular case: "As we have already indicated, we prefer the .. approach that there is no invariable or inflexible rule that a jury have to be expressly warned of the risk that they might make a mistaken identification. It will all depend on the facts. The question is therefore whether or not there were any factors here which required a particular kind of warning and

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806 [1984] 1 WLR 971

807 For a recent example of such a circumstance see *Dawes* [2021] EWCA Crim 760

808 *Blenkinsop* [1995] 1 Cr App R 7

809 *West* [2005] EWCA Crim 3034 at para.14. In *Faraz Ali* [2008] EWCA Crim 1522, Hooper LJ at paras.36 to 41 doubted that the images relied upon were of sufficient quality to invite the jury to use "the evidence of their own eyes" and repeated that if such an exercise is undertaken, the jury must be given an explicit warning about the dangers of mistaken identification. cf *Najjar* [2014] EWCA Crim 1309 in which the footage provided the jury "with an equivalent of a direct view of the incident and an exceptionally clear view of the perpetrator" (at para.17) and the appeal against conviction was rejected.

810 *Dodson & Williams* [1984] 1 WLR 971 by Watkins LJ. The need to deal clearly with such factors was highlighted by the Court of Appeal in *Walters* [2013] EWCA Crim 1361 at para.31.

811 [2013] EWCA Crim 1361

812 [1996] Crim LR 750

813 *Shanmugarajah and Liberna* [2015] EWCA Crim 783

whether the judge's directions to the jury fell short of those that would be required".[814]

Directions

7. Where, in order to avoid injustice, the jury need to be given a warning, adapted from *Turnbull*, as to the risk of mistaken identification, and the special need for caution before relying on such evidence, consideration should be given to directing that:

   (1) it is possible for anyone, and any one of them, to make a genuine and honest mistake in identification; and it is also possible for all of them to make such a mistake. The fact that a number of people make the same identification does not of itself prove that the identification is correct;

   (2) none of them knew D before they saw D in the dock, so this is the only knowledge on which any of them can base their recognition of D;

   (3) even if the person shown on an image appears similar to D, it may not be D.

8. The jury may also need to be warned that although they have had the advantage of having been able to observe D in the course of the trial over a significant period, in clear light, from a reasonably short distance and without obstruction or distraction:

   (1) D's appearance may have changed since the time that the suspect's image was captured and they must be careful not to make assumptions about what the defendant might have looked like at that time. [This situation will not arise if an image proved/agreed to be that of the defendant taken at the time that the suspect's image was captured has been put in evidence.];

   (2) the image/s with which they are comparing the defendant's features is/are only two dimensional: this is not the same as observing an actual person at the scene.

9. The jury may also need to be alerted to other factors which may make identification more difficult/less reliable such as poor lighting, a poor quality or black and white image, obstruction, movement, a partial view of the suspect's face.

10. Any obvious difference between the appearance of the defendant and the suspect shown on the image may need to be drawn to the attention of the jury.

11. Evidence which is capable of supporting, not capable of supporting or capable of undermining the case that the person shown on the image is the defendant must be drawn to the attention of the jury.

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814 *Shanmugarajah and Liberna para 32*

Example

You do not have any evidence of this incident from an eye-witness. However, there is CCTV footage and you have got photographs that have been made from that. You are asked to compare D against the person in the footage and photographs.

The prosecution say that you can be sure that it is D. The defence say that you cannot be sure of that, and that {summarise any argument put forward e.g. that the quality of the footage / images makes it impossible / unsafe to make any comparison; or that comparison shows that these are two different people}.

When you compare D against the person in the footage / photographs, you should look for any features which are common to both, and for any features which are different. By 'features' I mean both physical appearance and also other characteristics such as the way a person walks, stands, uses gestures and so on.

When making your comparison you must be cautious for the following reasons:

- Experience has shown that when one person identifies another, it is possible for the person to be mistaken, no matter how honest and convinced they are. Also, the fact that several people identify a person does not mean that the identification must be correct. A number of people may all be mistaken, and you yourselves must have this in mind when you are making your comparison.
- Although you have been able to look at D during this trial in good light, at a relatively close distance and without any obstructions or distractions, none of you knew D beforehand, so your ability to identify D is not based on previous knowledge or having seen D in several different situations before.
- D's appearance has / may have changed since the time of the incident, and you must not speculate about what D looked like then. [Any points on this topic by either party should be summarised here.]
- [If the jury have a photograph known to be of D and taken at or close to the time of the alleged offence] You have a photograph of D taken on / about {date}. You can compare this with the footage / photographs but you must still keep in mind the points I have just raised.
- The quality of the footage / photographs may affect your ability to make a comparison. You should take account of these points: {specify any characteristics relied on by either party e.g. relative position of camera(s) and person photographed (in particular the person's face), distance, focus, colour / monochrome, constant / intermittent, lighting, obstruction(s)}. If you decide that the quality of the footage / photographs does not allow you safely to make any comparison with D, you should not try to do so. However, if you are satisfied that the quality is good enough to allow you to make a comparison, you can study the footage / photographs for as long as you wish.
- The footage / photographs that you have are only two-dimensional and so do not provide the same amount of information as someone at the scene would have. Seeing footage / photographs from the time of the incident is not the same as witnessing it for yourselves. Having said that, a person at the scene only sees the incident once, usually without any warning that it is going to happen; but you have had the advantage of being able to study the footage / photographs several times.

- If you decide that the person shown on the footage / photographs is similar to D, even in several ways, this does not automatically mean that the person shown must be D.

You must also bear in mind that this is only part of the evidence in the case. {Identify any evidence which is capable of supporting, not capable of supporting or capable of undermining the evidence from which the jury are invited to conclude that the person on the footage / photographs is D.}

If you are sure, having considered all of the evidence, that the person shown on the footage / photographs is D, you must then decide whether D is guilty of the offence(s) with which D is charged. If you are not sure that the person on the footage / photographs is D, you must find D not guilty.

15-3 Identification from visual images by a witness who knows D and so is able to recognise him/her

ARCHBOLD 14-4, 22 and 65; BLACKSTONE'S F19.2

Legal summary

1. When the prosecution relies both upon the evidence of a witness who recognises D and the jury's own ability to compare the photographic evidence with D in person, the jury may be directed that the evidence and their own examination can be mutually supportive.[815] If so, they should be reminded of the danger that several witnesses can make the same mistake: *Caldwell.*[816] See also *Faraz Ali*[817] at paras. 34 to 35 in which the Court of Appeal (1) doubted that the image from which a police officer purported to recognise the suspect was of sufficient quality to permit recognition (the face was partially obscured) (2) doubted that the police officer's recognition would, for this reason, constitute supporting evidence of identification in the absence of evidence given by an expert, and (3) repeated the need for an explicit direction warning of the dangers arising from the purported recognition.[818]
2. A modified *Turnbull* direction will be required: see Chapter 15-1 above.
3. Where a police officer purports to recognise a person viewed on a CCTV, a record should be made detailing information such as the viewer's initial reaction, any failure to recognise at first viewing, what was said, any doubts expressed etc.[819] The Code also provides that the recording or images should be shown on an individual basis. In *Moss*[820] it was held that such a formal procedure cannot be expected where recognition occurs in an informal context, but something in the nature of an audit trail should be recorded so as to allow the jury to assess reliability: what matters is "not so much slavish adherence to procedure but evidence that enables the jury to assess the reliability of the evidence of recognition however it is provided" [para.20]. In *Spencer* the Court of Appeal, citing *Moss*, confirmed that the 'mischief' at which the Code was aimed was the "mere assertion the police recognised a suspect without any objective means of testing the accuracy of the assertion".[821] A wholesale failure to comply with the new provisions of Code D can lead to the exclusion of the identification evidence, as illustrated by *Deakin*.[822]
4. Guidance as to the approach in cases where there have been minor breaches of PACE Code D can be found in *Lariba*.[823]

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815 But see *Dawes* [2021] EWCA Crim 760 where the court commented approvingly on a direction that warned the jury against the danger of 'confirmation bias'.
816 [1994] 99 Cr App R 73
817 [2008] EWCA Crim 1522.
818 See also now *Simpson and Benzahi* [2019] EWCA Crim 1144
819 Following the recommendation in *Smith (Dean Martin) & Ors* [2008] EWCA Crim 343 Code D, paras 3.35 to 3.37. *Smith* was approved in *Chaney* [2009] EWCA Crim 21
820 [2011] EWCA Crim 252
821 [2014] EWCA Crim 933
822 [2012] EWCA Crim 2637
823 [2015] EWCA Crim 478

Directions

5. It should be noted that such evidence:

   (1) is direct evidence of identification by the witness of D; and

   (2) provides assistance to the jury in making their own comparison of D (and proved/agreed photographs of D) with the suspect shown on the CCTV footage/images. Reference should therefore be made to the direction in Chapter 15-2 above (Identification from visual images: comparison by the jury).

6. The jury must be given a warning, adapted from *Turnbull*, of the risk of mistaken identification and the special need for caution before relying on such evidence to avoid injustice. In particular they should be directed that:

   (1) a witness can make a genuine and honest mistake in identification;

   (2) this is equally so when a witness knows someone and purports to recognise them, because genuine and honest mistakes can be made in recognition even by those who know someone well, such as a close friend or member of their family.

   The jury should be warned that although the witness has had the advantage of being able to study the CCTV footage/images the image/s is/are only two dimensional and this is not the same as observing an actual person at the scene.

7. The jury must also be alerted to other factors which may make identification more difficult/less reliable such as poor lighting, a poor quality or black and white image, obstruction, movement, a partial view of the suspect's face and also the degree and currency of the witness' knowledge of D.

8. Any obvious difference between the appearance of D and the suspect shown on the image must be identified. If D's appearance may have changed since the time that the suspect's image was captured this must be pointed out and the jury directed not to make assumptions about what D might have looked like at that time. This situation will not arise if an image proved/agreed to be that of D taken at the time that the suspect's image was captured has been put in evidence.

9. Evidence which is capable of supporting, not capable of supporting, or capable of undermining the evidence of identification must be identified for the jury. Evidence capable of supporting the evidence of identification may include the jury's own comparison of D with the suspect shown in the CCTV footage/images and vice versa, in which case the direction must also reflect the features of the direction in Chapter 15-2 above (Identification from visual images: comparison by the jury).

Example

You do not have any evidence from a witness who was at the scene at the time of this incident. What you do have is evidence from W, a local shopkeeper who knows D and who has watched the CCTV footage taken from W's shop. W gave evidence that when he/she saw the footage he/she immediately recognised the person shown on it as D; and that W confirmed this by studying the footage several times. The defence case is that although W knows D and should be able to

recognise D, W is mistaken in his/her identification of D as the person shown on the footage.

You may consider W's evidence in two ways:

First, it is evidence of W's own identification of D from the footage / photographs.

Secondly, you may also use W's evidence to help you compare what you have seen of D in court with the footage of the incident.

When considering W's evidence you must be cautious for the following reasons:

- Experience has shown that when one person identifies another, it is possible for the person to be mistaken, no matter how honest and convinced they are.
- A person may be mistaken even when he/she could be expected to recognise someone because of previous knowledge of him/her. It has been known for a person to be sure that he/she has seen someone, even someone he/she knows well, only to realise that he/she could not in fact have seen the person and that he/she was wrong.
- Also, when you are making your own comparison, you must bear in mind that the fact that several people identify a person does not mean that the identification must be correct. A number of people may all be mistaken.
- The quality of the footage may affect W's – and your – ability to make a comparison. You should take account of these points: {specify any characteristics relied on by either party e.g. relative position of camera(s) and person photographed (in particular the person's face), distance, focus, colour / monochrome, constant / intermittent, lighting, obstruction(s)}.
- The footage from the time of the incident is only two-dimensional and is not the same as seeing it for yourself. Having said that, a person at the scene only witnesses the incident once, usually without any warning that it is going to happen; but you and W have had the advantage of being able to study the footage several times.
- If you decide that the quality of the footage is not good enough for a fair comparison to be made, you must ignore W's evidence and not embark on any comparison of your own.
- However, if you are satisfied that the quality of the footage is good enough for a fair comparison to be made, then you must then decide whether, taking account of W's evidence and your own observations, D is the person shown.

You must also bear in mind that W's evidence is only part of the evidence in the case. {Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of W.}

If, having considered all the evidence, you are sure that the person on the footage is D. you must then decide whether D is guilty of the offence(s) with which D is charged. If you are not sure that the person on the footage is D, you must find D not guilty.

15-4 Identification from visual images by a witness who has special knowledge

ARCHBOLD 14-60; BLACKSTONE'S F19.19

Legal summary

1. Evidence may be received from a witness (usually a police officer) who has studied photographs or film footage of a person and who purports to identify the person by using the knowledge acquired as a result of his/her viewing: *Clare and Peach*.[824]
2. In *Savalia*[825] the 'special knowledge' category of case was held to extend to the identification of a defendant from CCTV based not only the defendant's facial features but on a combination of factors, including physical build and gait.
3. Care will need to be given to ensure that the weaknesses in such evidence are drawn to the jury's attention bearing in mind that the witness will have no specialist training in facial mapping or similar techniques. The position where there has been a breach of the Codes of Practice has been considered in *Simpson and Banzahi*.[826]

Directions

4. It should be noted that such evidence:
   (1) is direct evidence of identification by the witness of D; and
   (2) provides assistance to the jury in making their own comparison of D (and proved/agreed photographs of D) with the suspect shown on the CCTV footage/images. Reference should therefore be made to the direction in Chapter 15-2.
5. The jury must be given a warning, adapted from *Turnbull*, of the risk of mistaken identification and the special need for caution before relying on such evidence to avoid injustice. In particular they should be directed that even a witness who has 'special knowledge' can make a genuine and honest mistake in identification.
6. The jury should be warned that although the witness has had the advantage of being able to study the CCTV footage/images the image/s is/are only two dimensional and this is not the same as observing an actual person at the scene.
7. The jury must also be alerted to other factors which may make identification more difficult/less reliable such as poor lighting, a poor quality or black and white image, obstruction, movement, a partial view of the suspect's face and also the degree and currency of the witness' knowledge of D.
8. Any obvious difference between the appearance of D and the suspect shown on the image must be identified. If D's appearance may have changed since the time that the suspect's image was captured this must be pointed out and the jury

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824 [1995] 2 Cr App R 333 and see recently *Ulas* [2023] EWCA Crim 82 on the same topic
825 [2011] EWCA Crim 1334
826 [2019] EWCA Crim 1144

directed not to make assumptions about what D might have looked like at that time. This situation will not arise if an image proved/agreed to be that of D taken at the time that the suspect's image was captured has been put in evidence.

9. Evidence which is capable of supporting, not capable of supporting, or capable of undermining the evidence of identification must be identified for the jury. Evidence capable of supporting the evidence of identification may include the jury's own comparison of D with the suspect shown in the CCTV footage/images and vice versa, in which case the direction must also reflect the features of the direction in Chapter 15-2 above.

PACE Code D

10. Code D:3.34-37 applies.[827]

11. The person studying the footage should maintain a viewing log.[828] Precisely what may be required or sufficient will vary from case to case. A police officer who spends hundreds, even thousands, of hours studying extensive footage showing numerous individuals will not be able to record observations and conclusions in the same way as in the case of a single subject in a short piece of footage.

12. Failure to make a contemporaneous record may render the evidence inadmissible, applying s.78 of PACE, particularly if the recognition evidence is poor: see for example *Smith*;[829] *JD*.[830]

13. If, notwithstanding the failure in record keeping, the witness is able to give a detailed explanation for the purported recognition and the jury is able to view the relevant material, it is more likely to be fair to admit the evidence: see for example *Chaney*;[831] *Lariba*.[832]

14. For a recent detailed review of law and practice: see *Yaryare and others*.[833] If evidence is admitted notwithstanding a breach of Code D, the judge should direct the jury that the law requires that the viewing officer should maintain a sufficient log and indicate those respects in which the log is deficient.

Example

You do not have any evidence of this incident from an eye witness. What you do have is evidence from PC X who, although he/she does not know D, has compared a known photograph/s of D, taken at about the same time, with CCTV footage (and still photographs taken from the footage) of the incident in which D is alleged to have taken part. PC X told us that he/she spent {number of hours} studying the footage and photographs and comparing them with the photograph/s

827 *Smith* [2008] EWCA Crim 1342
828 See ACPO Practice Advice 2011 at section 6.6 and Appendix 2
829 [2008] EWCA Crim 1342
830 [2012] EWCA Crim 2637
831 [2009] EWCA Crim 21; [2009] 1 Cr App R 35
832 [2015] EWCA Crim 478
833 [2020] ECWA Crim 1314

of D and PC X has identified D as being the person shown {specify e.g. striking W}. The defence case is that PC W's identification of D is mistaken.

You may consider PC X's evidence in two ways:

1. First, it is evidence of PC X's own identification of D from the footage / photographs.
2. Secondly, you may also use PC X's evidence to help your own comparison of the known photograph of D and what you have seen of D in court with the footage and photographs of the incident.

When considering PC X's evidence you must be cautious for the following reasons:

- Experience has shown that when one person identifies another, it is possible for the person to be mistaken, no matter how honest and convinced they are.
- Also, when you are making your own comparison, you must bear in mind that the fact that several people identify a person does not mean that the identification must be correct. A number of people may all be mistaken.
- The quality of the footage may affect PC X's – and your – ability to make a comparison. You should take account of these points: {specify any characteristics relied on by either party e.g. relative position of camera(s) and person photographed (in particular the person's face), distance, focus, colour / monochrome, constant / intermittent, lighting, obstruction(s)}.
- The footage from the time of the incident is only two-dimensional and is not the same as seeing it for yourself. Having said that, a person at the scene only witnesses the incident once, usually without any warning that it is going to happen; but you and PC X have had the advantage of being able to study the footage several times.
- If you decide that the quality of the footage is not good enough for a fair comparison to be made, you must ignore PC X's evidence and not make any comparison of your own.
- However, if you are satisfied that the quality of the footage is good enough for a fair comparison to be made, then you must then decide whether, taking account of PC X's evidence and your own observations, D is the person shown.
- [Where there has been a breach of Code D (D:3.35 and/or 36]: PC X should have, but did not {e.g. kept a note of his/her response and the factors which he/she says led him/her to recognise D as the person in the footage}. You should keep this in mind when you are deciding whether PC X's evidence of identification is reliable.

You must also bear in mind that PC X's evidence is only part of the evidence in the case. {Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of PC X.}

If, having considered all the evidence, you are sure that the person on the footage is D. you must then decide whether D is guilty of the offence(s) with which D is charged. If you are not sure that the person on the footage is D, you must find D not guilty.

15-5 Identification by facial mapping

ARCHBOLD 14- 66; BLACKSTONE'S F19.21

Legal summary

1. Facial mapping is a developing technique and expertise.[834] In its simplest form it amounts to little more than the comparison of one image with another.[835] Computer software and photographic technology have created more advanced techniques which enable two separate images to be enhanced and aligned in order to better to make the comparison.[836] The comparison will involve study of the proportions of the face, the juxtaposition of features of the face and its shape.[837]
2. An expert witness may testify as to the perceived similarities between the admitted control image of the defendant and the disputed crime scene photograph of the suspect, together with the absence of material differences. The expert should not however express an opinion upon the probability that the suspect image is the defendant rather than someone else, because there exists no database against which the match probability can be measured. In the absence of such statistical aids, the expert is limited to expressing an opinion based on their experience. The value of such evidence may be extremely limited. In any event, the quality of the evidence may be limited by the experience and scientific objectivity of the expert.[838]
3. The question whether, in the absence of a relevant database, a facial mapping expert should be permitted to express an opinion on the evidential value of their comparison between the image and the defendant's face was considered in *Atkins*[839] (but see doubts expressed obiter in *Gray*).[840] The Court of Appeal concluded that such evidence was permissible provided the experience and expertise of the expert justified the use of their own relative terms when seeking to interpret their results for the jury. Conventional expressions arranged in a hierarchy (e.g. from 'lends no support' to 'lends powerful support') should be used instead of numbers. The expert may be expected to be tested on the extent to which he/she has actively sought out dissimilarities as well as similarities. The jury should be reminded that any expert's expression of opinion is opinion and 'no more' and 'does not mean that he is necessarily right'.[841]

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834 As with all expert evidence, compliance with CrimPR Part 19 and Crim PD (2023) 7 (expert evidence) are important.
835 *Stockwell* [1993] Cr App R 260
836 *Clarke* [1995] 2 Cr App R 425
837 *Hookway* [1999] Crim LR 750
838 *Gray* [2003] EWCA Crim 1001
839 [2009] EWCA Crim 1876
840 [2003] EWCA Crim 1001
841 *Atkins* [2009] EWCA Crim 1876 at para 29 by Hughes LJ and *Purlis* [2017] EWCA Crim 1134

4. In *McDaid*[842] the Northern Ireland Court of Appeal, citing *Atkins*, confirmed that a suitably qualified expert:

> "may give evidence of facial similarities without being able to make a positive identification and, provided that the factual tribunal is aware that his views are not based upon a statistical database recording the incidence of the features compared as they appear in the population at large, such a witness is entitled is entitled to make use of the assessment framework employed in this case."[843]

5. The Court of Appeal in *Weighman*[844] underlined that whether admissible facial mapping evidence will be left to the jury to consider will depend on the ability of the jury in the light of the quality of the images to make their own assessment.[845]

6. In *Barnes*,[846] the use of 'reverse projection evidence' for the purpose of showing that CCTV images of an offender matched the height of the defendant was held to be analogous to facial mapping, and was therefore not to be considered a 'new science' but rather a photographic technique 'well-known to criminal courts.'[847]

Directions

7. In this situation E gives evidence of the comparison which E has made between a known image/images of D with CCTV footage/images of the scene of the incident.

8. The precise content of this direction will depend on how the evidence has developed in both examination in chief and cross-examination but the following matters must be covered:

   (1) the extent of expertise and experience of E;

   (2) the fact that E is giving expert evidence of opinion: see Chapter 10-3 above (Expert evidence). In particular this is only a part of the evidence and, as with any other part of the evidence, the jury is entitled to accept or to reject it;

   (3) the strengths and weaknesses of E's evidence in the light of E's method and the extent to which E looked for both similarities and differences between the known image/s and the footage/images of the scene;

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842 [2014] NICA 1 para.10
843 [2014] NICA 1 at para.10
844 [2011] EWCA Crim 2826
845 [2011] EWCA Crim 1605 at para.19
846 [2012] EWCA Crim 1605 para.19
847 At para.20. In *Rafiq Mohammed* [2010] EWCA Crim 2696, the court assumed (without deciding) that a comparison of walking gait by an expert podiatrist for the assistance of the jury was a legitimate exercise founded on relevant expertise, but allowed the appeal because the images were of insufficient quality for a reliable comparison. In *Otway* [2011] EWCA Crim 3 the court underlined the importance of establishing the proper limitations of such evidence from the outset and the need for advance preparation when its admissibility is to be challenged (at para 23).

(4) that, if it be the case, there is no unique identifying feature linking the appearance of D with the appearance of the suspect;

(5) that E's opinion is not based on any database of the incidence of features appearing in the population at large and consequently is not supported by any statistical foundation of match probability. As a result E's opinion, although informed by experience, is entirely subjective;

(6) that such evidence does not amount to evidence of positive identification (although it could positively exclude a suspect).

9. If E expresses his/her conclusions in relative terms (e.g. 'no support, limited support, moderate support, support, strong support, powerful support') it may help the jury to explain to them that these terms are no more than labels which E has applied to his/her opinion of the significance of his/her findings and that, because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability.

10. Any attempt to convert such opinion into a numerical or any other scale should be prevented from the outset and, if necessary, should be addressed with suitable warnings in the summing up.

11. The jury should be warned that such evidence does not amount to positive identification and that they should be cautious about finding D guilty on the basis of such evidence if it is not supported by other independent evidence. Evidence which is capable of supporting, evidence which is not capable of supporting and evidence which is capable of undermining such evidence must be drawn to the attention of the jury.

12. Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to prepare the images upon which their comparisons were made, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

13. A jury will almost always have seen the CCTV footage and/or still images taken from it for themselves and will have been invited to draw their own conclusions as to the correctness of a witness' identification of D from their own viewing of the footage/images and from their own observation of D. In such a case the jury must be given directions which cover the points set out in both this direction and the direction in Chapter 15-2 above (Identification from visual images: comparison by the jury). Subject to this, the jury should be directed that they are entitled to treat their own observation as support for the evidence of the witness and vice versa. See by way of analogy the Example in Chapter 15-3.

Example

E is an expert in facial mapping {summarise relevant qualifications and experience}.

[Give a direction about expert evidence: see Chapter 10-3.]

E explained what he/she did to compare images of D's face with images of the face of the person involved in the incident. E then went on to point out similarities and differences he/she found. Finally E gave his/her opinion on the significance of his/her findings.

To compare the images E {summarise the steps taken to prepare the images which were used to make a comparison}.

E found that: {summarise the evidence of similarity and dissimilarity}

When you are considering E's opinion, you must keep the following things in mind:

- Although E pointed out similarities between D's face and the face of the person involved in the incident, E said that there is no unique feature which conclusively shows that the faces are the same.
- Experience has shown that two people, who are completely unconnected with one another, can have very similar facial features.
- There are no statistics/is no database against which the chances of two different people having similar facial characteristics can be measured. So, E cannot say how many people have similar features {e.g. a nose which has been broken and deviates to the right}. Because of this, E's opinion, although based on E's examination of the images in this case and E's experience of {specify number of} cases is only E's personal view.
- E stated that his/her findings provide {e.g. strong support} for the prosecution's claim that D was the person involved in the incident. This is on a scale of 'no support, limited support, moderate support, strong support and powerful support'. This is not a numerical scale of probability but is a less precise way of explaining the strength which E personally attaches to what he/she saw.
- In any event, E's evidence is not evidence of positive identification of D.

You must also bear in mind that E's evidence is only part of the evidence in the case. {Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of E.}

If, having considered all the evidence, you are sure that the person on the footage is D, you must then decide whether D is guilty of the offence(s) with which he/she is charged. If you are not sure that the person on the footage is D, you must find D not guilty.

15-6 Fingerprints and other impressions

ARCHBOLD 14-75; BLACKSTONE'S F19.35; CrimPD (2023) Chapter 7 (re: expert evidence)

A. Fingerprints

Legal summary

1. Expert evidence[848] as to the likely match of fingerprint impressions left at the scene of crime and the defendant's fingerprint impressions have been admissible in evidence for at least one hundred years.[849] Once admitted, it is for the jury to assess its weight.[850] Although properly presented fingerprint evidence may provide sufficient identification (even if unsupported), D must be linked to the relevant prints by admissible evidence.[851] Code D of PACE sets out procedures governing the collection of prints.[852]
2. In *Buckley*,[853] Rose LJ held that the judge's discretion to admit fingerprint evidence depends on all the circumstances of the case, including in particular:
   (i) "the experience and expertise of the witness;
   (ii) the number of similar ridge characteristics;
   (iii) whether there are dissimilar characteristics;
   (iv) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of print than in an entire print; and
   (v) the quality and clarity of the print on the item relied on, which may involve, for example, consideration of possible injury to the person who left the print, as well as factors such as smearing or contamination."[854]
3. While in *Buckley* Rose LJ held that the judge would be highly unlikely to exercise their discretion where there were fewer than eight similar ridge characteristics, the police fingerprint bureau in England and Wales have since adopted a non-numerical standard. The latest guidelines emphasise the role of subjective

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848 As with all expert evidence compliance with CrimPR Part 19 is important and further see The Accreditation of Forensic Service Providers Regulations 2018 by reference to which there is now a requirement that all experts on DNA and fingerprints have to work from ISO approved and accredited laboratories.

849 *Castleton* [1910] 3 Cr App R 74 (appeal Nov 1909), in which the Court of Appeal refused leave to appeal against conviction when the sole evidence of identification was a match, proved by an expert fingerprint examiner, between a print left on a candle at the scene and the defendant's impressions. *Buckley* [1999] EWCA Crim 1191 for a review of the history of fingerprint standards.

850 *Reed* [2009] EWCA Crim 2698 (concerning DNA evidence) at para.111 discussing expert evidence generally.

851 *Chappell v DPP* (1988) 89 Cr App R 82

852 Code D, paras 4.1 to 4.10. Annex F deals with destruction and speculative searches. See also PACE 1984, ss.61, 63A, 65 and Sch 2A

853 [1999] EWCA Crim 1191

854 The editors of Archbold at para 14-77 suggest that the same standards that apply to fingerprint evidence apply to all other forms of prints, including palm prints.

evaluation in the comparison of prints. See also Codes of Practice and Conduct Friction Ridge Detail (Fingerprint) Comparison.

4. Occasionally, fingerprint experts disagree on the identification of a dissimilar characteristic between the two samples. If there is such a disagreement, careful directions will be required because, if there is a realistic possibility that a dissimilar characteristic exists, it will exculpate the defendant.

5. Since there is no nationally accepted standard of the number of identical characteristics required for the match to be conclusive of identity, the terms in which the expert expresses his/her conclusion, and the experience on which it is based, will be critical.

Directions

6. The jury should be directed that the expert is giving evidence of opinion: see Chapter 10-3.

7. The following points should be reviewed:

   (1) the experience and expertise of E;

   (2) the number of ridge characteristics said to be similar;

   (3) whether there are any dissimilar characteristics;

   (4) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of a print (i.e. in a smaller area) than in an entire print;

   (5) the quality and clarity of the print (e.g. whether there has been any possibility of contamination, any smearing, or any damage to the finger which left the print);

   (6) if there is a realistic possibility that a dissimilar characteristic (as between the known print of D and the print from the scene) exists, this will exonerate D.

8. If E expresses conclusions in relative terms (e.g. ‘no support, limited support, moderate support, support, strong support, powerful support’) it should be explained to the jury that these terms are no more than labels which E has applied to his/her opinion of the significance of his/her findings and that, because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability.

9. Any attempt to convert such opinion into a numerical or any other scale should be prevented from the outset and, if necessary, should be addressed with suitable warnings in the summing up.

10. Evidence which is capable of supporting/not capable of supporting/capable of undermining the expert evidence must be drawn to the attention of the jury.

    Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to compare the fingerprint/s, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

Example

E is an expert in the field of identification by fingerprints: {summarise relevant qualifications and experience}.

[Give a direction about expert evidence: see Chapter 10-3.]

E explained that each person's fingerprint is unique. E described – using the term 'ridge characteristics' – how E compared D's fingerprints with the fingerprint/s found at the scene. E pointed out similarities {and differences} between D's fingerprints and the fingerprint/s found at the scene and gave his/her opinion on the significance of his/her findings.

To compare the fingerprint/s E {summarise the steps taken to compare the fingerprints}.

E's findings were that: {summarise the evidence of the size and quality of the print/s found at the scene and of the similarity (and any differences) found in the/each comparison} e.g. E found a single print which E said was incomplete in that it had not been made by the whole width of a finger and part of the print had been smudged. E said that:

- the characteristics of 13 ridges could be made out;
- of these 12 were common to both D's known fingerprint and the fingerprint found at the scene;
- the 13th may, or may not, have been common to both D's known fingerprint and the print found at the scene: E could not rule out the possibility that it was different.

E expressed his/her opinion in terms of his/her findings providing {e.g. strong support} for the contention that D was the person involved in the incident, this being on a scale of 'no support, limited support, moderate support, strong support and powerful support'. It is important to recognise that this is not a numerical scale or a percentage of probability, nor are either such measures possible. It is a relatively imprecise way of expressing E's subjective opinion about the strength which E attaches to his/her findings.
E could not say when the print was left or in what circumstances.

You must also bear in mind that E's evidence is only part of the evidence in the case. {Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of E.}

B. Footwear impressions

Legal summary

11. The taking of footwear impressions is governed by s.61A PACE and Code D 1.3A. The making of comparisons is governed by s.63A PACE. 'Footwear' is not defined in PACE or in the Code.

12. A foot print is not capable of providing conclusive evidence of identity since the comparison does not depend upon the minutiae of unique ridge characteristics but upon the general size, shape and contours of the foot, together with the juxtaposition of its features. The print may be left by a bare or stockinged foot or by footwear and the comparison is usually demonstrated by the use of an overlay. Directions to the jury concerning the exactness and the limitations of the match will follow a similar pattern to those required for fingerprints. It is unusual to obtain a scene of crime print of such clarity and completeness that an exact match even of these general features can be made. Even if an exact match is obtained it is incapable of excluding others as donor of the crime print. At most it will place D among a group of individuals who could have left the mark and the jury should be so directed. This was confirmed in *T*[855] where the Court of Appeal held that Bayes' theorem and likelihood ratios should not be used by experts in this context:

> "An opinion that a shoe 'could have made the mark' is not in our view the same as saying that 'there was moderate [scientific] support for the prosecution case'. The use of the term 'could have made' is a more precise statement of the evidence; it enables a jury better to understand the true nature of the evidence than the more opaque phrase 'moderate scientific support'".[856]

13. However, the court noted that there might be cases, for example where the print was of an unusual size or pattern, in which it might be appropriate for an examiner to go further than 'could have made' and express a more definitive opinion. It is clear that the evidence of the expert as to the significance of the match will in all cases require close attention.

14. A clear dissimilarity between a footprint from a crime scene and one taken from D may establish, if not D's innocence, the fact that D could not have made the print at the scene.

Directions

15. The jury should be given a direction about expert evidence:[857] see Chapter 10-3 above.

16. The jury should be reminded of the evidence, in detail, and directed as to its potential significance and potential limitations, such as lack of clarity or an incomplete impression.

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855 [2010] EWCA Crim 2439
856 [2010] EWCA Crim 2439 at para.73
857 As with all expert evidence compliance with CrimPR Part 19 is important.

17. Even if an exact match between an impression made by footwear at the scene and an item of footwear attributable to D is obtained, this cannot exclude others as having left the impression at the scene. At best it will put D among a group of individuals who could have left the impression.
18. Any attempt to convert such opinion into a numerical or any other scale should be prevented from the outset and, if necessary, should be addressed with suitable warnings in the summing up.
19. Evidence which is capable of supporting/not capable of supporting/capable of undermining the expert evidence must be drawn to the attention of the jury.
20. Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to compare the footwear impressions, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

Example

[If not already given, an expert evidence direction should be given at this point: see Chapter 10-3 above]

In his/her evidence E stated that he/she compared the footwear impression taken from the scene with a trainer taken from D when D was arrested. E found that the size and tread pattern of the footwear that left the impression at the scene were the same as the size and tread pattern of the trainer taken from D. E also said that some damage to the tread of D's trainer was similar to features of the impression taken from the scene.

E agreed that the tread from the impression taken from the scene is the same as the tread of many thousands of trainers and that many thousands of people have size 9 feet. E also agreed that whilst the features of damage on the impression taken from the scene are the same as those on D's trainer, it is not possible to say that the damage is unique or that the impression at the scene must have been made by D's trainer.

E said that on a scale of 'no support, limited support, moderate support, strong support and powerful support' his/her findings provide moderate support for the prosecution's claim that the impression at the scene was made by D's trainer.

It is important to recognise that this evidence does not prove that D's trainer made the impression at the scene or, if it did do so, that D was wearing it at the time. So it cannot prove that D was at the scene. It is simply part of the evidence for you to consider. You must not leap to the conclusion that because the impression at the scene could have been made by D's trainer, D must have been there and so must be guilty. The fact is that the impression at the scene could have been made by any of a very large number of trainers, of which D's trainer is one.

C. Ear impressions

Legal summary

21. While there is no reason in principle why ear print comparison should not be used as an aid to identification, it is important to be aware of particular difficulties associated with it. In *Dallagher*,[858] the Court of Appeal accepted that evidence of ear print comparison was admissible but allowed the appeal on the ground of fresh expert evidence which tended to undermine the confidence with which the match and its significance were expressed. In *Kempster (No 2)*,[859] Latham LJ gave a helpful description of techniques for lifting and comparing ear prints, and warned against placing undue weight on an apparent match found in the shape and 'gross features' of the ear. A reliable match could only be made where the gross features truly provided a 'precise match'.

22. Ear print comparison suffers a disadvantage in common with facial mapping. While there is general agreement among experts that no two ears are the same, it is virtually impossible to obtain an ear impression which contains all relevant features of the ear. The crime scene impression is also likely to have been subject to variations in pressure and to at least minute movement, either of which will affect the reliability of the detail left. The scope for a significant number of reliable features for comparison is therefore limited and even if there is a match between them there is no means of assessing the statistical probability that the crime scene impression was left by someone other than the defendant.

Directions

23. The jury should be given a direction about expert evidence:[860] see Chapter 10-3 above (Expert evidence).

24. Evidence relating to ear impressions is so case specific that directions must be crafted to take account of the particular features of each individual case. It is essential that any such direction is discussed with the advocates before speeches.

25. Unless the impression taken from D's ear compares so precisely with the impression taken at the scene that it would be open to the jury to conclude from that evidence alone that the impression at the scene was made by D, the jury should be told that they must not find D guilty on the basis of such evidence alone if it is not supported by other evidence.

26. Any specific weaknesses in the evidence of, or concessions made by, any expert witness must be reviewed in detail.

27. Evidence which is capable of supporting/not capable of supporting/capable of undermining such evidence must be drawn to the attention of the jury.

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858 [2002] EWCA Crim 1903
859 [2008] EWCA Crim 975
860 As with all expert evidence compliance with CrimPR Part 19 is important.

28. Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to compare the impressions, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

Example

[If not already given, an expert evidence direction should be given at this point: see Chapter 10-3.]

NOTE: Any case involving the comparison of an ear impression with D's ear is bound to be case specific so no example is provided. For a discussion of the issues that may arise see *Kempster*.[861]

[861] [2008] 2 Crim. App. R.19

15-7 Identification by voice

ARCHBOLD 14-71; BLACKSTONE'S F19.24

Legal summary

1. Evidence of identification by voice can take a number of forms, such as from a lay witness who may or may not have known the defendant before hearing the questioned speech; evidence of voice identification procedures, at which a lay witness has identified the defendant's voice from a number of others; and, as a supplement or alternative to the above, the evidence of experts who may report conclusions based on analysis of questioned and reference speech, especially where the speech is accessible in electronic form. In certain circumstances, the jury may be asked to make their own comparison between questioned and reference speech recordings.
2. The leading authority is *Flynn and St John*.[862] In that case, Gage LJ emphasised:

> "…in all cases in which the prosecution rely on voice recognition evidence, whether lay listener, or expert, or both, the judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases." [64]

Evidence of a lay witness

3. In all cases of witness identification or recognition by voice, a modified *Turnbull* direction [see Chapter 15-1] is required emphasising the dangers of assuming that recognition or identification of voice is reliable: *Hersey*;[863] *Chenia*.[864] Identification by voice is even less reliable than eye witness identification or recognition; even a confident recognition of a familiar voice by a lay listener may nevertheless be wrong: *Flynn and St John*.[865] The direction need not follow a "precise form of words… so long as the essential elements of the warning are given to the jury": *Phipps.*[866]
4. The potential weaknesses of such identification or recognition include the following factors, some of which are not found in a *Turnbull* warning:
   (1) Audibility of speech heard.
   (2) Environmental factors affecting hearing of speech.
   (3) Duration for which speech heard.
   (4) Number of voices heard.
   (5) Whether it was heard directly or by electronic means such as phone or Skype, in which case the sound quality of what was transmitted will also come into play.
   (6) Whether there was an identified attempt to disguise the voice.

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862 [2008] EWCA Crim 970
863 [1997] EWCA Crim 3106
864 [2002] EWCA Crim 2345 and see also *Crow* [2021] EWCA Crim 617, a renewed application where the court reviewed the line of relevant authorities.
865 [2008] EWCA Crim 970 para 16
866 *[2012] UKPC 24*

(7) Hearer's hearing disability or other impediment (if any).

(8) Variety of speech heard.

(9) Degree of familiarity with speaker.

(10) Distinctiveness or accent of speaker.

(11) Whether the speaker spoke in his or her own native tongue, and whether the speech was heard in the hearer's native tongue.

(12) The fact that in contrast to visual identification there are likely to be fewer reference points for a lay person/investigator to use to record a contemporaneous description – and accordingly it is therefore more difficult to use first description to challenge a subsequent description or identification.

(13) Lapse of time between the occasion(s) on which the hearer became familiar with the defendant's speech, the occasion on which the questioned speech was heard and any subsequent identification process.

(14) Specific weaknesses in the design or execution of the identification procedure (see below).

Voice identification procedures

5. The Court of Appeal has approached the question of voice parades with caution: in *Hersey*[867] the court did not interfere with their use when relied on by the Crown but, in *Gummerson*,[868] stopped short of imposing a duty upon the police to conduct them.

6. Whereas visual identification parades are subject to an elaborate regulatory framework set out in Code D of the Codes of Practice, no such scheme exists in respect of voice identification evidence. This situation creates a challenge for the court dealing with *ad hoc* procedures – directions about the strengths and weaknesses of a given procedure need to be crafted very carefully, and on a case-specific basis.

Expert opinion evidence[869]

7. The principal methods by which voice comparisons are conducted by experts[870] are:

(1) auditory analysis (where the expert compares recordings by listening repeatedly);

(2) acoustic analysis (involving computerised comparisons of the voice samples).

Both are admissible forms of evidence in England and Wales: *Flynn* (*above*) (cf. *Doherty*[871] rejecting auditory as too unreliable). Voice expert evidence can be highly complex evidence of a kind which it is not easy for a jury to evaluate. A jury

867 [1998] Crim. L.R. 281 CA
868 [1999] Crim. L.R. 680 CA
869 Crim. L.R. 2001, Aug, 595-622
870 As with all expert evidence compliance with CrimPR Part 19 is important.
871 [2002] NICA B51

needs the assistance of the judge: *Yam*.[872] Particular care may be needed where translators are also involved in the exercise: see *Tamiz*.[873]

Comparisons in court

8. Careful consideration must be given as to whether the jury should be permitted to listen to recordings, for what purpose and if so with what practical arrangements in place.[874] It is suggested that the process should be regulated by the judge in the same way as viewing video footage is controlled. If the jury are permitted to review recordings the jury should again be reminded of a checklist of potential weaknesses of such an approach which must be tailored to the facts of each case, told to bear in mind the evidence of the voice recognition witnesses (if any) and warned of the dangers of relying on their own untrained ears: *Flynn and St John (*above*).*
9. Where a voice recording is played for another purpose (such as to demonstrate that certain words were uttered on a particular occasion), and it is not appropriate for the jury to undertake any voice comparison for themselves, they should be directed specifically to refrain from doing so.

Directions

10. If an expert witness has given evidence, a direction about such evidence should be given if it has not already been given: see Chapter 10-3 above.
11. What follows is a non-exhaustive list of possible considerations.
    (1) Identification by voice recognition is more difficult than visual identification.
    (2) As with visual identification, a genuine, honest and convincing witness who purports to identify a voice may be mistaken and a number of such witnesses may all be mistaken. This is so even when the witness/witnesses are very familiar with the known voice i.e. the basis for recognition is strong.
    (3) Voice recognition evidence of a witness who is not an expert may be admitted but the ability of a lay listener correctly to identify voices is subject to a number of variables which require such evidence to be treated with great caution and great care having regard to, inter alia, these factors:
        (a) the quality of the recording of the disputed voice;
        (b) the length of time between the listener hearing the known voice and the listener's attempt to recognise the disputed voice;
        (c) the extent of the listener's familiarity with the known voice;
        (d) the nature, duration and amount of speech which it is sought to identify;

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872 [2010] EWCA Crim 2072
873 [2010] EWCA Crim 2638
874 Practical arrangements will include whether the jury listen through headphones, the order in which any recordings are played of the reference voice and the questioned voice, whether the jury are given a transcript of any recognisable utterances, how many times the recordings are repeated, and at whose request, and what arrangements will be made for the jury to consider the same material during their deliberations.

(e) the nature and integrity of the process by which the purported identification was made, in particular whether or not a voice comparison exercise in which the disputed voice is put with the voices of several others (similar to an identification procedure) was used.

(4) Voice identification is likely to be more reliable when carried out by (i) an expert listener using auditory phonetic analysis and/or (ii) an expert in voice analysis using acoustic recording and measurement (quantitative acoustic analysis).

(5) Evidence which is capable of supporting/not capable of supporting/capable of undermining such evidence must be drawn to the attention of the jury.

(6) Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to compare the recordings, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

Example 1: Non-expert witness

W gave evidence that at {specify time} on {specify date} he/she received a 'phone call from D, in the course of which D told W {specify details}. It is not in dispute that W received such a phone call but D denies that it was made by him/her. D says that W is mistaken in thinking that the voice was D's.

When considering this evidence you need to be especially cautious because experience has shown that any witness who gives evidence of identification can be mistaken and this is so even when the witness is honest and convinced that he/she is right. Such a witness may well seem convincing but this does not mean that the witness cannot be wrong. This is so even when a witness knows a person well and says that he/she has recognised that person.

In this case, where the evidence is that W recognised the voice but did not see the caller, the danger of such recognition being wrong is even greater.

So before you could decide that it was D who made this 'phone call you would have to be sure that W's evidence that he/she recognised D's voice is accurate and reliable. You need to look carefully at all the circumstances in which W heard the voice.

You must ask yourselves:

- What was the content and the context of the call?
- How long was W listening to the voice of the person W says was D?
- How clear was the telephone? You don't have any recording of the conversation so the only way you can judge this is by the description that W gave when W was questioned about it.
- Did anything distract W during the 'phone call?
- How well does W know D's voice?
- Is there anything distinctive about D's voice or the way D speaks which might make it any easier to identify?

- How long was it between the time that W became familiar with D's voice and the time of the 'phone call; and between the time that W told the police that the voice was D's; and the time that W picked out the voice on the voice parade?
- Is there any marked difference between W's description of the voice and speech that W heard during the 'phone call and D's voice and the way in which D speaks?

When you consider whether there are any weaknesses in W's evidence you should bear in mind:

- that whilst W knows D well, W does not have any training or experience in voice recognition;
- W was speaking and listening to the caller on a 'phone, which does not provide the same quality and definition as a face to face conversation.

You should also consider {specify any other matter}.

The following evidence is capable of providing support for/undermining W's evidence {specify}. I should point out that the evidence that {specify} is not capable of supporting W's is {specify}.

Example 2: Expert witness (with auditory but not acoustic analysis)

There is a recording of a 2 minute conversation between a person alleged to be D and another person which, it is not disputed, implicates D in the offence with which D is charged. The conversation was recorded using a microphone inserted into a hole in a party wall between terraced houses. The wall had been drilled but the voices are muffled: some but not all words can be made out. There is also some 'over-talking'. The questioned speech has been compared with D's known speech as heard on D's 37 minute tape-recorded interview.

E is an expert in analysing sound, including sound made by the human voice {summarise qualifications and experience}.

[If not already given, an expert evidence direction should be given at this point: see Chapter 10-3 above]

When you are deciding whether or not to accept E's evidence you must be cautious for the following reasons:

- The quality of the original recordings of the conversation {e.g. recorded through the wall at the house is compromised because of the muffling effect of the wall, as was apparent when the enhanced versions were played, and as E accepted in his/her evidence, only certain words are sufficiently clear to be understood as individual words};
- The amount of speech in question {e.g. is small: the total amount of time during which the person said to be D was speaking is 49 seconds and on 3 occasions, for a total duration of 17 seconds, both people were speaking at the same time};
- Although E compared a recording of D's voice with the recording of the conversation, E does not know D personally and is not as familiar as a close relative or friend would be;

E did not test his/her comparison by comparing the recordings of D's voice and the speech in question with either recordings of other voices which are similar in pitch, tone, accent and speed or with the voices of any of the other defendants;

Although you have heard the recording of the conversation in question for yourselves, the only reason for that was so that you know (a) what was said and (b) the material on which E has based his/her opinion. But you are not experts in voice recognition and you must not base any conclusion on your own inexpert and untrained comparison between the recorded conversation and the recording of D's voice.

The following evidence is capable of providing support for/undermining W's evidence {specify}. I should point out that the evidence that {specify} is not capable of supporting W's is {specify}.

15-8 Identification by Forensic Gait analysis

Where forensic gait analysis is undertaken, all parties in the case will be assisted by the primer issued by the Royal Society in conjunction with the Judicial College, entitled Forensic Gait Analysis: A primer for the courts.[875]

[875] Available from Royal Society: Science and the Law

15-9 Identification by DNA

ARCHBOLD 14-81; BLACKSTONE'S F19.27

Legal summary

1. Where DNA evidence is relied on, all parties in the case will be assisted by the primer issued by the Royal Society in conjunction with the Judicial College, entitled *Forensic DNA Analysis: A primer for the courts*.[876] There is now a requirement that all experts on DNA and fingerprints have to work from ISO approved and accredited laboratories.[877]

Profiling DNA material

2. Different regions or 'loci' in the DNA chain contain repeated blocks of 'alleles'. Modern analysis concentrates on 10 loci in the chain which are known to contain alleles which vary widely between individuals. There is also a gender marker. The sample is amplified using PCR. The blocks are identified using electrophoresis. Analysis of the result is achieved by means of laser technology which detects coloured markers for the alleles, converted by a computer software programme to graph form. The alleles are represented by numbers at each of the 10 known loci.

Low template DNA

3. Despite at one time being subjected to criticism and even being temporarily suspended following the decision in *Hoey*,[878] low template DNA (the technique by which a minute quantity of DNA can be copied to produce an amplified sample for analysis) was endorsed in an expert review commissioned by the Forensic Science Regulator.[879] The report also reached a favourable conclusion in respect of the precautions taken in UK laboratories against contamination.

4. In a thorough review of the state of science, the Court of Appeal in *Reed, Reed and Garmson*[880] held that the technique could be used to obtain profiles capable of reliable interpretation if the available quantity of DNA is above the stochastic threshold of between 100 and 200 picograms.[881] Challenges to the validity of the technique where the quantity is above that threshold should no longer be permitted in the absence of new scientific evidence. The judgment is a valuable source of information on the following topics: (1) the technique of conventional DNA analysis (paras.30 to 43); (2) the technique of analysis of Low Template DNA by the Low Copy Numbering (LCN) process and the phenomenon of stochastic effects (paras.44 to 49); (3) match probability (paras.52 to 55); (4) expert evidence of the manner and time of transfer of cellular material (paras.59 to 61; 81 to 103; paras.111 to 127); (5) the procedural requirements of CPR 33 for the admission of expert evidence (paras.128 to 134); and (6) analysis of

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876 Available from Royal Society: Science and the Law
877 The Accreditation of Forensic Service Providers Regulations 2018
878 [2007] NICC 49
879 A Review of the Science of Low Template DNA Analysis
880 [2009] EWCA Crim 2698
881 See para 74 for further discussion

mixed and partial profiles and the effect of that analysis upon the need for careful directions in summing up (paras.18 to 25; 178 to 215).

5. In *C*[882] it was held that the decision in *Reed* had not purported to lay down a rule establishing the need for a set minimum quantity of DNA; the only question was whether a reliable quantity could be produced despite the low quantity. *Broughton*[883] reached a similar conclusion, namely that the court in *Reed* had not said that evidence of DNA analysis was inadmissible where the quantity of available material fell below the stochastic threshold, but rather that:

> "… above this threshold a challenge to the validity of analysing LTDNA by the LCN process should not be permitted in the absence of new scientific evidence. However, the court did not hold or make at any observation to the effect that below the stochastic threshold DNA evidence is not admissible. To the contrary, the court explained at paragraph 48:
>
> "… Above that threshold … the stochastic effect should not affect the reliability of the DNA profile obtained. Below the stochastic threshold the electrophoretograms may be capable of producing a reliable profile, if for example there is reproducibility between the two runs."[884]

6. Thomas LJ concluded the answer was not to be found in a minimum threshold but in the general principles governing the admissibility of expert evidence:

> "A court must consider whether the subject matter of the evidence is part of a body of knowledge or experience which is sufficiently well organised or recognised to be accepted as a reliable body of knowledge or experience. If the field is sufficiently well established to pass the ordinary tests of reliability and relevance, then that is sufficient. The weight of the evidence should then be established by our familiar adversarial forensic techniques."[885]

7. At paragraph 41 of *Dawes*,[886] the court stated:

> "We reject any suggestion that the principle to be derived from *R v C* [2010] EWCA Crim 2578 dictates that there is a particular threshold below which scientific evidence is unreliable. To the contrary, in [26] Thomas LJ (as he then was) makes the point:
>
> > "In our judgement, counsel for the appellant was wrong in his view that a "knockout blow" could be achieved if he persuaded the judge that the amount of DNA in the minor male profile was below 100-200 picograms. The sole question was whether, despite the low quantity, a reliable profile could be produced. The judge accepted the evidence of the FSS 10 expert, uncontradicted as it was by any defence expert evidence. He reached the inevitable conclusion that the DNA results were sufficiently reliable to be admissible. It was for the jury to hear the evidence and determine the weight to be attached to it."

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882 [2010] EWCA Crim 2578
883 [2010] EWCA Crim 549
884 [2010] EWCA Crim 549 at para 31
885 [2010] EWCA Crim 549 at para 32. Citing *Reed* [2009] EWCA Crim 2698 at paras.111-113
886 [2021] EWCA Crim 760

> The commentary in [27] as to mixed profile, as was the case here, does not undermine that essential principle: that is, quantity is not necessarily an indicator of reliability."

8. In *Dlugosz*,[887] Thomas LJ offered guidance on the direction to a jury on low template DNA:

> "that provided it is made clear to the jury the very limited basis upon which an evaluation can be made without a statistical database, a jury can be assisted in its consideration of the evidence by an expression of an evaluative opinion by the experts. We consider that on the materials with which we have been provided, there may be a sufficiently reliable scientific basis on which an evaluative opinion can be expressed in cases, provided the expert has sufficient experience (which must be set out in full detail in the report) and the profile has sufficient features for such an opinion to be given. If the admissibility is challenged, the judge must, in the present state of this science, scrutinise the experience of the expert and the features of the profile so as to be satisfied as to the reliability of the basis on which the evaluative opinion is being given. If the judge is satisfied and the evidence is admissible, it must then be made very clear to the jury that the evaluation has no statistical basis. It must be emphasised that the opinion expressed is quite different to the usual DNA evidence based on statistical match probability. It must be spelt out that the evaluative opinion is no more than an opinion based upon [the expert's] experience which should then be explained. It must be stressed that, in contrast to the usual type of DNA evidence, it is only of more limited assistance."

Mixed and partial profiles

9. Each parent contributes one allele at each locus. The analyst may find in the profile produced from the crime scene specimen more than two alleles at a single locus. If so, the specimen contains a mix of DNA from more than one person. The major contribution will be indicated by the higher peaks on the graph. Separating out the different profiles is a matter for expert examination and analysis. The presence of mixed profiles allows the possibility that, while both contain the same allele at the same locus, one allele masks the other. Further, the presence of stutter, represented by stunted peaks in the graphic profile, may mask an allele from a minor contributor.

10. There may be recovered from the crime scene specimen a profile which is partial because, for one reason or another (e.g. degradation), no alleles are found at one or more loci. These are called 'voids'. The significance of voids lies in the possibility that the void failed to yield alleles which could have excluded the defendant from the group who could have left the specimen at the scene. In statistical terms a matching but partial profile will increase the number of people who could have left their DNA at the scene. It was the proper statistical evaluation of a partial profile which was the subject of appeal in *Bates*.[888] The Court of Appeal held that a statistical evaluation based upon the alleles which were present and did match (in that case 1 in 610,000) was both sound and

887 [2013] EWCA Crim 2
888 [2006] EWCA Crim 1395

admissible in evidence provided that the jury were made aware of the assumption underlying the figures and of the possibilities raised by the 'voids'.

Interpreting results

The role and obligations of the expert

11. Interpretation is a matter of expertise.[889] The analyst compares the blocks of alleles at each locus as identified from the crime specimen with their equivalent from the suspect's specimen. The statistical likelihood of a match at each locus can be calculated from the forensic science database. If a match is obtained at each of the 10 loci a match probability in the order of 1 in 1 billion is achieved. The fewer the number of loci in the crime specimen producing results for comparison, the less discriminating the match probability will be.

12. When the expert testifies, he/she should not overstep the line separating the expert's province from that of the jury. As held in *Doheny*,[890] the expert's role is to explain the nature of the match between the DNA in the crime stain and the defendant's DNA, and give the jury the random occurrence ratio. The expert should not be asked to opine as to the likelihood that it was the defendant who left the crime stain and should be careful to avoid terminology which could lead the jury to believe that he/she was expressing an opinion.

13. The court in *Reed* emphasised the importance of the expert following the obligation in [what was then] CrimPR, r.33.3(1)(f) and (g) [see now Crim PR 19] to identify areas in the report in relation to which there is a range of opinion. The scope of opinion should be summarised and reasons for the expert's own opinion be given. Any qualifications to the opinion should be made clear.[891]

'Match probability' and 'Likelihood ratio'[892]

14. If a person's DNA profile matches that of a crime sample, it is the expert's role to evaluate the significance of the match using statistical means.

    (1) The 'random occurrence ratio' (or 'match probability') is the statistical frequency with which the match in profile between the crime scene sample and someone unrelated to D will be found in the general population. A probability of 1 in 1 billion is so low that, barring the involvement of a close relative, the possibility that someone other than D was the donor of the crime scene sample is effectively eliminated. This significantly reduces the risk that the 'prosecutor's fallacy' will creep into the evidence or have any evidence upon the outcome of the trial.[893]

    (2) The 'likelihood ratio' is an expression of the comparative likelihood of a given DNA result being found in the context of two mutually inconsistent competing conditions such as "Proposition 1: D is a contributor to a mixed crimestain. Proposition 2: D is not a contributor to the crimestain". The *raw* likelihood of the DNA finding in each circumstance is first evaluated independently and then the likelihood **ratio** is an expression of one

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889 As with all expert evidence compliance with CrimPR Part 19 is important.
890 [1996] EWCA Crim 728
891 [1996] EWCA Crim 728 para 131
892 See for a clear explanation of these terms ICCA RSS
893 *Gray* [2005] EWCA Crim 3564 at para 21 to 22

likelihood as against another. The likelihood ratio might be expressed as follows: "The DNA findings are around one billion times more likely if Proposition 1 is true".

The 'prosecutor's fallacy'

15. The 'prosecutor's fallacy' confused the random occurrence ratio with the probability that the defendant committed the offence. In *Doheny and Adams*,[894] Phillips LJ demonstrated it by reference to a random occurrence ratio of 1 in 1 million. This did not mean that there was a 1 in a million chance that someone other than the defendant left the stain. In a male population of 26 million there were 26 who could have left the stain. The odds of someone other than the defendant having left the stain depend upon whether any of the other 26 is implicated.[895]

The need for a sufficiently reliable scientific basis

16. In *Dlugosz*,[896] three conjoined appeals which each raised issues as to the evaluation of low template and mixed DNA evidence, it was argued that unless statistical evidence of the relevant DNA match probability could be given, an evaluative opinion should not be admitted either. The court rejected the argument that the jury in such cases lacked a firm basis on which to evaluate the significance of the evidence given. Although in determining the admissibility of any expert evidence the court must be satisfied that there is a sufficiently reliable scientific basis for it:

> "provided the conclusions from the analysis of a mixed profile are supported by detailed evidence in the form of a report of the experience relied on and the particular features of the mixed profile which make it possible to give an evaluative opinion in the circumstances of the particular case, such an opinion is, in principle, admissible, even though there is presently no statistical basis to provide a random match probability and the sliding scale cannot be used."[897]

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894 [1996] EWCA Crim 728. See also *Gordon* [1995] 1 Cr App R 290

895 *Blackstone's* at F18.30: "it may be that only one person in 1000 wears size 14 shoes, but even if D and the offender each wears size 14 shoes that does not mean there is only one chance in 1000 of D being innocent. There may indeed be other suspects, each of whom wears size 14 shoes."

896 [2013] EWCA Crim 2

897 [2013] EWCA Crim 2 at para 28. See also *Thomas* [2011] EWCA Crim 1295. The expert in the case was entitled to base her opinion on simulation experiments and on her lengthy experience as a forensic scientist. Her evidence could be tested in cross-examination and it was for the jury to assess its limitations and weight.

Procedural requirements

17. In *Reed, Reed and Garmson*,[898] the court emphasised the importance of pre-trial preparation and management, and the role of CrimPR 33 [now 19]. Thomas LJ gave the following guidance:

> "131 In cases involving DNA evidence,
>
> ii) It is particularly important to ensure that the obligation under Rule 33.3(1)(f) and (g)[899] is followed and also that, where propositions are to be advanced as part of an evaluative opinion … that each proposition is spelt out with precision in the expert report.
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> iii) Expert reports must, after each has been served, be carefully analysed by the parties. Where a disagreement is identified, this must be brought to the attention of the court.
>
> iv) If the reports are available before the PCMH, this should be done at the PCMH; but if the reports have not been served by all parties at the time of the PCMH (as may often be the case), it is the duty of the Crown and the defence to ensure that the necessary steps are taken to bring the matter back before the judge where a disagreement is identified.
>
> v) It will then in the ordinary case be necessary for the judge to exercise his powers under Rule 33.6 and make an order for the provision of a statement.
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> vi) We would anticipate, even in such a case, that, as was eventually the position in the present appeal, much of the science relating to DNA will be common ground. The experts should be able to set out in the statement under Rule 33.6 in clear terms for use at the trial the basic science that is agreed, in so far as it is not contained in one of the reports. The experts must then identify with precision what is in dispute – for example, the match probability, the interpretation of the electrophoretograms or the evaluative opinion that is to be given.
>
> vii) If the order as to the provision of the statement under Rule 33.6 is not observed and in the absence of a good reason, then the trial judge should consider carefully whether to exercise the power to refuse permission to the party whose expert is in default to call that expert to give evidence. In many cases, the judge may well exercise that power. A failure to find time for a meeting because of commitments to other matters, a common problem with many experts as was evident in this appeal, is not to be treated as a good reason.
>
> 132 This procedure will also identify whether the issue in dispute raises a question of admissibility to be determined by the judge or whether the issue is one where the dispute is simply one for determination by the jury."

18. The use of hearsay statements from laboratory staff and others engaged in the process of analysis is now expressly permitted by s.127 Criminal Justice Act 2003.

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898 [2009] EWCA Crim 2698 at paras 128 to 134

899 Now Crim PR, r 19(4)(f)

No principle that independent evidence linking the defendant and the crime is *always* required

19. In *Tsekiri*,[900] the Court of Appeal considered the question whether DNA on a moveable object at the scene of the crime could be sufficient on its own to establish a prima facie case. The case involved a fingerprint left on a door handle of a car that had been interfered with. Overturning a series of authorities including *Ogden*[901] and *Bryon*,[902] the Court noted that techniques of DNA analysis have improved markedly in the last decade and what was insufficient scientific evidence a decade ago will not necessarily be insufficient now.

> "In our view the fact that DNA was on an article left at the scene of a crime can be sufficient without more to raise a case to answer where the match probability is 1:1 billion or similar. Whether it is will depend on the facts of the particular case."

20. The Court in *Tsekiri* referred to a non-exhaustive list of relevant factors including the following:

    (1) Is there any evidence of some other explanation for the presence of the defendant's DNA on the item other than involvement in the crime, including an apparently plausible account from the defendant in interview or is the evidence unexplained?

    (2) Was the article apparently associated with the offence itself?

    (3) How readily movable was the article in question?

    (4) Is there evidence of some geographical association between the offence and the offender?

    (5) In the case of a mixed profile is the DNA profile which matches the defendant the major contributor to the overall DNA profile?

    (6) Is it more or less likely that the DNA profile attributable to the defendant was deposited by primary or secondary transfer?

21. The court concluded:

> "This is not an exhaustive list and each case will depend on its own facts. The crucial point is that there is no evidential or legal principle which prevents a case solely dependent on the presence of the defendant's DNA profile on an article left at the scene of a crime being considered by a jury."[903]

22. In *Jones*[904] the Court of Appeal concluded that the case should not have been left to the jury. DNA of D was in a mixed profile on a hand grenade. The jury were not assisted by expert evidence as to the improbability of secondary

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900 [2017] EWCA Crim 40
901 [2013] EWCA Crim 1294
902 [2015] 2 Cr.App.R 21
903 For an example of *Tsekiri* being applied see *Bech* [2018] EWCA Crim 448
904 [2020] EWCA Crim 1021 and see also *Killick* [202] EWCA Crim 785 where a prosecution appeal against a terminating ruling was rejected where the principal evidence was the finding of D's DNA on a screwdriver used in order to gain entry in the course of a burglary.

transfer. No sure conclusion could be reached as to the competing possibilities of direct and indirect deposit of D's DNA. The Court also considered geographical association. D lived in the area where the device was found. Emphasising that each case turns on its own facts, the Court concluded (para 30):

> "In a case where the DNA link itself was in question, such proximity might help, but that is not the issue here. Paradoxically, if this appellant lived in the north of Scotland or the west of Cornwall, the risk of innocent secondary transfer might be thought to be very much lower. If the appellant lived at a distance from Warrington it would arguably make secondary transfer less likely, through (for example) a casual handshake with a conspirator, or the vendor of the commercially available paintball grenade before adaptation."

23. *Tsekiri* and *Killick* were further considered in *Belhaj-Farhat*,[905] where the prosecution relied upon the defendant's DNA being discovered on a cigarette butt left inside the burgled premises. The appeal was dismissed the court commenting: "It cannot be elevated to a principle that because the court took one particular view of DNA evidence on one particular set of facts, that necessarily translates across to other cases on other facts, where the objects are different and the circumstances in which they had been found are different as well".[906] In a case where DNA evidence would have failed the *Tsekiri* test if it stood alone, but is supported by other independent evidence, the jury should be directed about the limited probative value of the DNA evidence. In *Reed, Reed and Garmson*,[907] the Court of Appeal approved the trial judge's approach of explaining to the jury at the outset of his consideration of the DNA evidence:

> "The important thing is this. No one suggests that this evidence on its own conclusively proves the guilt of the defendant on any count or goes anywhere near doing that. If all you had was the DNA evidence you could not begin to find [the defendant] guilty on any of these counts because all the DNA evidence does (at the most) is show that he is one of the men who may have committed these offences and that is perhaps to put it at its highest."

24. The situation will be different where the crime is one such as simple possession of a weapon. In this case the jury is being invited to use the DNA evidence to establish a direct link between D and the article in question. Subject to being satisfied about the way the DNA was transferred the jury can convict on that evidence.[908]

> "The presence of DNA on the article, on the muzzle of a gun in this case, is capable of being evidence of possession of the article … The possibility of indirect transfer was a matter for the jury to address on the basis of all of the evidence in the case. If they concluded that it might be the case that it was indirectly transferred in some way, then they would of course have to acquit, but that was not a necessary conclusion and the matter was properly left to

905 [2022] EWCA Crim 115
906 Para 32
907 [2009] EWCA Crim 2698 at paras 128 to 134
908 *Sampson* [2014] EWCA Crim 1968

them, provided that they were correctly directed as to the burden and the standard of proof."[909]

Directions

25. DNA evidence, if disputed, is always intricate both in terms of the scientific process and the factual detail. In most cases the existence of DNA is unlikely to be in issue: the main issue is likely to be the interpretation of the scientific findings in terms of match probability, which is usually expressed in terms of the probability of a match between people of the same gender who are unrelated being in the order of one in so many (often expressed in millions or even one billion). The summing up must focus on the real issues in relation to such evidence.
26. A direction about expert evidence will be necessary: see Chapter 10-3 above.
27. The direction is likely to be complex and should be discussed with the advocates in the absence of the jury before closing speeches.
28. Depending on the issues in the case the following matters may need to be considered when reviewing such evidence for the jury:
    (1) A brief summary of the evidence which has been given to explain what DNA is and how evidence of its presence may be relevant in the trial process. This may include evidence of full and/or partial profiles.
    (2) A summary of the DNA findings.
    (3) Where there is evidence of a partial DNA profile the jury must be made aware of its inherent limitations.
    (4) Where there is evidence of a mixed sample (DNA from more than one person) care must be taken to remind the jury of the detail of the findings and any opinion/s expressed in relation to those findings.
    (5) Avoiding the 'prosecutor's fallacy', the random occurrence ratio or, if used, the likelihood ratio, should be explained. The direction should be expressed in terms of probability, for example:

        "…if you accept the scientific evidence called by the Crown there are probably only 4 or 5 white males in the UK from whom the semen stain could have come. You must look at that scientific evidence and all the other evidence in order to decide whether it was D who left that stain or whether it is possible that it was left by another of the small group of men who share the same DNA characteristics".

    (6) A summary of any explanation given by D in relation to the DNA findings: in most cases D will accept that DNA which matches D's DNA profile is his/hers and will give an explanation as to how it came to be where it was found.

[909] See also *FNC* [2015] EWCA Crim 1732

(7) The jury should be reminded that the DNA findings are of themselves only evidence of a probability of contact between D and the place from which the sample was taken and to the extent shown by the profile. In considering their verdict the jury must have regard to all of the evidence in the case.

(8) The jury should be reminded of evidence which is capable of supporting, not capable of supporting and capable of undermining the DNA evidence.

(9) Where the profile of DNA found at a particular location does not match that of D, this may, depending on the circumstances of the case, be capable of providing powerful evidence which undermines the prosecution case. If this is so, the jury must be directed appropriately.

Example

Explanation of DNA[910]

NOTE: It is important that any explanation is a summary of the evidence given by a forensic scientist and not 'evidence' given by the judge. This example is adapted from an expert witness statement made in 2013.

DNA (Deoxyribo-nucleic acid) is a complex chemical found in almost all cells in the human body which may be deposited onto an item or onto another person. Where DNA is found it is possible to prepare a DNA profile, that is to say a 'picture' of the components of the DNA, which may then be compared with another DNA profile, obtained from a reference sample or reference samples taken from one or more people. If the DNA profiles which are compared are different then the DNA could not have originated from the person with whose reference sample the DNA found has been compared. If they are the same then the evidential significance of the match may be evaluated.

No person's DNA profile is unique, and so two or more people will have the same DNA profile. Because of this, the existence of a particular DNA profile in a particular situation cannot prove that a particular person was involved in that situation but instead the existence of the profile together with other scientific data may be used to give an indication of the probability, not of that particular person being involved, but of one of a group of people, of which that person is one, being involved.

This indication of probability is provided by reference to the 'random occurrence ratio'. This is the frequency with which DNA characteristics matching the DNA sample found in a particular situation are likely to be found in the population at large.

[910] In respect of which there is invaluable assistance to be gained from the Royal Society 'Judicial Primers': Royal Society: Science and the Law "Each primer presents an easily understood and accurate position on the scientific topic in question, as well as considering the limitations of the science, challenges associated with its application and an explanation of how the scientific area is used within the judicial system".

The DNA analysis technique used in this case examined 10 areas, plus another area that indicates the gender of the source of the DNA. Within each area are 2 results: one from the mother and one from the father of the person whose DNA it is. The presence of more than 2 results at one area in the DNA profile indicates the presence of a mixture of DNA from more than one person. Where a mixture of DNA is present it can still be possible to make a statistical assessment of the likelihood of the findings if a person has contributed to the DNA, rather than that they have not and the results are present by chance.

Analysis in a particular case

In this case we heard of DNA being found on/at {location}. We also heard that this DNA has been compared with a sample of DNA which was taken from D and that the DNA which was found matches D's DNA. It also matches {number} other members of the population. Based on this evidence E said that the probability of the DNA which was found having been left on/at {location} by someone other than D was {data}. That is the random occurrence ratio in this case.

If you accept this evidence, it means that there are probably only {number and category … e.g. 5 people/males/white males} in the UK from whom that DNA could have come. D is one of them. What you must decide on all the evidence is whether you are sure that it was D who left that DNA or whether it is possible that is was one of that other small group of {people/males/white males} who share the same DNA characteristics.

Defendant's explanation: Denial that DNA is D's and assertion that the exhibits have been contaminated

D denies that the DNA which was recovered from {location} is his/hers and has suggested in his/her evidence that a possible reason for this is that the DNA taken from {location} has somehow been exposed to D's DNA sample during the course of the scientific examination of these exhibits at the laboratory. You should bear in mind that, as it is for the prosecution to prove the case against D, it is for the prosecution to establish that the DNA taken from {location} has not been contaminated: it is not for D to establish that it has.

As to this issue you will remember the evidence which E gave about this possibility when E was cross-examined, namely that {review evidence}. If having considered that evidence you decide that the DNA taken from {location} may have been contaminated, then you will take no account of this evidence at all. If on the other hand you are sure that the DNA taken from {location} has not somehow been mixed with D's DNA then you are entitled to take the evidence about DNA into account when you are considering whether it has been proved, so that you are sure of it, that D is guilty.

Defendant's explanation: Admission that the DNA is D's and suggestion of how it may have been in the place in which it was found

D has accepted that the DNA found at/on {location} is his/hers but D has given evidence that {review evidence}. W's evidence on the other hand is that {review evidence}.

You will have to consider these two conflicting accounts and decide whether the account which D has given is, or may be true, or whether you can be sure that it is W who has told you the truth. If you find that D's account is, or may be, true then this would provide a possible explanation for the presence of D's DNA at/on {location} which is not incriminating. On the other hand if you find W's account is true, it follows that you will reject D's account, and in this event you are entitled to consider the DNA evidence when you are deciding whether the prosecution have established, so that you are sure of it, that D committed the offence.

Other factors

A direction in relation to expert evidence must also be given (see Chapter 10-3 above) which should include a similar warning to this:

I should point out to you that the expert's findings and evidence are in themselves only evidence of a **probability** of contact between D and the location from which the DNA sample was taken. This evidence does not in itself prove that D committed the offence with which D has been charged and, in order to reach your verdict, you must have regard to all of the evidence in the case of which this is but a part.

As to the other evidence in the case which is capable of supporting/not capable of supporting/undermining the DNA evidence {review evidence}.

Glossary

Term	Definition
Allele	One member of a pair or series of genes which control the same trait. Represented by forensic scientists at each locus as a number.
Allele 'drop in'	An apparently spurious allele seen in electrophoresis which potentially indicates a false positive for the allele. A potentially spurious contribution to the mathematical analysis is known as a 'stochastic effect' of LCN when the material analysed is less than 100-200 picograms (one 10 millionth of a grain of salt).
Allele 'drop out'	An allele which should be present but is not detected by electrophoresis, giving a false negative. Known as a 'stochastic effect' of LCN as above.
DNA	Deoxyribonucleic acid in the mitochondria and nucleus of a cell contains the genetic instructions used in the development and functioning of all known living organisms.
DNA profile	Made up of target regions of DNA codified by the number of STR (see below) repeats at each locus
Electrophoresis	The method by which the DNA fragments produced in STR are separated and detected.
Electrophoretogram	The result of electrophoresis produced in graph form.
Locus/loci	Specific region(s) on a chromosome where a gene or short tandem repeat (STR) resides. The forensic scientist examines the alleles at 10 loci known to differ significantly between individuals.
Low template DNA / Low copy numbering	By increasing the number of PCR cycles from the standard 28-30 to 34, additional amplification can produce a DNA profile from tiny amounts of sample
Masking	When two contributors to a mixed profile have common alleles at the same locus they may not be separately revealed; hence pair 'masks' the other.
Mixed profile	Profile from more than one person, detected when there are more than two alleles at one locus. There will frequently be a major and a minor contributor in which the minor profile is partial.
NDNAD	National DNA Database.
PCR	Polymerase chain reaction, a process by which a single copy or more copies of DNA from specific regions of the DNA chain can be amplified.

SGM Plus	Second Generation Multiplex Test: an Amplification kit used to generate DNA profile. It targets 10 STR loci plus the gender marker.
Stochastic threshold	Above which the profile is unlikely to suffer from stochastic effects (i.e. potentially spurious effects), such as allelic drop out.
STR	Short tandem repeat, where a part of the DNA molecule repeats. Comparison of the pattern or blocks produced is the modern form of DNA profiling, in use since the 1990s.
Stutter	The PCR amplification of tetranucleotide short tandem repeat (STR) loci typically produces a minor product band shorter than the corresponding main allele band; this is referred to as the stutter band or shadow band. They are well known and identified by analysts
Voids	A locus at which no alleles are found in the crime specimen probably through degradation of the material. The defendant may say that the alleles which should have been there might have excluded him/her.

16. DEFENDANT – THINGS SAID

16-1 Confessions

ARCHBOLD 15B-1; BLACKSTONE'S F18.1

Legal summary

1. For the purposes of PACE, a confession is "any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise": s.82(1).

Mixed statement

2. The evidential effect of a 'mixed statement' (i.e. comprising both admissions and exculpatory/self-serving assertions) was explained by Lord Lane CJ in *Duncan*[911] (since approved by the House of Lords in *Sharp*):[912]

> "… the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies."

3. While *Duncan* concerned a defendant who had not given evidence, the principle that the whole statement is admissible as evidence of the truth of the matters stated applies whether D gives evidence or not. As to the weight to be attached to the exculpatory part of a mixed statement, Lord Lane CJ held that:

> "… where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight."[913]

4. In *Hamand*[914] the Court of Appeal held that the exculpatory parts of a mixed statement were capable of discharging an evidential burden on D (e.g. to raise the issue of self-defence or loss of control).

5. In *Papworth*,[915] applying *Garrod*[916] it was held that the rule is based on fairness to D and simplicity for the jury. The judge should be encouraged to estimate at the end of the evidence whether the Crown placed significant reliance on the incriminating statements; if so, "the more it is likely that the jury should be told that the parts which explain or excuse those incriminating parts are also evidence in the case."

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911 (1981) 73 Cr App R 359 at 365
912 [1988] 1 All ER 65
913 (1981) 73 Cr App R 359 at 365
914 (1985) 82 Cr App R 65
915 [2007] EWCA Crim 3031
916 [1997] Crim LR 445. See also *Shirley* [2013] EWCA Crim 1990

6. Where the prosecution relies on a series of inculpatory remarks in interview the judge should not direct the jury to dismiss them as merely reaction.[917] Care needs to be taken not to misdescribe mixed statements. See also *Greenhalgh*[918] where the judge was in error by describing a mixed statement as "not capable of being evidence in the case."

Admissibility of confessions

7. The admissibility of the confession is a matter for the judge. If the judge rules a confession inadmissible following a voir dire, the jury should not normally be told anything about it.[919]

8. A confession may be excluded on the following grounds:

   (1) Under s.76 PACE, that the confession was obtained:

      (a) by oppression[920] of the person who made it; or

      (b) in consequence of anything said or done[921] which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him/her in consequence thereof.

   (2) Under s.78 PACE, that having regard to all the circumstances, including the circumstances in which the evidence was obtained (e.g. in breach of Code C),[922] the admission of the evidence would have such an adverse effect on

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917 *Gijkokaj* [2014] EWCA Crim 386

918 [2014] EWCA Crim 2084

919 Where the circumstances in which the accused came to confess are in dispute, the judge may need to hear evidence on the voir dire which may determine how the confession came to be made. The judge should not when deciding that issue admit or be influenced by evidence as to whether the confession is true: *Wong Kam-Ming v Queen, The* [1980] AC 247. If the judge rules a confession to be admissible, the defence can still try to persuade the jury otherwise. Even if the judge is satisfied that a confession was properly obtained, he/she must explain to the jury that they must not rely on it unless they too are satisfied of it *(Mushtaq (Ashfaq Ahmed)* [2005] UKHL 25; [2005] 1 WLR 1513 and *Al-Jaryan (Muner)* [2020] EWCA Crim 440).

920 It was held in *Fulling* that the word 'oppression' in the Police and Criminal Evidence Act 1984 s.76(2)(a) should be given its natural and ordinary meaning, which imports some harsh, wrongful, cruel or unjust treatment of a suspect. This is broader than the definition in s.76(8) which is to include "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)" Per curiam: a confession may be invalid under the provisions of s.76(2)(b) of the 1984 Act even where there is no suspicion of improper behaviour. *Fulling* [1987] QB 426; [1987] 2 WLR 923

921 A breach by the police of an obligation under PACE or PACE Code C will not lead to automatic exclusion of a confession obtained in consequence (*Delaney* (1988) 88 Cr App R 338), though it may, on its own or in combination with other factors, provide evidence that s.76(2)(b) has not been complied with.

922 NB look out for the introduction of new Codes and see *Sheppard* [2019] EWCA Crim 1062 on when the caution should be administered, particularly where it is unclear at the outset whether D is a witness or a suspect. On whether Code C applies to confessions to a prison officer see *Harper* [2019] EWCA Crim 343. In *Ward* [2018] EWCA Crim 1464 it was held that a judge had not erred in allowing evidence of confessions, made to a volunteer appropriate adult at the police station, to be admitted at D's trial for child sex offences.

the fairness of the proceedings that the court ought not to admit it. Even a clear and admitted breach, though potentially to be deplored, will not lead to the confession being excluded if it has not operated in a way prejudicial to the accused.[923]

(3) Under the court's common law discretion to exclude evidence so as to protect D from an unfair trial (preserved by s.82 PACE).[924]

9. If the confession is admitted in evidence, D is not precluded from raising before the jury matters relevant to their consideration of the reliability and truth of the confession and the weight to be given to the confession is a matter for the jury.[925] If D continues to argue that the confession was obtained as a result of oppression or any other improper means, the jury should not be told that the judge has already considered such matters and ruled the confession admissible.[926] The jury need only be told that if they conclude that the confession was, or may have been, obtained as a result of oppression, or in consequence of anything said or done which was likely to render it unreliable, they should give it no weight and disregard it.[927]

10. Where the confession is the sole evidence relied upon by the prosecution, the court needs to be especially vigilant to ensure that it was reliable and fair. Parliament did not intend to impose a high burden upon a defendant seeking to challenge a confession: *Berres*.[928]

11. Where a confession made by a 'mentally handicapped'[929] person not in the presence of an independent person is received in evidence, and the case against the accused depends wholly or substantially on a confession by the accused, the court must warn the jury that there is a "special need for caution

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923 *Canale* [1990] 2 All ER 187

924 By s.76(4) the admissibility of other prosecution evidence (such as a concealed murder weapon or a sample of the accused's writing) discovered as a result of a confession is not prejudiced merely because the confession itself is inadmissible under s.76(2). But the prosecution cannot go on to prove that this was found as a result of D's confession unless the relevant part of the confession itself is admissible (s.76(5)). Section 76 here follows the common law as laid down in *Warickshall* 168 E.R. 234, *Voisin (Louis Marie)* [1918] 1 K.B. 531 and *Berriman* (1854) 6 Cox CC 388. A similar rule applies to a co-accused who seeks to rely on evidence discovered as a result of a confession that is inadmissible under s.76A(2) (see s.76A(4) and (5)). This rule appears to be compatible with art.6 of the ECHR: see *Gafgen v Germany* (22978/05) (2011) 52 E.H.R.R. 1; *HM Advocate v P* [2011] UKSC 44; [2011] 1 W.L.R. 2497

925 *Murray* [1951] KB at 393; *Chan Wei Keung* [1967] 51 Cr App R 257 at 265; *Mushtaq* [2005] 1 WLR 1513

926 *Mitchell* [1998] AC 695; *Thompson* [1998] AC 811

927 *Musthaq* [2005] 1 WLR 1513 para [47]. Even when not obtained by oppression, a confession may still be inadmissible if obtained, "in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof". That is not the same as asking whether this confession is reliable, or whether this particular accused was affected by whatever was said or done (*Proulx v Governor of Brixton Prison* [2001] 1 All E.R. 57).

928 [2014] EWHC 283 (Admin)

929 This is the term used in s.77

before convicting the accused in reliance on the confession" (s.77 PACE).[930] In practice such a confession is likely to be excluded under either s.76 or s.78.[931]

NOTE: For confessions in cases where there are co-accused see Chapter 14-15.

Directions

12. A confession that is a statement adverse to the interests of D may have been made in a number of different circumstances e.g. to an acquaintance, a stranger or to the police in interview.

13. Specific directions will depend on the circumstances of the case, but the following should be considered:

    (1) A review of the terms of the confession.

    (2) If the fact of the confession is disputed, the jury must decide whether they are satisfied that a confession was made. Accordingly, the jury should be reminded of any evidence tending to support and any evidence tending to rebut the making of the confession.

    (3) If the fact of the confession is admitted but it is disputed that it is true, the jury should be reminded of any evidence relevant to this issue.

    (4) If it is alleged that the confession was made to the police as a result of oppression, the jury must be directed that they may rely upon the confession only if they are sure that there was no oppression. The jury should be reminded of any evidence relevant to this issue.

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930 By PACE s.77(3), 'independent person' does not include a police officer or person employed for, or engaged on, police purposes; 'mentally handicapped' means a person in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning. Where the prosecution case against a mentally handicapped defendant depends wholly or substantially on a confession made by him/her in the absence of an 'independent person' (who will usually be an 'appropriate adult' attending in accordance with PACE Code C) the jury must be warned that there is a 'special need for caution' before convicting him/her in reliance on that confession (s.77 and see *Al-Jaryan (Muner)* [2020] EWCA Crim 440). In *McKenzie (David Stuart) (Practice Note)* [1993] 1 WLR 453, the Court of Appeal went further: (1) Where the prosecution case depends wholly upon confessions; (2) the defendant suffers from a significant degree of mental handicap; and (3) the confessions are unconvincing to a point where a jury properly directed could not properly convict upon them, then the judge, assuming that he/she has not excluded the confessions earlier, should withdraw the case from the jury. The confessions may be unconvincing, for example, because they lack the incriminating details to be expected of a guilty and willing confessor, or because they are inconsistent with other evidence, or because they are otherwise inherently improbable.

931 The court in *Moss* (1990) 91 Cr App R 371 thought that s.77 was aimed at two possible cases: (a) where a confession has been properly obtained from a mentally handicapped person in the absence of an independent person in the course of an 'urgent interview' as permitted by Code C; (b) where the interview was in breach of Code C but there was only 'one interview during a comparatively short period of custody'.

(5) If the confession is said to have been made in breach of the Codes of PACE, the breach/es alleged and the prosecution's response should be reviewed and the jury directed that if they consider there was, or may have been, a breach of the Code they must consider the effect that this may have upon the reliability of the confession and the weight that they attach to it.

(6) If a confession is said to have been made by a D who is 'mentally handicapped' and was not made in the presence of an independent person, the jury must be warned that there is a special need for caution before convicting D in reliance on that confession.

16-2 Exculpatory Statements

Legal summary

1. An exculpatory or self-serving denial is not generally admissible unless given in circumstances of spontaneity. The matter was examined in the case of *Tooke*,[932] in which the Court of Appeal said:

   > "…the test which should be applied is partly that of spontaneity, partly that of relevance and partly that of asking whether the statement which is sought to be admitted adds any weight to the other testimony which has been given in the case."

2. This approach was followed in the case of *Evans*[933] where it was held that the defendant's conversation after his police interview about some of the evidence could not be considered spontaneous.

3. This position is to be contrasted with a defendant having been spoken to at a stage when not a suspect, and where the answers obtained were not in themselves confessions, but were inconsistent with the case D was eventually to run at trial: see *Olive*.[934]

Example 1: Where the fact of the confession is not accepted/not admitted to amount to a confession

(a) Where there is an issue that D said what is alleged

W gave evidence that while W and D were {specify circumstances} D told W that {specify alleged words of confession}.

D accepted in his/her evidence that he/she and W were together {specify circumstances} but denied that he/she said this to W: D's case is that W's evidence about this is untrue and that W has invented it because {specify}.

You must first decide whether D did say this to W, taking account of all of the evidence which bears on this point namely {specify}. Unless you are sure that D did say this, you must take no account of it at all. If on the other hand you are sure that D did say it, then you must go on to decide whether it was true and reliable. If you are sure that it is true and that you can rely upon it, then you may treat it as evidence which supports the prosecution's case. If you are not sure that it is true, then you must ignore it altogether.

(b) Where there is an issue whether what was said amounts to a confession

W gave evidence that while W and D were {specify circumstances} D told W that {specify alleged words of confession}.

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932 (1989) 90 Cr App R 417
933 [2017] EWCA Crim 2386
934 [2022] EWCA Crim 1141

D's case is that although D did say these things, they do not amount to a confession and when you come to decide whether you can safely rely upon this evidence, you must consider D's explanation for having said what he/she did and the interpretation which D invites you to put on these words.

If you are not sure that what D said amounts to a confession, then you must ignore it completely. If you are sure that it does amount to a confession, then you must go on to decide whether it is true and reliable. If you are sure that it is true and that you can rely upon it, then you may treat it as evidence which supports the prosecution's case. If you are not sure that it is true, then you must ignore it altogether.

Example 2: Where the confession is admitted but said to be untrue or unreliable

The prosecution rely on evidence that when D was interviewed he/she said that {specify that part of the interview which is relied on as a confession} and they say that this amounts to a confession that D is guilty of the offence.

(a) Where there is an issue whether the confession is true

D's case is that although he/she did say these things they are not true, and D only said what he/she did because {specify}. When considering this you should have regard to all the circumstances in which it came to be made and decide whether any of those circumstances might cast doubt upon its truthfulness.

If you are not sure that it is true (or if you are sure that it is not true) then you must ignore it completely. If you are sure that the confession is true, then you may treat it as evidence which supports the prosecution's case.

(b) Potential unreliability

You should also consider the terms of D's alleged confession and consider whether D appears to have admitted something/s which cannot in fact be true. In particular {specify any weaknesses in the confession evidence which may have a bearing on its reliability}. Plainly if you find that the confession cannot be true, then you cannot rely on it and you must ignore it completely. If you are sure that some or all of the confession is true, then you may treat those parts as evidence which supports the prosecution's case.

(c) Where oppression or other impropriety is alleged

D has alleged that although he/she did make this confession, it is not true and that before D made it D had been told that ….{specify: e.g. D would not be going home until he/she had admitted what he/she had done}. First you must decide if that was, or may have been, said to D. You must then decide whether, despite that, D's confession was made voluntarily or whether it was, or may have been, made as a result of …. {specify}.

If you conclude that the confession was, or may have been, obtained as a result of oppression, or in consequence of anything said or done which was likely to render it unreliable, then you should give it no weight and ignore it.

If you are sure that it was made voluntarily, then you are entitled to take that into account when you are deciding whether or not the confession is in fact true. If, for whatever reason, you are not sure that the confession is true you must ignore it. If

you are sure that some or all of the confession is true, then you may treat those parts as evidence which supports the prosecution's case.

(d) Breach of Code C – no caution

It is agreed that when D was arrested on/at …{specify} D was cautioned {remind the jury of the words of the caution}. It is also agreed that when D was interviewed at the police station on/at …{specify} the caution was not repeated, nor was D reminded of it. During that interview D said a number of things which may, depending on what view you take of them, support the prosecution's case. When D gave evidence, D told you that if he/she had known that he/she did not have to say anything, he/she would not have done so.

The failure to caution D or make any mention of it was a breach of a Code of Practice with which the police are obliged to comply when interviewing any suspect – and you must consider what effect this may have had on the reliability of what D said in the course of the interview and also on the significance, if any, you decide to attach to it, given that D had not been told, or reminded, that he/she did not have to say anything.

You should bear in mind the points which have been made by both the prosecution and the defence about this, namely that {specify}.

If, having considered these points, you are not sure that what D said in interview was the truth then you must take no account of it. If you are sure that despite the fact that when interviewed D was not cautioned, or reminded of the caution, what D said was the truth, and that it would be fair to rely on this evidence as supporting the prosecution case then you may do so.

16-3 Lies

ARCHBOLD 4-461; BLACKSTONE'S F1.21

Legal summary

1. A defendant's lie, whether made before the trial or in the course of evidence or both, may be probative of guilt.[935] A lie is only capable of supporting other evidence against D if the jury are sure that:[936]
   (1) it is shown, by other evidence in the case, to be a deliberate untruth; i.e. it did not arise from confusion or mistake;
   (2) it relates to a significant issue;
   (3) it was not told for a reason advanced by or on behalf of D, or for some other reason arising from the evidence, which does not point to D's guilt.[937]
2. The direction should be tailored to the circumstances of the case, but the jury must be directed that only if they are sure that these criteria are satisfied can D's lie be used as some support for the prosecution case, but that the lie itself cannot prove guilt.[938] It is important that care is taken to make clear these criteria.[939]
3. If the issue for the jury is whether to believe the prosecution witnesses rather than D, and doing so will necessarily lead them to conclude that D was lying in the account he/she gave, such a direction is not necessary.[940] This was reiterated in the case of *LW*.[941]
4. Similarly, a lies direction is not needed where D's explanation for his/her admitted lies can be dealt with fairly in summing-up.[942]

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935 *Goodway* (1994) 98 Cr App R 11
936 *Lucas* (1981) 73 Cr App R 159, CA. See also *Burge and Pegg* [1996] 1 Cr App Rep 163
937 *Goodway* (1994) 98 Cr App Rep 11; *Taylor* [1998] Crim LR 822, CA
938 *Strudwick and Merry* (1994) 99 Cr App R 326 at p. 331
939 *Sunalla* [2014] CN 1404, CA
940 *Harron* [1996] 2 Cr App R 457, if the jury were told they could rely on such lies as evidence of D's guilt they would be likely to engage in circular reasoning – "we believe V therefore D is a liar therefore that is a good reason to believe V and convict D." See also *Middleton* [2001] Crim LR 251
941 [2018] EWCA Crim 1986. The Court of Appeal agreed that the trial judge was wrong to dismiss the argument for a *Lucas* direction in the absence of admitted lies. However, the judge was right to say that the case turned wholly on the jury's assessment of the credibility of X and D about events. There was no need for a lies direction (see paras 14 and 15) because D had pleaded guilty to some allegations but disputed an allegation of sexual assault in the same incident. See further on this topic *Mann* [2019] EWCA Crim 1200
942 *Saunders* [1996] 1 Cr App R 463 at pp. 518–19

5. A lies direction is normally only required in four situations[943] (which may overlap) as described in *Burge and Pegg*:
   (1) "Where the defence relies on an alibi;[944]
   (2) Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by D;
   (3) Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved;
   (4) Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so."
6. A lies direction is not necessarily needed where D's explanation for his/her admitted lies can be dealt with fairly in summing-up.[945]
7. Where D told lies in interview and did not mention matters on which D has relied in his/her defence a single direction should be given which addresses both points: giving separate directions about lies and possible s.34 CJPOA inferences is always unhelpful. The judgment in *Spottiswood*[946] provides a detailed analysis of the interrelationship between lies and s.34 and should be considered compulsory reading if there is the potential to give both a lies and failure to mention direction to the jury.
8. In *Pitcher*[947] the court had occasion to consider a lies direction given in respect of a non-defendant witness. The court considered that the judge had been correct to give such a direction although suggested it would have been better if the direction had not suggested a degree of equivalence with the lies direction given in respect of D. The court commented at para 55:

   "…custom-built directions ….. may require that specific guidance is given in such cases so that the jury does not wrongly exclude the possibility that the witness may have lied for reasons other than (as the defendant has suggested) his own guilt in respect of the offence in issue. Where, as here, the lies told by a non-defendant witness have taken on a particular relevance to the issues to be determined, the need to ensure that the jury adopts a coherent process of reasoning - allowing that there may be entirely innocent explanations for those lies - can extend to that witness, albeit that this will be

943 *Burge* [1996] 1 Cr App R 163
944 See also *Lesley* [1996] 1 Cr App R 39 on the desirability of warning the jury of false alibis sometimes being invented to bolster a genuine defence.
945 *Saunders* [1996] 1 Cr App R 463 at pp. 518–19 although the modern approach is to give a lies direction in the sort of situation that arose in that case.
946 [2019] EWCA Crim 949
947 [2021] EWCA Crim 1013; the court did not cross-refer to *Makunjuola* but doing such may be worthwhile.

in relation to the evaluation of the creditworthiness of his evidence rather than as potential corroboration of his guilt".

Directions

9. Whether a direction should be given to the jury in respect of any admitted or proved lie/s should be the subject of discussion with the advocates before speeches.[948] In particular, care should be taken to identify with the advocates the lie/s in respect of which the direction is to be given.

10. Before the jury may use an alleged or admitted lie against D, they must be sure of **all** of the following:

    (1) that it is either admitted or shown, by other evidence in the case, to be a deliberate untruth: i.e. it did not arise from confusion or mistake;

    (2) that it relates to a significant issue; and

    (3) that it was not told for a reason advanced by or on behalf of D, or some other reason arising from the evidence, which does not point to D's guilt.

11. The jury must be directed that unless they are sure of **all** of the above, the [alleged] lie is not relevant and must be ignored.

12. If the jury are sure of all of the above, they may use the lie as some support for the prosecution case, but it must be made clear that a lie can never by itself prove guilt.

13. In a case in which by telling lies in interview the defendant failed to mention matters on which he/she now relies in his/her defence, so that a s.34 inference direction is required [see Chapter 17-1] a direction combining both of these features, rather than two separate directions, should be given. In *Spottiswood*[949] the court did not consider that there was a material misdirection when the judge gave both a s.34 and a separate lies direction. Nevertheless, the judgment commended the provision of a combined direction along the lines provided in Example 3 herein.

Example 1: D admits telling a lie and gives a reason for having done so

When D was {e.g. arrested/interviewed/ charged} D said {specify}. D admits that he/she said this and accepts that it was a lie, but gave an explanation namely {specify}.

When you are considering this evidence, you must decide why D lied. In doing so you must bear in mind that a defendant who tells a lie is not necessarily guilty; sometimes a defendant who is not guilty will tell a lie for some other reason. The reason which D gave for telling this lie is that he/she was scared that he/she would not be believed if D gave the account which he/she gave in evidence (which D said is the truth) and in a state of panic instead said the first thing that came into his/her head. If you find that that is, or may be, true you must take no notice of this lie and not hold it against D.

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948 *Wainwright* [2021] EWCA Crim 122 at [43]
949 [2019] EWCA Crim 949

[Only if there is an evidential basis for the following: If you are satisfied that this was not the reason that D lied, you should also consider whether D may have been, and still is, afraid to tell the truth because {e.g. although it would help him/her, D has not wanted to incriminate any of his/her co-defendants and, for obvious reasons, has not felt able to say so}; and if you find that this is, or may be, the reason for D to have lied then again you will take no notice of this lie and not hold it against D.]

If however you are sure that D did not have this/these reason/s for lying, you may use this as evidence which supports the prosecution's case, but D is not to be convicted either wholly or mainly on the basis that he/she lied.

Example 2: D denies saying what is alleged

The prosecution say that when D was {e.g. arrested/interviewed/ charged} he/she said {specify}. They say that this was a deliberate lie which D made up in an attempt to cover up the fact that {specify}. D denies that he/she said this at all.

In considering this evidence you must answer three questions:

1. Did D say this? If you are not sure that D said it, then you must ignore this point completely.
2. If you are sure that D did say this, was it a deliberate untruth or may it have been said because of {e.g. confusion, mistake}. If you are not sure that it was a deliberate lie, then again you must ignore this point.
3. If you are sure that it was a deliberate lie, then why did D lie? In answering this question, you must bear in mind that a defendant who tells a lie is not necessarily guilty: sometimes a defendant who is not guilty will tell a lie for some other reason. In this case, given the evidence that {specify} you should consider whether D lied, or may have lied, because {specify}.

If, having considered these questions you are sure that D did say this, that it was a deliberate lie and that D did not have any 'innocent' reason for lying, you may use this as evidence which supports the prosecution's case, but D is not to be convicted either wholly or mainly on the basis that he/she lied. The fact that D lied does not, on its own, prove that D is guilty.

NOTE: These examples may be tailored to fit cases in which D admits that he/she said what is alleged but denies that it was untrue. The warning that D is not to be convicted wholly or mainly on the basis that he/she lied must be given in every case.

Example 3: D admits telling a lie in interview, gives a reason for having done so and accepts that by lying he/she did not mention something on which he/she has relied in court[950]

Before his/her interview D was cautioned in these words: 'You do not have to say anything but it may harm your defence if you fail to mention when questioned anything which you later rely upon in court.' D then went on to give an account to the police in which he/she said {specify}.

As part of his/her defence D has relied on {specify}.

D did not mention these things when he/she was questioned, but instead (as D accepts) told lies, and this may, as D was told in the words of the caution, 'harm his/her defence'. This is because you are entitled, subject to certain conditions, to draw the conclusion that these things are not true and have since been invented by D to support his/her defence.

You must be satisfied of three things before you are entitled to draw that conclusion. These are that at the time when D was interviewed:

1. the prosecution case being put to D was such that it called for an answer; and
2. D could reasonably have been expected to mention the matters on which he/she now relies; and
3. the only sensible reason that D did not do so is that D had not yet thought of them.

The defence ask you not to draw this conclusion from the fact that D did not mention these things in interview. They rely on D's evidence that he/she didn't tell the police about these things, and instead told the police what he/she now accepts are lies, so that/because {specify}.

If you find that this is or may be right, then you should not hold it against D that D told lies instead of mentioning these things in his/her interview. Neither the fact that D failed to mention them, nor the fact that D lied, could provide any support for the prosecution case.

If, on the other hand, you are sure there was no good reason for D telling lies to the police in interview instead of giving the account on which D now relies, you are entitled to use this as some support for the prosecution case; but you must not convict D wholly or mainly on the strength of it.

[950] This suggested direction was specifically approved in *Spottiswood* [2019] EWCA Crim 949 at [45]

17. DEFENDANT – THINGS NOT SAID OR DONE

17-1 Matters not mentioned when questioned or charged

ARCHBOLD 15B-52; BLACKSTONE'S F20.3

Legal summary

1. Sections 34(1) and (2) Criminal Justice and Public Order Act 1994 provide that if D is questioned under caution or charged with an offence and D fails to mention a fact later relied on in his/her defence at trial which, in the circumstances then prevailing, D could reasonably have been expected to mention, the jury, in determining whether D is guilty of the offence charged, may draw such inferences from the failure as appear 'proper'.
2. The object of s.34 is to deter late fabrication and to encourage early disclosure of genuine defences: *Brizzalari*.[951] In *Smith*[952] it was held that to give a s.34 direction where D had put forward no more than a bare denial would amount to a direction that guilt could simply be inferred from the exercise of the right to silence. This was not the purpose of s.34.
3. A failure to mention a fact which is admittedly true cannot found an adverse inference since the inference contemplated by s.34 is that the disputed fact is not true.[953]

Access to legal advice

4. By s.34(2A),[954] no inference may be drawn unless D was given the opportunity to consult a solicitor before being questioned or charged. In *McGowan v B*,[955] it was acknowledged that there was no rule to be derived from ECtHR jurisprudence that the right of access to legal advice during police questioning could only be waived if D had received advice from a lawyer as to whether or not he/she should do so. *Saunders*[956] makes clear that a waiver should be "voluntary, informed and unequivocal" in order to be effective.

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951 [2004] EWCA Crim 310
952 [2011] EWCA Crim 1098
953 *Webber* [2004] UKHL 1 at [28]; *Wheeler* [2008] EWCA Crim 688; *Chivers* [2011] EWCA Crim 1212 and *Zeinden* [2012] EWCA Crim 2489
954 Added by s.58 Youth Justice and Criminal Evidence Act 1999, to ensure compliance with *Murray v UK* [1996] 22 EHRR 29
955 [2011] 1 WLR 3121
956 [2012] 2 Cr App R 321

Defendant's failure to mention facts

5. The statutory right to draw inferences is aimed at the failure to mention facts on which reliance is placed at trial, not mere silence itself.[957] Facts may be relied upon, notwithstanding D has not asserted them in evidence. A positive case put in cross-examination may be sufficient.[958] If a prepared statement is submitted by or on behalf of D in lieu of answers to questions posed in interview, no inference is available unless D later relies on facts which do not appear in the prepared statement.[959] There is no requirement that the unmentioned fact must be one about which the accused has specifically been asked a question: see *Harewood and Rehman*.[960] A direction must not be given if, in the case of a D who gives evidence, D is not asked about the fact that he/she did not answer questions in interview.[961] In *Noor*[962] a s.34 direction was appropriate where D adopted something that he did not mention in interview (that W fell asleep in his taxi – which was a feature of the evidence upon which the prosecution relied) but added a suggestion that as a consequence he spent time trying to wake her.

Lies and section 34

6. Where the criticism is that D has varied his/her account between his/her statement (or interview) and his/her evidence, the right approach may be to consider a lies direction rather than a direction under s.34.[963] In *Hackett*,[964] it was confirmed that where s.34 and lies overlap it will usually be unhelpful to give two separate directions. The judge should select and adapt the more appropriate direction given the evidence in the case.[965] Having regard to these cases, Sir John Thomas emphasised in *Khan*[966] that "it is obvious that a jury needs tailored directions in cases of this kind". See further on this issue *Taskaya*.[967] In *Spottiswood*[968] the court did not consider the provision of both a s.34 and a separate lies direction to amount to a material misdirection. Nevertheless, the judgment commended the provision of a combined direction along the lines provided in Example 3 at 16-3 herein.

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957 *Brizzalari* [2004] EWCA Crim 310; *Argent* [1997] 2 Cr App R 27 at [32]; *T v DPP* [2007] EWHC 1793 (Admin) at [20] and [26]. An admission by the defendant during his/her evidence of a fact relied on by the prosecution does not without more constitute reliance by the defendant: *Betts* [2001] EWCA Crim 224 at [33], cf *Daly* [2001] EWCA Crim 2643. See recently on the use of a lies direction rather than s 34: *Molliere* [2023] EWCA Crim 228

958 *Webber* [2004] UKHL 1

959 *Knight* [2003] EWCA Crim 1977

960 [2021] EWCA Crim 1936

961 *Walton* [2013] EWCA Crim 2536

962 [2021] EWCA Crim 1767

963 *Turner* [2003] EWCA Crim 3108

964 [2011] EWCA Crim 380

965 *Rana* [2007] EWCA Crim 2261 at [10] to [11]. Where both directions are given, they should be logically justifiable and include those warnings which are appropriate to the facts: *Stanislas* [2004] EWCA Crim 2266 at [11] to [13]

966 [2012] EWCA Crim 774

967 [2017] EWCA Crim 632

968 [2019] EWCA Crim 949

7. In *Wainwright*[969] the court considered *Rana* and *Hackett* and concluded that separate directions dealing with lies and a failure to mention may well be the more appropriate course, particularly where the explanation for the lies is different from that which the D puts forward in respect of a failure to mention. The court also emphasised how important it is that the direction dealing with lies explains that there may be reasons for the lies that are not connected with guilt. The court also suggested that the proposed directions should be provided to advocates in advance and given to the jury in written form, even if they are only referred to during the evidence review stage of the summing up.

Which D could reasonably have been expected to mention

8. The question whether D, in the circumstances prevailing at the time, could reasonably have been expected to mention the relevant fact may depend upon a variety of factors which, usually, should be left for the jury to determine. In *Argent*,[970] Lord Bingham CJ identified the following factors (which do not create a closed list):

> "The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at that time. The courts should not construe the expression "in the circumstances" restrictively: matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant. When reference is made to "the accused" attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with such qualities, apprehensions, knowledge and advice as he is shown to have had at the time."[971]

The application of those factors was considered in *M*[972] and for a recent review of the relevant authorities and principles see *Black*.[973] See also *Harewood and Rehman* (above) acknowledging that the circumstances which the jury are to take into account include the length of the questioning, the relative significance or importance to any answers D does give in interview or to the contents of any prepared statement which D has given. The jury are entitled to infer that if the interviews lasted a considerable period, the questions are likely to have descended to a commensurate level of detail.

9. Where D gives evidence, D's reason for the failure to disclose should be explored.[974] An adverse inference will only be appropriate where the jury concludes that the silence can only sensibly be attributed to D not having an answer, or none that would withstand questioning.[975]

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969 [2021] EWCA Crim 122
970 [1997] 2 Cr App R 27
971 At [32]
972 [2012] 1 Cr App R 3
973 [2020] EWCA Crim 915
974 *T v DPP* [2007] EWHC 1793 (Admin)
975 *Daly* [2002] 2 Cr App R 201; *Petkar* [2004] 1 Cr App R 270

Legal advice and privilege

10. Ds often cite advice from a legal representative as the reason for remaining silent in the face of questioning: like any other reason (see *Argent* above), this is for the jury to examine.[976] Conversations between the suspect and their solicitor are subject to legal professional privilege. D is not bound to waive the privilege; if it is not waived, the right must be respected.[977] Privilege will be waived if D and/or D's solicitor give evidence of the content or reason for the advice,[978] but in such circumstances privilege will not be waived generally.[979] In *Seaton*,[980] the Court of Appeal confirmed that privilege is waived only to the extent of "opening up questions which properly go to whether such reason can be the true explanation for his silence … That will ordinarily include questions relating to recent fabrication, and thus to what he told his solicitor of the facts now relied on at trial."[981]

11. The question whether D could **reasonably** have been expected to mention the fact now relied on may ultimately depend on whether the jury is satisfied that legal advice is the **true** reason for the failure to disclose (*Betts*[982] by Maurice Kay LJ) endorsed by Lord Woolf CJ in *Beckles*.[983] In *Hoare*,[984] it was held that the question is whether D remained silent "not because of [the] advice but because he had no or no satisfactory explanation to give."[985]

The right to silence and the fairness of the trial

12. The ability of the jury to draw an inference of guilt from D's failure does not infringe the right to a fair trial enshrined in Article 6 ECHR. The ultimate question is whether the inference could fairly be drawn in the circumstances. The judge is required to emphasise D's right to silence and to ensure that the jury understand "that it could only draw an adverse inference if satisfied that the applicants' silence … could only sensibly be attributed to their having no answer or none that would stand up to cross- examination."[986]

13. However, in *Murray v UK*[987] and *Beckles v UK*,[988] the ECtHR emphasised that a conviction based wholly or mainly on the adverse inference infringed D's right to silence. Section 38(3) of the 1994 Act prohibits conviction based 'solely' upon an adverse inference.

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976 *Condron v UK* (2001) 31 EHRR 1
977 *Beckles* [2004] EWCA Crim 2766 at [43]
978 *Bodwen* [1992] 2 Cr App R 176; *Loizou* [2006] EWCA Crim 1719 at [84]
979 *Seaton* [2011] 1 Cr App R 2
980 [2011] 1 Cr App R 2
981 At [43(g)] by the Vice President
982 *Betts* [2001] EWCA Crim 224 at [53], approved in *Hoare* [2005] 1 WLR 1804 at [54] to [55]
983 [2004] EWCA Crim 2766
984 [2005] 1 WLR 1804
985 At [51]
986 *Condron v UK* [2001] 31 EHRR 1 at [61]. See also *Beckles v UK* [2003] 36 EHRR 162 at [64]
987 [1996] 22 EHRR 29
988 [2003] 36 EHRR 162

14. In *Chenia*[989] the Court of Appeal advised that trial judges should follow the then JSB's latest specimen direction (2001) since it seemed to have acquired the approval of the ECtHR in *Beckles v UK*. That direction included the words, "If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it".[990] In *Dybicz*[991] it was stated that:

> "As *Green* confirms, a judge is not obliged to adopt verbatim the terms of the specimen direction, although a failure to do so may carry the risk that an important matter may be omitted. The issue in this case is therefore not whether the judge repeated the precise words of the specimen direction, still less whether he repeated the precise words of the paraphrase in *Archbold.* Rather, it is whether the terms in which the judge directed the jury were correct in law and sufficient in the circumstances of the case."

The inferences available

15. The inferences available will depend on the development of the evidence in the case. The issue should be faced by the parties during the course of the evidence and requires discussion with the advocates before speeches. Possible inferences or conclusions will include the following:
    (1) The fact now relied on is true but D, for reasons of D's own, chose not to reveal it;
    (2) The fact now relied on is irrelevant;
    (3) The 'fact' now relied on is of more recent invention;
    (4) D's present answer to the prosecution case is fabricated;
    (5) D is guilty.
16. The obvious inference from a failure to mention a fact is that the 'fact' is not true. Rejection of the fact which D failed to mention may, or may not, justify a further adverse inference. If the fact now relied on is, in effect, D's defence to the charge, D's failure to mention it may undermine D's whole defence as a recent invention, put forward only after D had the opportunity to tailor his/her account to the prosecution evidence. Alternatively, the fact now relied on may be peripheral, secondary or irrelevant, such that the falsity of it would not necessarily undermine the defence. The appropriate inference may be that the 'fact' was invented to improve the defence, leaving open the question whether the defence is true or false.
17. Finally, the jury may be sure that D could reasonably have been expected to mention the fact but not sure that any adverse inference should be drawn, even an inference that the 'fact' is false. An adverse inference is not limited to recent fabrication.[992] It follows that care must be taken to ensure that the jury understands the range of permissible inferences and, if necessary, that the inference they may draw may be of no assistance or of limited assistance in judging D's guilt.

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989 [2002] EWCA Crim 2345
990 That a direction to this effect is required was confirmed in *Petkar* [2003] EWCA Crim 2668
991 [2020] EWCA Crim 1047
992 *Milford* [2001] Crim LR 330

The Mountford problem

18. Particular difficulties may arise when it is argued on behalf of D that the jury cannot determine the reason for D's failure to mention his/her defence without first deciding whether the defence is true. In *Mountford*,[993] the defendant, charged with possession of heroin with intent to supply, put forward the defence that the actual dealer was W, the main prosecution witness. D's explanation for failing to reveal this defence at interview was that D was reluctant to expose W to prosecution. The Court of Appeal held that the jury could not properly reject the defendant's reason for not mentioning this fact without first concluding that the fact was untrue: the very issue on which the defendant's guilt turned. In these circumstances, the judge should not have left s.34 to the jury.
19. *Mountford* has been much debated. It was followed in *Gill*,[994] but doubted in *Daly*[995] and *Gowland-Wynn*.[996] In *Chenia*,[997] it was held that the *Mountford* approach would only be appropriate in the "rare case", while in *Webber*[998] the House of Lords (while not going so far as to specifically overrule *Mountford)* considered that the s.34 direction had been rightly given by the trial judge in *Mountford*.[999]
20. If faced with the *Mountford* dilemma, the judge should leave the s.34 decision to the jury. The judge will need to explain that the jury must first decide whether the defendant could reasonably have been expected to mention the fact on which D now relies and, second and if so, what, if any, inferences are available from D's failure to do so. The jury might be sure of the first but not the second. The judge's responsibility is to ensure that the jury is properly guided.

The Direction

21. The trial judge should always consider whether a s.34 direction will assist on the facts of the particular case.[1000] There is a danger of the direction becoming overly complicated, and this is particularly so if the D has told lies as well – see *Spottiswood*.[1001]
22. There will be rare circumstances in which, although s.34 applies, the judge may be required to warn the jury against drawing any inference.
23. In *Pektar*[1002] Rix LJ stated that when a direction is given:

> "…the following matters should be set before a jury in a well-crafted and careful direction:
>
> (i) The facts which the accused failed to mention but which are relied on in his defence should be identified…

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993 [1999] Crim LR 575
994 [2001] 1 Cr App R 160
995 [2002] 2 Cr App R 201
996 [2002] 1 Cr App R 569
997 [2003] 2 Cr App R 83
998 [2004] 1 All ER 770
999 See also *Adetoro v UK* [2010] ECHR 609, app no 46834/06 at [51] to [54]
1000 *Essa* [2009] EWCA Crim 43
1001 [2019] EWCA Crim 949
1002 [2004] 1 Cr App R 22

(ii) The inferences …which it is suggested might be drawn from failure to mention such facts should be identified, to the extent that they may go beyond the standard inference of late fabrication…

(iii) The jury should be told that, if an inference is drawn, they should not convict "wholly or mainly on the strength of it…". The first of those alternatives ("wholly") is a clear way of putting the need for the prosecution to be able to prove a case to answer, otherwise than by means of any inference drawn. The second alternative ("or mainly") buttresses that need.

(iv) The jury should be told that an inference should be drawn "only if you think it is a fair and proper conclusion….

(v) An inference should be drawn "only if … the only sensible explanation for his failure" is that he had no answer or none that would stand up to scrutiny…In other words the inference canvassed should only be drawn if there is no other sensible explanation for the failure. That is analogous to the essence of a direction on lies.

(vi) An inference should only be drawn if, apart from the defendant's failure to mention facts later relied on in his defence, the prosecution case is "so strong that it clearly calls for an answer by him…".

(vii) The jury should be reminded of the evidence on the basis of which the jury are invited not to draw any conclusion from the defendant's silence…This goes with point (iv) above, because it is only after a jury has considered the defendant's explanation for his failure that they can conclude that there is no other sensible explanation for it.

(viii) A special direction should be given where the explanation for silence of which evidence has been given is that the defendant was advised by his solicitor to remain silent".

24. The judge is not prohibited from making fair comment on the evidence as long as what is said does not cross a line so as to become "unfair and overly robust"; see *Sakyi*.[1003]

Directions

25. The jury must be reminded that D was cautioned, highlighting the fact that D was told that:

(1) D did not have to say anything – and so D had a right to say nothing;

(2) it might harm D's defence if D did not mention when questioned something which he/she later relied on in court; and so D was aware that conclusions might be drawn against him/her if he/she failed to mention facts when he/she was being interviewed which he/she later relied on; and

(3) anything D did say might be given in evidence.

[1003] [2014] EWCA Crim 1784

26. The following should be identified in discussion with the advocates before speeches and then in the summing up to the jury:
    (1) the fact/s which D failed to mention but which is/are relied on in D's defence;
    (2) the reason/s, if any, which D gave for failing to mention those facts;
    (3) the conclusion/s which it is suggested might be drawn from D's failure to mention those facts, usually that it has been made up after the interview and is not true.
27. The jury must be directed that they may only draw such an inference:
    (1) if apart from D's failure to mention facts later relied on in his/her defence, the prosecution case as it appeared at the time of the interview was such that it clearly called for an answer; and
    (2) if there is no sensible explanation for D's failure other than that D had no answer at that time or none that would stand up to scrutiny. In this regard the jury must consider any explanation which D gave for his/her failure (including legal advice) and be told that unless they are sure that that was not the genuine reason for D's failure they should not draw any conclusion against D as a result of it; and
    (3) if they think it is fair and proper to draw such a conclusion.
28. The jury must be directed that, if they do draw such a conclusion, they must not convict D wholly or mainly on the strength of it. In *Bonsu*[1004] an argument that the jury should also be directed that they should only draw an inference if they concluded that the defendant had a "case to answer" was firmly rejected.
29. A special direction should be given if evidence has been given that D's reason for silence/not mentioning a fact/facts was that D had been advised by his/her solicitor to remain silent. The jury should be directed that:
    (1) if they decide that D was, or may have been, so advised this is an important matter for them to consider but it does not automatically prevent them from drawing any conclusion against D from his/her silence, because a person who is given legal advice can choose whether to follow it or not and was made aware at the time of the interview that his/her defence might be harmed if he/she did not mention facts on which he/she later relied at trial;
    (2) in deciding whether, despite having been advised to remain silent, D could reasonably have been expected to mention the fact/s on which D now relies they should take account of such things as D's age, D's maturity, the complexity of the facts on which D now relies and any evidence about the reason for the advice being given;
    (3) if they find that D had a good defence but chose to say nothing on his/her solicitor's advice they should not draw any conclusion against D;
    (4) if they are sure that the real reason for D's silence was that D had no defence to put forward and merely hid behind the legal advice which he/she had been given, they would be entitled to draw a conclusion against D.

[1004] [2020] EWCA Crim 660

30. If the judge has decided that no adverse conclusion arises from D's failure to mention a fact/s then consideration should be given as to whether it is appropriate to direct the jury that they should not hold that failure against D. It is a direction that the judge should discuss with the advocates, the potential need for such being very much a fact specific decision.[1005]

Example

Before his/her interview D was cautioned. D was told that he/she need not say anything. It was therefore his/her right to remain silent. However, D was also told that it might harm his/her defence if he/she did not mention when questioned something which he/she later relied on in court; and that anything he/she did say might be given in evidence.

As part of his/her defence D has relied upon matters that D did not mention when questioned [specify the facts to which this direction applies]. This may, as D was told in the words of the caution, "harm his/her defence". This is because you may conclude that D failed to mention those facts in interview because [select which inference(s) is/are contended]:

- he/she had no answer then;
- had no answer that he/she then believed would stand up to scrutiny;
- has since invented his/her account;
- has since changed his/her account to fit the prosecution's case;
- any other inferences [refer to what is contended].

You may only draw that conclusion if you think it is a fair and proper conclusion, and you are satisfied about three things. First, that when D was interviewed, he/she could reasonably have been expected to mention the facts on which D now relies. Second, that the only sensible explanation for D's failure to mention the facts is that he/she had no answer at the time or none that would stand up to scrutiny. Third, that apart from D's failure to mention those facts, the prosecution case as was put to D in interview was so strong that it clearly called for an answer by him/her.

If you do draw that conclusion, you must not convict him/her wholly or mainly on the strength of it. You may, however, take it into account as some additional support for the prosecution's case and when deciding whether D's evidence about these facts is true.

(Add if appropriate). The defence invite you not to draw any conclusion from D's silence/ failure to mention these facts, because [set out the evidence]. If you accept this evidence then you should not draw any conclusion from his/her silence/failure to mention these facts, do not do so. Otherwise, subject to what I have said, you may do so.

[1005] See *McGarry* [1999] 1 WLR 500 as explained in *Thomas* [2002] EWCA Crim 1308 (at paras 9 to 17), *Jama* [2008] EWCA Crim 2861 (at paras 14 and 15) and most recently in *Thacker and Ors* [2021] EWCA Crim 97 (paras 106-110)

(Where legal advice to make no comment in interview is relied upon, add the following to or instead of the above paragraph as appropriate). D has given evidence that he/she did not answer questions on the advice of his/her legal representative. If you accept the evidence that he/she was so advised, this is obviously an important consideration, but it does not automatically prevent you from drawing any conclusion from his/her silence. A person given legal advice has the choice whether to accept or reject it. D was warned that any failure to mention facts which he/she relied on at trial might harm D's defence. Take into account also **(here set out any circumstances relevant to the particular case, which may include the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise or the facts which the defendant has relied at the trial).** You must decide whether D could reasonably have been expected to mention the facts on which he/she now relies. If, for example, you thought that D may have had an answer to give, but genuinely relied on the legal advice to remain silent, you should not draw any conclusion against him/her. But, if for example, you were sure that D remained silent because he/she had no satisfactory answer to give, and merely latched onto the legal advice, you would be entitled to draw a conclusion against him/her, subject to the direction I have given you.

17-2 No account given for objects, substances or marks s.36 CJPOA or presence at a particular place s.37 CJPOA

ARCHBOLD 15B-68 and 15B-71; BLACKSTONE'S F20.34

Legal summary

Section 36

1. Section 36 CJPOA permits the jury to draw an inference adverse to D from his/her failure or refusal, when requested, to account for any object, substance or mark. "Substance or mark" includes the condition of clothing or footwear. The section concerns only the refusal to account for the object, substance or mark. Any adverse inference arising from the fact of possession of the object or the presence of the substance or mark is additionally available at common law.
2. The qualifying conditions are:[1006]
   (1) D was arrested by a constable (constable can, by statute, include certain other officers e.g. a customs officer);
   (2) There was on D's person, clothing or footwear, or otherwise in D's possession, or in a place where D was at the time of D's arrest, any object, substance or mark;
   (3) That constable or another constable investigating the case reasonably believed that the presence of the object, substance or mark may be attributable to the participation of D in an offence which the constable specified;
   (4) The constable informed D of this belief and requested D to account for the presence of the object, substance or mark;
   (5) The constable informed D in ordinary language, when making the request, of the effect under the section of a failure or refusal to account for the object, substance or mark;[1007]
   (6) If the request was made at an authorised place of detention, D was allowed the opportunity to consult a solicitor before the request was made;[1008]
   (7) D failed or refused to account for the object, substance or mark.
3. Section 36, unlike s.34, has no qualifying condition of reasonableness;[1009] the sole question is whether the suspect accounted for the object, substance or mark.[1010]
4. The strength of the inference increases with the suspicious nature of the circumstances. In *Connolly*,[1011] the defendant had been given an opportunity to account for an incriminating receipt in his pocket and his presence near the scene of the crime but remained completely silent. The Court of Appeal for

[1006] Unless stated, CJPOA 1994, s.36(1)
[1007] CJPOA 1994, s.36(4). See also PACE 1984, Code C, paras 10.11/11
[1008] CJPOA 1994, s.36(4A)
[1009] Per Rose L.J. in *Roble* [1997] Crim. L.R. 449 at 3
[1010] *Compton* [2002] EWCA Crim 2835
[1011] 10 June 1994, unreported

Northern Ireland accepted that it had been proper to draw an inference[1012] that the defendant intended to sit out the interrogation and assess the strength of the case against him, thereby keeping his options open in the event of being charged.

5. The direction laid down in *Cowan* "related to a case involving section 35 but it is common ground that the same principles apply when dealing with section 36": *Milford*.[1013]

6. In *Compton*,[1014] Buxton LJ emphasised the importance of correct directions being given. The most crucial point is that the jury must be told that they can only hold against a D a failure to give an explanation if they are sure the D had no acceptable explanation to offer.

Section 37

7. Section 37 CJPOA permits the jury to draw an inference adverse to D from D's failure or refusal to account, when requested, for his/her presence at a place[1015] where an offence was committed.

8. The qualifying conditions are:[1016]

   (1) D was arrested by a constable (constable can, by statute, include certain other officers e.g. customs officer);

   (2) D was found at a place at or about the time an offence was allegedly committed;

   (3) that the constable or another constable investigating the offence reasonably believed that D's presence at that place and time may be attributable to D's participation in the commission of the offence;

   (4) the constable informed D of this belief and requested D to account for his/her presence;

   (5) D was told in ordinary language by the constable making the request of the effect under the section of a failure to account for his/her presence;[1017]

   (6) if the request was made at an authorised place of detention, D had been allowed an opportunity to consult a solicitor before the request was made;[1018]

   (7) D failed or refused to account for his/her presence.

9. Section 37 does not require a finding that D could **reasonably** have been expected to account for his/her presence.

[1012] Under provisions equivalent to ss.36 and 37
[1013] [2002] EWCA Crim 1528 at [25]
[1014] [2002] EWCA Crim 2835
[1015] As defined in CJPOA 1994, s.38(1)
[1016] Unless stated, CJPOA 1994, s.37(1)
[1017] CJPOA 1994, s.37(3). See also PACE 1984, Code C, paras 10.10/11
[1018] CJPOA 1994, s.37(3A)

10. D shall not have a case to answer or be convicted of an offence solely or mainly on an inference drawn under the provisions: s.38(3).[1019]

Directions

NOTE: The content of the directions in respect of cases concerning ss.36 and/or 37 are similar and follow the same pattern.

11. The jury must be reminded of the qualifying conditions:
    (1) D was arrested by a constable;
    (2) D was arrested at a place at or about the time the offence for which D was arrested is alleged to have been committed or had on his/her person, or in or on D's clothing or footwear or otherwise in D's possession the object, substance or mark the subject of the direction.
    (3) A constable told D either at the scene or in the course of questioning that he/she believed the place D was at and/or any object/substance/mark found on D was attributable to D's participation in the offence.
    (4) The constable asked D to account for his/her presence at the place or the presence of the object/substance/mark.
    (5) The constable told D in ordinary language of the consequences of failing to account for his/her presence or the presence of the object/substance/mark namely that at any trial the court would be entitled to draw such inference as appeared proper: e.g. that D did not have an explanation to give.
12. The following should be identified in discussion with the advocates before speeches and then in the summing up to the jury:
    (1) the explanation relied on at trial for D's presence or the presence of any object/substance/mark which D failed to mention at the time D was asked on arrest/in interview;
    (2) the reason/s, if any, which D gave for failing to mention those facts;
    (3) the conclusion/s which it is suggested might be drawn from D's failure to mention those facts – usually that it has been made up after the interview and is not true.
13. The jury must be directed that they may only draw such an inference if they are sure there is no sensible explanation for D's failure other than that D had no answer at that time or none that would stand up to scrutiny. In this regard, the jury must consider any explanation which D gave for his/her failure and be told that, unless they are sure that that was not the genuine reason for his/her failure, they should not draw any conclusion against D as a result of it.
14. A special direction should be given if evidence has been given that D's reason for silence/not mentioning a fact/s was that D had been advised by his/her solicitor to remain silent. The direction should be in the same terms as that when a D fails to mention a matter subsequently relied on in court [see Chapter 17-1].

[1019] *Murray* (1996) 22 E.H.R.R. 29 at [47]

15. If the judge has decided that no adverse conclusion should be drawn from D's failure to mention a fact/s the jury must specifically be directed that they must not draw any adverse conclusion.
16. The jury must be directed that if they do draw such a conclusion they must not convict D wholly or mainly on the strength of it.

Example: failing to account for presence at the scene and presence of an object

On arrival at {specify} the police found D. They arrested D and discovered D had a {specify e.g. knife in his/her pocket}.

In interview D was asked why he/she had been there and why he/she had a {specify} with him/her. D was warned at the time that if he/she failed to explain these things it might harm his/her defence. D answered "No comment" to all questions/did not give a satisfactory answer.

The prosecution invite you to conclude that when D was interviewed D had no explanation for his/her presence at {specify} or his/her possession of {specify} and that the account D has given to you is one D has made up since.

You heard D's evidence that he/she had not answered this question in interview because {specify}.

The defence say that D has given you a true explanation for both D's presence and the possession of {specify} and that you should accept the reason D gave for not providing the explanation at the time of interview.

If you think D's account of why he/she did not give an explanation at the time is or may be true, then the fact that D did not give it at the time is irrelevant.

If you are sure that D's account for this is untrue you can take that into account as providing some support for the prosecution case, though you must not convict D wholly or mainly on the basis of his/her failure to explain these things.

17-3 Refusal to provide intimate samples

ARCHBOLD: 15A-192; BLACKSTONE'S: F20.54

Legal summary

1. By s.62(10) Police and Criminal Evidence Act 1984:

   "Where the appropriate consent to the taking of an intimate sample from a person was refused without good cause, in any proceedings against that person for an offence - …(b) the court or jury, in determining whether that person is guilty of the offence charged, may draw such inferences from the refusal as appear proper."

2. An intimate sample may only be taken if appropriately authorised and if the appropriate consent is given,[1020] and before it is taken an officer must inform the person of the following:

   (1) the reason for taking the sample;

   (2) the fact that authorisation has been given and the provision under which it has been given; and

   (3) if the sample is taken at a police station, the fact that it may be the subject of a speculative search.[1021]

3. The person must also be warned of the possible consequences of a refusal to give consent.

Directions

4. The police have a statutory power to request a suspect to provide samples of DNA/hair etc. [s.62 PACE].

5. The suspect does not have to provide a sample but if the suspect refuses without good cause, it may harm his/her defence.

6. The reason/s for refusal will have been explored in evidence and should be revisited with the advocates before speeches.

7. D may seek to rely upon legal advice for an initial refusal but the question of whether there was a subsequent opportunity to provide a sample is likely to have been explored in evidence and must be incorporated in the direction.

Example

When the police went to investigate a burglary at {location} they found blood staining on the inside of the broken window through which the burglar had entered. D was arrested having been seen running away from the scene. D denied being the burglar. When D was arrested, he/she was asked to provide a DNA sample to compare with the blood found within the house. D was warned that a failure to provide a sample might harm his/her defence.

[1020] PACE 1984, s.62(1) (subject to s.63B)
[1021] PACE 1984, s.62(5)

The comparison of D's DNA with that from the blood within the house could either have provided very powerful evidence that D was the burglar, or it might have provided evidence that D could not have been the person whose blood was within the house.

D declined to provide a sample for comparison. You have also heard that further opportunities to provide a sample were offered to D on two occasions when D appeared at this court for preliminary hearings in this case.

D has told you that he/she declined to provide a sample on the advice of the solicitor who was representing him/her at the police station and has told you that he/she has not had further advice.

We have not heard what advice D was given; such advice is confidential between solicitor and client. Whatever the advice was, both D and D's solicitor knew that a refusal to provide a sample might harm D's defence.

If you think it might be true that D has repeatedly refused to provide a sample because D was in good faith following the advice of his/her solicitor, you could treat that as a good reason for failing to provide a sample and not hold D's refusal against him/her.

If, however, you are sure that D is just using the solicitor's advice as an excuse for not providing the sample, you can use D's refusal as evidence in support of the prosecution case.

You must not convict D wholly or mainly on the evidence of a refusal to provide a sample.

17-4 Failure to make proper disclosure of the defence case

ARCHBOLD 12-81; BLACKSTONE'S D9.29

Legal summary

1. The disclosure obligations on the defence are set out in the CPIA,[1022] the Code of Practice issued under it and the CrimPR Part 15.[1023]
2. By s.5 CPIA, once the case is sent to the Crown Court and the prosecution case is served, D is required to serve a 'defence statement' on the prosecution and the court.[1024] This written statement should set out the basis on which the case will be defended.
3. Service of the statement must be within 28 days of the prosecutor complying or purporting to comply with the duty of primary disclosure.[1025]

Contents of a defence statement

4. Section 6A(1)[1026] sets out the areas which the defence statement must cover:
   (1) the nature of D's defence, including any particular defences on which D intends to rely;
   (2) the matters of fact on which D takes issue with the prosecution, including the reasons why;
   (3) particulars of the matters of fact on which D intends to rely for the purposes of D's defence;
   (4) any points of law which D wishes to take, including any authorities on which D intends to rely.
5. A general denial accompanied by a positive but unspecified challenge to the evidence of a witness will not be enough (*Bryant*),[1027] whereas a statement which advances no positive case and which simply puts the Crown to proof will satisfy the requirements of s.6A (*Rochford*).[1028]

[1022] As amended by the CJA 2003 and the CJIA 2008

[1023] The legislative scheme is further supplemented by (1) the A-G's Guidelines on Disclosure of Information in Criminal Proceedings (see also the A-G's Supplementary Guidelines on Disclosure: Digitally Stored Material); (2) the Court of Appeal's Protocol for the Control and Management of Unused Material in the Crown Court (the 'Crown Court Protocol'); (3) the CPS/Police Disclosure Manual; (4) the Protocol for the Control and Management of Heavy Fraud and Other Complex Cases; and (5) the Code of Practice for Arranging and Conducting Interviews of Witnesses Notified by the Accused.

[1024] To respect privilege against self-incrimination, the defence duty is limited to revealing the case which will be presented at trial. It does not extend, as in the case of the prosecution, to unused material.

[1025] Criminal Procedure Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011 (SI 2011 No 209), reg 2(3)

[1026] As amended by the CJA 2003, s.33(2) and the CJIA 2008, s.60(1)

[1027] [2005] EWCA Crim 2029

[1028] [2011] 1 WLR 534. See also *Malcolm* [2011] EWCA Crim 2069

6. The Crown Court Protocol provides that judges will expect a defence statement to contain a "clear and detailed exposition of the issues of fact and law in the case."[1029] As part of what is described as the need for a complete change of culture, the judge must examine the defence statement with care to ensure that it complies with s.6A. In doing so, the judge should take into account what can reasonably be expected of the defence in light of how clearly the prosecution case has been put, including for example whether inferences the prosecution will be asking the jury to draw from the evidence have been spelled out.
7. In relation to alibi notices, see s.6A(2)[1030] and Chapter 18-2.

Details of defence witnesses

8. Separately to the defence statement, by s.6C[1031] the defence must also notify the court and prosecutor of any witnesses they intend to call at trial, other than the defendant him/herself and any alibi witnesses already notified.[1032] Details consisting of names, addresses and dates of birth must be provided or, if any such details are unknown, other identifying information. Notice of intention to call a witness must be given within 28 days from the date when the prosecutor complies or purports to comply with the prosecutor's initial duty to disclose.[1033] In *Rochford*,[1034] the Court of Appeal confirmed that these obligations are designed to abolish trial by ambush.

Breaches of defence disclosure requirements and sanctions

9. The following breaches of requirements on the defence attract the sanctions of s.11:[1035]
   (1) Failure to serve a defence statement or to serve within time: ss.5 and 11(2)(a) and (b).
   (2) Failure to give notice of defence witnesses or to provide it within time: ss.6C and 11(2)(d) and (e).
   (3) Setting out inconsistent defences in the defence statement: s.11(2)(e).
   (4) Putting forward at trial a defence not mentioned in the defence statement: s.11(2)(f)(i).
   (5) Relying on any matter at trial which should have been put but was not mentioned in the defence statement: ss.6A(1) and 11(2)(f)(ii).
   (6) Giving evidence of alibi or calling a witness to give evidence in support of an alibi without giving notice in the defence statement: ss.6A(2) and 11(2)(f)(iii) and (iv).

1029 At [35]
1030 As amended by the CJA 2003, s.33(2)
1031 Added by the CJA 2003, s.34
1032 Under the CrimPR 2013, r 22.4, the defendant must also serve any defence witness notice given under section 6C on the court officer and prosecutor.
1033 Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011 (SI 2011 No 209), reg 2(3)
1034 [2011] 1 WLR 534, citing *Penner* [2010] EWCA Crim 1155
1035 Section 11(2), as amended by the CJA 2003, s.39 and the CIJA 2008, s.60(2)

10. The sanctions provided by s.11(5) are:

    (1) The court or any other party may make any such comment as appears appropriate.[1036]

    (2) The court or jury may draw such inferences as appear proper in deciding whether the defendant is guilty of the offence concerned.

11. Breaches of defence requirements under CPIA can only be met by the sanctions set out in s.11. A breach of s.6A is not punishable as a contempt of court (*Rochford)*[1037] and waiting until a very late stage to provide material on which cross-examination is based does not entitle the court to refuse to allow D to put forward matters in cross-examination which go to a relevant issue (*T*).[1038]

12. The sanctions only come into play in the Crown Court when the prosecution has closed its case and any submissions of no case have been rejected. There is no provision equivalent to s.34(2) CJPOA: see Chapter 17-1.

13. For the jury to be able to draw an adverse inference, it is important that the defence statement, if any, was made by D. Section 6E provides that a defence statement submitted by D's solicitor under s.5 shall, unless the contrary is proved, be deemed to have been given with the authority of the accused. The effect of the presumption is that if D wishes to avoid responsibility for a defence statement entered by his/her representatives, D has to provide an explanation why.

14. The court in *Essa*[1039] rejected the contention that s.11(5) was incompatible with the right to a fair trial under Article 6 ECHR. The court noted that the use of s.11(5) is subject to judicial controls, in particular the ability to interfere and stop unfair cross-examination or to tell the jury to disregard it.

Comment on inference

15. The first question for the trial judge is whether he/she is going to direct the jury that an adverse inference is available. Discussion with advocates is essential: The court suggested in *Wheeler*[1040] that defence statements should be signed so as to acknowledge their accuracy and avoid disputes.

16. The only significance to the jury of a breach of D's disclosure obligations is likely to be the potential inference that a fact on which D now relies is false, either because it was, without justification, advanced late, or is inconsistent with a previous account in the defence statement. In practice, therefore, the judge will need to decide whether to explain that the adverse inference is available, or, to warn the jury against drawing it.

[1036] By CPIA 1996, s.11(6), if the matter not mentioned was a point of law (including admissibility of evidence), comment by another party may be made only with the leave of the court.

[1037] [2010] EWCA Crim 1928

[1038] [2012] EWCA Crim 2358. However, a failure to provide a defence statement resulting in additional expense for the prosecution may result in a wasted costs order: *SVS Solicitors* [2012] EWCA Crim 319

[1039] [2009] EWCA Crim 43

[1040] [2001] 1 Cr App R 10

17. In the straightforward case, where D has signed the defence statement and D is now advancing a different case from that disclosed, there will usually be little difficulty in framing directions. Where, however, D maintains that he/she was not responsible for the inaccuracy, a specific direction to the jury on how to approach the inconsistency may be necessary, especially where the defendant's credibility is crucial to his/her case.[1041]

18. Where the judge directs the jury that they may draw an inference on the basis of an apparent inconsistency, it will usually be unhelpful for the judge also to give a *Lucas* direction.[1042] If, however, the facts are such that the defendant is entitled to the protection of a *Lucas* direction, that protection should be incorporated into the direction concerning the inference: see Chapter 16-3 Lies.

19. The judge's directions as to legitimate inferences will be similar to those required for s.34 CJPOA: see Chapter 17-1.

20. In considering what direction to give to the jury when D has put forward a defence which is different from that advanced in the defence statement, the judge must have regard to (a) the extent of the difference/s; and (b) whether there is justification for it.[1043] D may not be convicted solely on the basis of an adverse inference: s.11(10).

Directions

21. Some explanation, in simple terms and without going into the detail of the legislation, must be given to the jury as to the obligation to provide a defence statement, and its purpose. This should be done either when the defence statement is first raised in the course of the evidence and/or in the summing up.

22. If no adverse inference is to be drawn the jury must be directed accordingly.

23. In a case in which there is potential for the jury to draw an adverse inference the jury must be reminded of:

    (1) the failure to provide or period of delay in providing the defence statement;

    (2) the difference/s between the defence statement and the matters on which the defendant has relied in court;

    (3) the particular adverse inference/s which they have been invited to draw.

24. The jury should be directed that whether or not they do draw such inference/s will depend on whether or not they find that the reason/s advanced by D for not providing any details of the matter/s on which D has relied in court any earlier than he/she did or at all are, or may be, good reasons.

25. If the jury find that there are, or may be, good reasons for the failure, then they should ignore the fact that D did not provide such details in the defence statement or at all.

[1041] *Wheeler* [2000] 164 JP 565. The court suggested that defence statements should be signed so as to acknowledge their accuracy and avoid disputes.
[1042] *Hackett* [2011] 2 Cr App R 35
[1043] CPIA 1996, s.11(8)

26. If the jury are satisfied that there was no good reason, and that D's failure to provide the details any earlier or at all can only be explained by the fact that D did not have any defence, or any defence which would stand up to scrutiny, then the failure may have some relevance. The jury may bear this in mind when they are deciding whether D's account is true and whether the prosecution have proved the case against D. But they may only do so if they conclude that it is fair and proper to do so; and they must not convict D solely or mainly because of any failure.

27. The example below is based on the premise that there was a sufficient case to answer, D was in breach of his/her statutory duty to file his/her defence statement and D elected to give evidence. In the circumstances, the failure does not require the qualification that the jury should only use it as some support for the prosecution's case if the case is sufficiently strong to call for an answer.

Example

As I explained when the issue first arose, the prosecution must disclose well before the trial all of the evidence upon which they intend to rely. The defence must complete a formal document known as a defence statement which tells the court (a) those parts of the prosecution case with which D disagrees, and (b) the facts upon which D is to rely in his/her defence.

This is so that each side has a chance to prepare for trial and neither is taken by surprise. In this case, the defence statement was due to be filed no later than {date}. Reminders were given to the defence solicitors and to D in person on {date} but the defence statement was not served until {date}.

The prosecution say that this was because D had no real defence and the delay in filing the defence statement was because D had not yet thought of one. The defence say that D was having difficulties in {specify e.g. finding answers to the prosecution case} and that was the reason for the late service of the defence statement.

It is for you to assess the reason put forward by D for failing to provide a defence statement in good time. If you accept that D's account was or may be true, then you should ignore the failure to file the defence statement.

If, however, you reject D's account you can consider whether D's failure should count against him/her. The prosecution suggests it shows that D had not, at that stage, thought of the defence he/she is putting before you.

It is always for the prosecution to make you sure of D's guilt. D's failure to file the defence statement may provide some support for the prosecution case but you must not convict D wholly or mainly on the basis of that failure.

17-5 Defendant's silence at trial

ARCHBOLD 4-377; BLACKSTONE'S F20.41

Legal summary

1. By s.35(2) CJPOA, the jury may draw an inference adverse to D from D's failure to give evidence at trial.
2. The qualifying conditions are:[1044]
   (1) D's guilt is in issue.[1045]
   (2) It does not appear to the judge that the physical or mental condition of D makes it undesirable for the defendant to give evidence.[1046]
   (3) The trial judge has satisfied him/herself in the presence of the jury that D was aware that:
      (a) the stage had been reached at which evidence could be given for the defence;
      (b) D could if he/she wished give evidence;
      (c) if D chose not to give evidence or, having been sworn, without good cause, refused to answer questions it would be permissible for the jury to draw such inferences as appear proper.
   (4) D declined to give evidence or refused, without good cause, to answer questions.
3. In respect of condition 2(2) above:
   (1) medical evidence will almost certainly be required;[1047]
   (2) a *voir dire* may be required to determine whether there is an evidential basis for a s.35(1)(b) ruling (see fn references to *Friend*, *Burnett* and *Mulindwa*), though the judge is under no obligation to initiate the procedure if the defence advocate does not seek to do so;[1048]

[1044] CJPOA 1994, s.35(1), (2) and (5)

[1045] If the mental or physical condition of D makes it undesirable for D to give evidence, then the potential for an adverse inference does not arise: see s.35(1)(a)

[1046] If it does, then s.35(1)(b) applies and the potential for an adverse inference does not arise. See *Friend* [1997] 1 WLR 1433 (defendant's low IQ and expert evidence suggesting that he might find it difficult to do himself justice in the witness box did not make it 'undesirable' for him to give evidence). See also *Burnet* [2016] EWCA Crim 1941 where a medical report suggested the defendant was not fit to testify but a s.35 direction was given (and upheld) because the judge had regard to the fact that the defendant had been able to give explanations in interviews and could have developed those by testifying. See further *Mulindwa* [2017] EWCA Crim 416 which reviews the case law in this area and also considers the limits to the ambit of expert evidence – it should not trespass into areas of credibility or truthfulness.

[1047] *Kavanagh* [2005] EWHC 820 (Admin)

[1048] *A* [1997] Crim LR 883

(3) In assessing whether it is 'undesirable', the judge is entitled to weigh the likely significance of the defendant's evidence to the issues in the case with the nature and consequences of the mental condition revealed by the expert evidence.[1049]

4. In respect of condition 2(3) above, on whether D has voluntarily decided not to testify, see *Farooqi*.[1050]

5. In respect of condition 2(4) above, by s.35(5) CJPOA 1994, the defendant is to be taken to have refused to answer without due cause unless D is entitled, by virtue of any other enactment or on the ground of privilege, to answer, or, the trial judge excuses D from answering under his/her general discretion.

6. Section 35(2) requires the court, at the conclusion of the prosecution evidence, to satisfy itself that D is aware that the stage has been reached at which evidence can be given for the defence and that D's decision not to give evidence or, if D does give evidence, D's failure to answer questions, without a good reason, may lead to inferences being drawn against him/her.

7. The provision is mandatory. The jury may not draw an adverse inference from D's decision not to give evidence unless the judge has asked the relevant questions of D or D's advocate. This remains the case even if D has deliberately absented him/herself from the trial, thus putting it beyond the power of the defence advocate to obtain instructions.[1051]

8. Where there is a potential issue as to the defendant's capacity, it is particularly important to ensure that the relevant considerations are made clear to the defendant.[1052]

9. No inference can be drawn where the facts adduced by the prosecution are unchallenged and the only issue is whether they amounted to the offence charged.[1053]

10. If a D refuses to remove her niqab before giving evidence, she should not be allowed to give evidence; the judge should in such circumstances give an adapted direction about this.[1054] See now the Equal Treatment Bench Book Ch 9.

11. A conviction should not be based solely upon D's decision not to give evidence.[1055]

[1049] *Tabbakh* [2009] EWCA Crim 464
[1050] [2013] EWCA Crim 1649
[1051] *Gough* [2001] EWCA Crim 2545
[1052] *Cox* [2013] EWCA Crim 1025
[1053] *McManus* [2001] EWCA Crim 2455
[1054] *D(R)* unreported, 16 Sept 2013, Blackfriars Crown Court (HHJ Murphy)
[1055] *Cowan* [1996] QB 373 as explained in *Petkar* [2003] EWCA Crim 2668. It cannot be the only factor to justify a conviction and the totality of the evidence must prove guilt beyond reasonable doubt." This ensures compliance with *Murray v UK* (1996) 22 EHRR 29, where it was held that the defendant should not be convicted "solely or mainly" on an inference from silence.

Inferences available

12. The jury must be satisfied that there is a case to answer before they draw an adverse inference.[1056] The jury need not resolve disputed issues of fact before concluding there is a case to answer.

13. In *Cowan*,[1057] the Court of Appeal rejected the contention that s.35 should be confined to exceptional cases; this was clear from the plain wording of the provision.[1058]

14. Lord Taylor held that "[t]he effect of section 35 is that the court or jury may regard the inference from failure to testify as, in effect, a further evidential factor in support of the prosecution case."

15. The nature of the inference available will depend on the way in which the evidence has developed and the strength of the prosecution case. The stronger the case, the more powerful the incentive to provide an answer, if there is one. In the Northern Ireland appeal in *Murray v DPP*[1059] Lord Slynn offered the following analysis:

> "…if parts of the prosecution case had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt. On the other hand, if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty."[1060]

16. There are no special rules which apply to cases in which the defence to a murder charge is diminished responsibility.[1061]

Cowan essentials for summing up on section 35

17. Lord Taylor CJ in *Cowan*[1062] observed:

> "…there are certain essentials which we would highlight. (1) The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is. (2) It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains. (3) An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act. (4) Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered

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1056 *Cowan* [1996] QB 373
1057 [1996] QB 373
1058 Followed in *Napper* (1997) 161 JP 16
1059 [1994] 1 WLR 1
1060 At p 11
1061 *Barry* [2010] 1 Cr App R 32
1062 *Cowan* [1996] QB 373, 381

sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence. (5) If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference.

It is not possible to anticipate all the circumstances in which a judge might think it right to direct or advise a jury against drawing an adverse inference".

Summing up the defence case

18. In *Scott Clarke*,[1063] where the case against the D was entirely circumstantial and D had given lengthy answers in interview but elected not to give evidence, the Court of Appeal emphasised the importance of placing the defence case before the jury in summing up.

Special provisions on a charge of causing or allowing a child or vulnerable adult to die or suffer serious physical harm

19. Special provision is made by ss.6 and 6A Domestic Violence, Crime and Victims Act 2004 for the inferences to be drawn where a person fails to testify when charged with an offence under s.5 of that Act (causing or allowing a child or vulnerable adult to die or suffer serious physical harm).
20. Section 6(2) provides that where the jury is permitted to draw a proper inference in relation to the s.5 offence, they may also draw such inferences in determining whether D is guilty of murder or manslaughter (or of any other offence of which D could lawfully be convicted on those charges), even if there would otherwise be no case to answer in relation to that offence. Similar provision is made in s.6A in relation to inferences about relevant offences where the defendant is charged with allowing a child or vulnerable adult to suffer serious harm.

Directions

21. No adverse inference can be drawn unless the judge has given the necessary warning at the time D's opportunity to give evidence arose. The warning is as follows:

    (1) Where D is represented:

    "Have you advised your client that the stage has now been reached at which he/she may give evidence and, if he/she chooses not do so or, having been sworn [or having affirmed] without good cause refuses to answer any question, the jury may draw such inferences as appear proper from his/her failure to do so?"

    (2) Where D is not represented:

    {The version below is based upon the CrimPD}

    "You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath [or affirmation], and be cross-

[1063] [2010] EWCA Crim 684

examined like any other witness. If you do not give evidence or, having been sworn [or having affirmed] without good cause refuse to answer any question the jury may draw such inferences as appear proper. That means they may hold it against you. You may also call any witness or witnesses whom you have arranged to attend court or lead any agreed evidence. Afterwards you may also, if you wish, address the jury. But you cannot at that stage give evidence. Do you now intend to give evidence?"

{This version is suggested to be a rather simpler formulation of the question that an unrepresented D is more likely to understand}

"This is the point when you can give evidence. If you choose to do so, it will be on oath [or affirmation], and you will be cross-examined like any other witness. If you do not give evidence, the jury may take that into account when they are considering their verdict; that means they may hold it against you. If you start to give evidence but refuse to answer the questions then, unless there is a good reason, the jury may hold that against you. Do you intend to give evidence?"

22. The question of whether there is an adverse inference to be drawn from the fact that D did not give evidence must be addressed with the advocates before speeches. If D is unrepresented then the position will need to be discussed with them.

23. In some cases it will be appropriate to remind the defence advocate that no reason for the failure can be advanced without evidence.

24. The adverse inference is open to the jury if:

    (1) D's guilt is in issue;

    (2) D's physical or mental condition is not such that it is undesirable for D to give evidence;

    (3) D, having been given the statutory warning at the time when D could have given evidence, declined without good cause to do so.

25. Where no adverse inference arises, for example because of the physical or mental condition of D or because D is absent, the jury must be directed about this.

26. Where the adverse inference **is** appropriate directions must include:

    (1) D had an absolute right not to give evidence.

    (2) The burden of proving the case rests throughout upon the prosecution.

    (3) The fact that D did not give evidence means that there is no evidence from D to rebut, contradict or explain the evidence of prosecution witnesses.

    (4) The jury should be reminded of the warning given to D at the time his/her opportunity to give evidence arose.

(5) If they are sure that:

(a) the prosecution case is sufficiently strong to call for an answer; and

(b) there is no sensible reason for D not to have given evidence, other than that D has no answer to the prosecution case or none that would stand up to cross-examination

the jury may conclude that the reason D did not give evidence is because D has no answer or none that would stand up to cross-examination and they may regard the fact that D did not give evidence as lending some support to the prosecution case.

27. A warning that an inference drawn from the fact that D did not give evidence cannot of itself prove guilt.

28. Where the adverse inference is **not** appropriate directions must include:

(1) D had an absolute right not to give evidence.

(2) The burden of proving the case rests throughout upon the prosecution.

(3) Although the fact that D did not give evidence means that there is no evidence from D to rebut, contradict or explain the evidence of prosecution witnesses, the fact that D did not give evidence must not be held against him/her.

Example 1: Where inference may be drawn, D does not give evidence but relies upon account in interview/prepared statement

D chose not to give evidence. That is D's right but it has these consequences:

1. D has not given evidence in the trial to contradict or undermine the evidence of the prosecution witnesses that {specify}. D did give an account to the police which D's advocate has told you he/she stands by. That interview is part of the evidence, but it was not given on oath and tested in cross-examination.
2. You will remember that when I asked D's advocate whether D was going to give evidence he/she told us that D understood that if he/she failed to do so, you would be entitled to draw inferences from that failure; in other words that you would be entitled to conclude that D did not feel he/she had an answer to the prosecution case that would stand up to cross-examination.

You must decide whether or not D's failure to give evidence should count against him/her. First, you must be sure that the prosecution case is so strong that it calls for an answer. Second, you must be sure that the true reason for not giving evidence is that D did not have an answer that he/she believed would stand up to questioning.

You must remember it is for the prosecution to prove the guilt of the defendant and while D's failure to give evidence can provide support for the case, you cannot convict the defendant wholly or mainly because of that failure.

Example 2: Where no adverse inference may be drawn, D does not give evidence and relies upon account in interview/prepared statement

D did not give evidence. That is D's right. Under our law, no one is required to give evidence at his/her trial and you must not hold it against D that he/she has exercised that right.

It does however mean that there is no evidence from D on oath to contradict, or undermine the evidence of witnesses for the prosecution. When D was interviewed, his/her solicitor gave the police a prepared statement and then D refused to answer further questions. That statement is evidence in the case but it was not given on oath and D did not answer questions about it that were asked by the police. This means it has not been tested in the way witnesses called by the prosecution have been cross-examined by D's advocate. That is a matter you can take into account when deciding what weight to give to aspects of the evidence in the case.

18. DEFENCES – GENERAL

18-1 Self-defence/prevention of crime/protection of household

ARCHBOLD 19-45; BLACKSTONE'S A3.55

Legal summary

1. A defence may be available in a case where D's explanation for their use of force is that they believed it was necessary to do so to protect themselves, others,[1064] property[1065] or prevent crime or conduct a lawful arrest.[1066] The defence takes slightly different forms in different contexts (see below) but these overlap substantially. All share the same basic structure with two crucial limbs (see in particular *Keane and McGrath*[1067]).
   (1) Did D believe or may D have believed that it was necessary to use force to defend themselves from an attack or imminent attack on them or others or to protect property or prevent crime? (subjective question);[1068] and
   (2) Was the amount of force D used reasonable[1069] in the circumstances, including the dangers[1070] as D believed them to be? (objective question)[1071]
2. The defence is for the prosecution to disprove to the criminal standard once sufficient evidence has been raised. Where there is evidence which if accepted could raise a prima facie case of self-defence, this should be left to the jury even if the accused has not formally relied upon self-defence.[1072] If D was, or may have been, acting in lawful self-defence they are not guilty. The jury should be reminded that D may have acted in the heat of the moment without the opportunity to weigh precisely the amount of force needed to repel the attack D anticipated.[1073] The jury may take account of D's physical characteristics but not psychiatric conditions, unless there are exceptional circumstances making the evidence especially probative.[1074] If D does no more than they instinctively believe to be necessary that is strong, though not conclusive, evidence that it was reasonable.[1075] If D is the initial aggressor they are not automatically denied the defence where 'the tables had been turned', but D cannot rely on self-defence where D has set out to engineer an attack by W which will allow D

1064 Section 76(10)(b) CJIA 2008; *Duffy* [1967] 1 Q.B. 60
1065 Section 76(2)(aa) CJIA 2008
1066 Section 3 Criminal Law Act 1967
1067 [2010] EWCA Crim 2514, para [4]. See also *Hayes* [2011] EWCA Crim 2680
1068 Section 76(3) CJIA 2008, *Williams* (1984) 78 Cr App R 276, 281; *Beckford* v *The Queen* [1988] AC 130, 144
1069 *Keane* above
1070 *Shaw v The Queen* [2001] UKPC 26 at [19]
1071 Section 76((6) CJIA 2008
1072 *DPP (Jamaica) v Bailey* [1995] 1 Cr App R 257 and see *Williams and Ors* [2020] EWCA Crim 193 for example of where judge was right not to leave self-defence to the jury when D claimed to have been seeking to prevent the commission of a crime.
1073 Section 76(7); s.76(4); *Palmer* [1971] AC 814
1074 *Martin* [2002] 1 Cr App R 27; *Oye* [2013] EWCA Crim 1725; *Press and Thompson* [2013] EWCA Crim 1849
1075 *Keane* (above); s.76(8)

to respond with greater violence under the guise of self-defence.[1076] The defence remains available to a defendant who has made a pre-emptive strike in anticipation of an actual or perceived **imminent** attack.[1077] Similarly, the defence is not precluded if D failed to retreat from what was or what D believed to be an attack; failure to retreat is a relevant factor in assessing whether the use of force was reasonable in the circumstances.[1078]

Mistake of fact

3. The defence is available even if D is mistaken as to the circumstances as he/she genuinely believed them to be, whether or not the mistake was a reasonable one for D to have made.[1079] The objective test is to be decided by reference to the circumstances as D believed them to be.[1080]

Intoxication

4. D cannot rely on any belief in the need for force which is "attributable to intoxication that was voluntarily induced".[1081] D cannot rely on the defence if his/her state of mind is a direct and proximate result of self-induced intoxication even if the intoxicant is no longer still present in D's system.

> "The words "attributable to intoxication" in s. 76(5) are broad enough to encompass both (a) a mistaken state of mind as a result of being drunk or intoxicated at the time and (b) a mistaken state of mind immediately and proximately consequent upon earlier drink or drug-taking, so that even though the person concerned is not drunk or intoxicated at the time, the short-term effects can be shown to have triggered subsequent episodes of e.g. paranoia".[1082]

5. However, the defendant **may** be able to rely on a genuine belief resulting from long term "mental illness precipitated (perhaps over a considerable period of time) by alcohol and drug misuse".[1083]

Delusional beliefs

6. A mistake of fact, even if based on a delusion caused by mental illness, can operate to satisfy the first limb of the defence.[1084] However, no consideration of a delusion caused by mental illness should be included in the objective evaluation.

> "An insane person cannot set the standards of reasonableness as to the degree of force used by reference to his own insanity. In truth it makes as little sense to talk of the reasonable lunatic as it did, in the context of cases on provocation, to talk of the reasonable glue-sniffer."[1085]

[1076] *Harvey* [2009] EWCA Crim 469
[1077] *Beckford* [1988] AC 130, 141
[1078] Section 76(6A); *Bird* (1985) 81 Cr App R 110; *Ray* [2017] EWCA Crim 1391 para 38
[1079] Section 76(4)
[1080] Section 79(3); *Oye* [2013] EWCA Crim 1725 para 39
[1081] Section 76(5); *Hatton* [2006] 1 Cr App R 16
[1082] *Taj* [2018] EWCA Crim 1743 para 60
[1083] *Taj* para 60
[1084] *Oye* [2013] EWCA Crim 1725
[1085] *Oye* para 39

7. In a case of murder, self-defence is available in a different but partially overlapping range of circumstances than loss of control under the Coroners and Justice Act 2009, s.54:[1086] see Chapter 19-3.

8. In appropriate circumstances self-defence may be available in cases of dangerous or careless driving.[1087] The defence might also be available even where force is used by an individual against a police officer who is acting lawfully in the execution of his/her duty.[1088]

The forms of the defence

9. Common law defence of self/other or property: The common law defence of protection of self, others or property is 'clarified' by s.76 CJIA as amended.[1089]

10. Prevention of crime under s.3 Criminal Law Act 1967:

> "(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."
>
> "(2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

11. This statutory defence applies only when the force is used by D while a criminal offence is taking place or has in fact occurred. It is not available if D has used force in the mistaken belief that a crime is being or has been committed. Care is needed particularly as to whether a crime is ongoing (*Atwood*[1090]) and where D is relying on powers of citizen's arrest under s.24A PACE: see *Morris*.[1091] The defence extends to the use of force against an innocent third party where such force is used to prevent a crime from being committed against someone else.[1092]

Householder cases

12. The common law defence is modified in a 'householder case' (s.76(8A) CJIA)[1093] that is (i) where D is lawfully in a dwelling and (ii) while in or partly in a building, or part of a building, that is a dwelling (iii) D uses force (iv) against someone D believes to be in, or entering, the building or part of it as a trespasser.

13. The householder defence is available where the injured person entered lawfully but thereafter became a trespasser. Section 76(8A)(d) is concerned with D's **belief**, at the time of infliction of the injury, that the person was in the building as a trespasser: *Cheeseman*.[1094] The householder defence engages two factual questions. First, whether the defendant was not a trespasser when force was used and, secondly, whether the defendant believed the injured party to be a trespasser at that time. There needs to be an evidential basis for this to arise.

[1086] See *Dawes* [2013] EWCA Crim 322
[1087] *Riddell* [2017] EWCA 413
[1088] *Oraki* [2018] EWHC 115 (Admin)
[1089] Section 76(10)(a)(ia) CJIA 2008; *Faraj* [2007] EWCA Crim 1033
[1090] [2011] RTR 173
[1091] [2013] EWCA Crim 436
[1092] *Hichens* [2011] EWCA Crim 1626
[1093] Criminal Law and Legal Policy Unit Circular April 2013
[1094] [2019] EWCA Crim 149

Sometimes the circumstances of the case give rise to an inference that the defendant believed that the intruder was a trespasser when using force in self-defence. For an example of a case in which there was no such evidence, see *Magson*.[1095]

14. In such a case, when considering the second limb of the defence "the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances."[1096] Even if not grossly disproportionate the degree of force used by a householder still has to be assessed in the particular context of a householder having to contend with a trespasser – *Ray*[1097] para 35. The modified defence applies only where D is defending themselves or others, but not their property.[1098]

Directions

15. Whilst the phrase 'self-defence' is used, these directions can be adapted to cover cases where force is used in defence of another, defence of property, prevention of crime and for lawful arrest.
16. Once an issue of self-defence is raised, it is for the prosecution to disprove.
17. If D was, or may have been, acting in lawful self-defence they are not guilty.
18. There are two aspects of the defence:
    (1) A belief that there is a need to use force; and
    (2) The use of no more than reasonable force in the circumstances as D believed them to be. In a 'householder' case, to which s.76(8A) CJIA applies, presuming "that the defendant genuinely believed that it was necessary to use force to defend themselves, the questions are:
        (a) was the degree of force the defendant used grossly disproportionate in the circumstances as D believed them to be? If the answer is "yes", D cannot rely on self-defence. If "no", then;
        (b) was the degree of force the defendant used nevertheless reasonable in the circumstances they believed them to be? If it was reasonable, D has a defence. If it was unreasonable, D does not."[1099]
19. Self-defence does not apply if the jury are sure that D did not believe they needed to defend themselves, or if the jury are sure that the force he/she used was more than was reasonable in the circumstances as D believed them to be.
20. In a non-householder case, if the degree of force used by D was disproportionate, then it cannot be reasonable. It must lead to a conviction. In a householder case, disproportionate force can be reasonable (and therefore lead to an acquittal) but grossly disproportionate force cannot be reasonable and in

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[1095] [2022] EWCA Crim 1084
[1096] Section 5A of the CJIA 2008.See also *R (Collins) v Secretary of State for Justice* [2015] EWHC 33 (Admin) as explained in *Ray* [2017] EWCA Crim 1391
[1097] [2017] EWCA Crim 1391
[1098] For cases involving shared and mixed use accommodation see ss.76(8B) and 76(8C)
[1099] *Collins* [20] per Leveson P as explained by the then LCJ in *Ray* paras 33-38

such circumstances the verdict should be guilty. If the actions of D in a householder case were merely disproportionate, that does not necessarily mean that they were unreasonable. Whether the degree of force used by D was reasonable is the question the jury have to decide.[1100]

21. It may be necessary to add further directions e.g. in the heat of the moment D cannot be expected to work out exactly how much force to use; and/or that if D used or may have used no more force than they genuinely believed was necessary, that would be strong evidence that the force used was reasonable.

22. The issue of the potential to retreat may need to be explained differently when the householder defence arises.[1101]

23. A jury does not have to be told the whole of the law: they need directions to enable them to resolve the issue of whether D should be found guilty or not guilty.

24. In some cases the only real issue for a jury is whether they are sure that the force used by D was unlawful or whether it may have been used in lawful self-defence i.e. the issue of the reasonableness of the force used does not arise because the parties agree that if the force was used in self-defence it was reasonable. In such circumstances there is no need to burden the jury with directions about the second limb.

Example 1: Where the issue of the extent of the force used arises the direction must include the second limb

D has admitted to striking W but has said that he/she was not acting unlawfully but was acting in lawful self-defence. The prosecution have to prove the case, so it is for them to make you sure that D was the aggressor and was not acting in lawful self-defence.

The law of self-defence is really just common sense. If someone is under attack or believes that they are about to be attacked they are entitled to defend themselves so long as they use no more than reasonable force. In this case when D struck W he/she says it was because he/she believed W was about to hit them.

If on the evidence you are sure that D was the aggressor and did not believe they were under threat from W then no question of self-defence arises and, subject to the other elements of the offence being proved, your verdict will be one of Guilty. If, however, you consider it was or may have been the case that D was or believed they were under attack or believed they were about to be attacked, you must go on

[1100] See *Ray* paras 34-38 and in particular in para 34: "It will nevertheless very rarely be helpful for judges to attempt explicitly in a summing up to distinguish between what is "disproportionate" and what is "unreasonable". The focus of the jury in the context of a householder case ultimately should be on what is reasonable or unreasonable in the particular circumstances. In the overwhelming majority of cases it therefore should neither be necessary nor helpful in a summing up to use language referring expressly to the contrast between disproportionate and unreasonable force; because once the jury have concluded that the degree of force used was not grossly disproportionate the sole issue is whether the degree of force used was unreasonable in the circumstances. That should be the focus for the jury."

[1101] *Ray* para 38

to consider whether D's response was reasonable. If you were to consider that what D did was, in the heat of the moment when fine judgments are difficult, no more than D genuinely believed was necessary, that would be strong evidence that what D did was reasonable; and if you consider D did no more than was reasonable, D was acting in lawful self-defence and is not guilty of the charge. It is for you to decide whether the force used was reasonable and you must do that in the light of the circumstances as you find D believed them to be. If you are sure that even allowing for the difficulties faced in the heat of the moment D used more than reasonable force, then D was not acting in lawful self-defence and, if the other parts of the offence have been proved, D is guilty.

Example 2: Where the only issue is whether the force used was unlawful or in self-defence

D has admitted to striking W but has said that they were not acting unlawfully but acting in lawful self-defence. The prosecution have to prove the case, so it is for them to make you sure that D was the aggressor and was not acting in lawful self-defence.

The law of self-defence is really just common sense. If someone is or believes they are under attack or believes they are about to be attacked they are entitled to defend themselves. In this case D says he/she struck W because W had hit him/her / he/she believed that W was about to hit him/her – and D believed that they needed to defend themselves.

If you are sure that D was the aggressor and did not believe that he/she was under attack or threat of attack then self-defence does not arise and, subject to the other elements of the offence being proved, your verdict will be one of Guilty.
If, however, you consider that D believed, or may have believed, that he/she was under attack or about to be attacked, there is no suggestion that the force he/she used was unreasonable, and the prosecution will not have proved that D was acting unlawfully and your verdict will be Not Guilty.

Example 3: Voluntary intoxication

A person is not entitled to claim that they were acting in lawful self-defence if their belief that they were under attack/are about to be attacked by W was mistaken and that mistake arose only because they were intoxicated, either from drink and/or drugs that they had chosen to take.

(a) If the mistake is as to a belief in the need for self-defence

So, if you are sure that D was mistaken in their belief that they were about to be attacked/was under attack and the mistake was only made because they were drunk/had taken drugs and is not one that they would have made if they had been sober, then D was not acting in lawful self-defence and, subject to the other elements of the offence being proved, your verdict will be one of Guilty.

(b) If the mistake is as to the extent of force

If D was mistaken in his/her belief that W had a weapon and that he/she needed a weapon to defend themselves and the mistake was only made because D was drunk/had taken drugs and is not a mistake that they would have made if they had

been sober, then D was not acting in lawful self-defence and, subject to the other elements of the offence being proved, your verdict will be one of Guilty.

Example 4: Where the issue is one of self-defence by a householder

{The LCJ in *Ray* stated at para 26:

> "The use of disproportionate force which is short of grossly disproportionate is not, on the wording of the section, of itself necessarily the use of reasonable force. The jury are in such a case, where the defendant is a householder, entitled to form the view, taking into account all the other circumstances (as the defendant believed them to be), that the degree of force used was either reasonable or not reasonable."

At para 34 the LCJ further stated:

> "….it therefore should neither be necessary nor helpful in a summing up to use language referring expressly to the contrast between disproportionate and unreasonable force."

In an appropriate case, perhaps where the prosecution are asserting the degree of force to have been grossly disproportionate and which, in a non-householder situation, a jury could be anticipated as potentially considering it to have been at least unreasonable, consideration may need to be given as to whether the case falls outside "…the overwhelming majority of cases" identified by the LCJ as not calling for elucidation upon the "contrast between disproportionate and unreasonable force" and thus merit some explanation to the jury of how disproportionate force may still be reasonable in the context of a householder. Such a direction might, however, result in a jury wondering or even asking how D can be potentially disproportionate but yet reasonable or alternatively reasonable but still disproportionate?}

W admits that he/she received the injuries when they were attempting to burgle D's home and so it is agreed that when D discovered W in the house W was a trespasser. The prosecution case is that D's reaction to finding a burglar in their home was to shout at W that he/she would teach him/her a lesson and then attack W with their son's cricket bat. The prosecution suggest that D acted as he/she did in order to punish W for breaking in. On this basis, the prosecution allege that the issue of self-defence simply doesn't arise.

The defence case is very different. D told you that he/she was taken by surprise by W coming up the stairs towards them in the darkened house and that they panicked, fearing for their own safety and that of their family. D says he/she picked up the nearest object to hand, the cricket bat, and then struck W in order to defend themselves and the family from an intruder who had broken into their home and who D believed represented a physical threat.

So the prosecution say D acted unlawfully by attacking W. By contrast D says that he/she was not acting unlawfully but was acting in lawful self-defence. Because the prosecution have to prove the case it is for them to make you sure that D was **not** acting in lawful self-defence. If you decide that D was or may have been acting in lawful self-defence then the prosecution would have failed to prove the case and you would find D not guilty.

The law of self-defence is really just common sense. If a person is under attack, or believes they are about to be attacked, then they are entitled to defend themselves so long as the force used is reasonable. In assessing what is reasonable you must consider the circumstances as that person believed them to be. The law recognises, however, that the actions of a householder faced with a trespasser have to be assessed with particular regard being paid to that context as I shall explain in a moment.

The assessment of all factual matters is for you alone. The first question to consider is whether the defendant was behaving defensively at all and not, as the prosecution allege, simply acting as the aggressor handing out what might be termed some 'rough justice' to a criminal? If you are sure D was the aggressor, then lawful self-defence does not arise and you may have little difficulty in concluding that D is guilty of the offence charged, provided that you are sure the other ingredients of the offence are also proved.

If, however, you consider that D believed or may have believed there was a need to use some defensive force, then you will have to assess the reasonableness of what D did. In deciding whether D's actions were reasonable, take account of the circumstances which D believed to exist: being confronted by an intruder in his/her home. That has obvious potential to increase the level of threat that someone might perceive and/or make it more difficult for the person to judge the nature of the appropriate response to such a threat. It is for you to decide whether D's behaviour was reasonable. It would not be reasonable if what D did was grossly disproportionate – that is to say, if D went wholly over the top. You assess that issue in the circumstances as D believed them to be. D told you that they had been woken in the middle of the night to find an intruder in their home who D believed represented a threat of physical violence towards, not just themselves, but the rest of the family. D did not believe he/she could retreat; D did not believe there was time to call for assistance. D told you he/she instinctively picked up the cricket bat and struck W in defence of themselves and the family.

If you are sure that the force used by D was grossly disproportionate, in the sense that he/she went completely over the top, then D would not have been acting in self-defence. Even if you were not sure that D went completely over the top, you will still need to decide whether D's actions were reasonable, but that must be judged from the perspective of the particular circumstance of D having to deal with an intruder in the home. If you decide that, in the heat of the moment when fine judgments are difficult, D did or may have done no more than what they instinctively thought was necessary, that would be strong evidence that what D did was reasonable. If the force used was or may have been reasonable in all the circumstances as D believed them to be, then you would find D not guilty. If, on the other hand and notwithstanding that D was faced by an intruder in the home, you are sure that D's actions were unreasonable then he/she would not have been acting in lawful self-defence and your verdict would be guilty.

Route to verdict Example 4

There is no dispute that the defendant used force against W when D was in their own home and W was a trespasser. Subject to you being sure that the other ingredients of the offence are proved, approach the issue of self-defence as follows:

Question 1

Are you sure that D was the aggressor and that he/she did not believe it was necessary to use force against W?

- If your answer is **Yes,** your verdict will be 'Guilty'.
- If your answer is **No,** go on to consider question 2.

Question 2

Are you sure that in the circumstances as D believed them to be, and having particular regard to the fact that D was confronted by an intruder in their own home, the force used by D against W was grossly disproportionate in the sense that D's reaction was completely over the top?

- If your answer is **Yes**, your verdict will be 'Guilty'.
- If your answer is **No**, go on to consider question 3.

Question 3

Are you sure that in the circumstances as D believed them to be, and having particular regard to the fact that D was confronted by an intruder in their own home, the force used by D was unreasonable?

- If your answer is **Yes,** your verdict will be 'Guilty'.
- If your answer is **No,** your verdict will be 'Not guilty'.

[**Note:** if the issue of the potential to retreat arises in a case then it should be dealt with in accordance with para 38 of *Ray*.]

Example 5: Distinguishing the tests on householder/standard self-defence

[**Note:** the route to verdict will call for very careful crafting and consideration may need to be given to the potential for some of the jurors to be of the view that D did or may have believed W to be a trespasser but others may be sure D did not. This could give rise to the possibility of some of the jurors applying the 'standard' test of reasonableness and some the 'householder' test, which contemplates the potential for a disproportionate reaction to still be regarded as reasonable [See reference to para 34 of *Ray* above].

It is suggested that the task of the assessment by the jury will be advantaged by the provision of practical guidance focused upon the facts of the particular case.]

This case concerns a neighbour dispute that ended up in violence. The prosecution allege that when W went around to D's house to protest about the noise D was making in cutting his/her hedge, W was let in by D's son who showed W into the conservatory where D was taking a break from gardening. W told you that he/she complained to D about the noise being made and that D reacted by striking W with the hedge-trimmer, causing W to sustain a cut to the head. So the prosecution case is that D simply lost his/her temper, striking a neighbour who he/she knew was lawfully in the home.

D disputes all this. He/she says they heard W barge past their son coming into the house shouting: "I'm going to kill your dad/mum!" D says that he/she struck W with

the hedge-trimmer because D believed that W was a trespasser who was about to hit him/her.

It follows that D agrees that they struck W but says they did so in lawful self-defence.

The prosecution have to prove the case, so it is for them to make you sure that D was not acting in lawful self-defence. They say this is a case where lawful self-defence does not arise because D was at all times the aggressor and, even if D believed there was a need for some defensive force, what they did was unreasonable.

The law of self-defence is really just common sense. If a person is under attack or believes they are about to be attacked then they are entitled to defend themselves so long as the force used is reasonable. In assessing what is reasonable you must consider the circumstances as D believed them to exist. The law recognises that the actions of a householder faced with a trespasser have to be assessed with particular regard being paid to that circumstance as I shall explain in a moment.

The assessment of all factual matters is for you alone. The first question to consider is whether the defendant was acting defensively at all and not, as the prosecution allege, simply behaving as the aggressor – striking a neighbour who was lawfully in the home in what was an act of bad temper? If you are sure D was the aggressor, then lawful self-defence does not arise and you may have little difficulty in concluding that D is guilty of the offence charged.

If, however, you consider that D believed or may have believed there was a need to use some defensive force, then you will have to assess the reasonableness of D's actions. In that context one of the issues you will need to consider is whether D believed, or may have believed, that W had entered the home as a trespasser? If that may have been the case, then you may think it would have the potential to increase the level of threat that someone might perceive and/or to make it more difficult to judge the nature of the appropriate response to such a threat. It is for you to decide whether D's behaviour was reasonable on the facts as they believed them to be. Even if D did believe or may have believed W was a trespasser, the reaction to that would not be reasonable if what D did was grossly disproportionate – that is to say if D went wholly over the top. D told you that W had charged into the home uttering threats of violence and on that basis D believed W represented a threat of physical violence to which he/she instinctively reacted by striking out with the hedge-trimmer.

If you are sure that the force used by D was grossly disproportionate, in the sense that he/she went completely over the top, then they would not have been acting in self-defence and your verdict would be guilty. Even if you were not sure that D went completely over the top you will still need to decide whether D's actions were reasonable. Your assessment of that will be affected by whether the prosecution have made you sure that D knew W was lawfully on the premises. The prosecution task of disproving self-defence is inevitably going to be somewhat easier if in fact D knew his/her son had invited W into the home so that they might voice some concern as to the noise D had been making. If, however, D believed or may have believed W to be a trespasser you would assess the reasonableness of D's response from the perspective of D having to deal with an intruder in his/her home. Even disproportionate force could still be assessed by you as being reasonable in

the particular context of D having to deal with someone he/she believed or may have believed to be a trespasser. The question you have to decide is whether, in all the circumstances as you find to exist, it was a reasonable amount of force.

If you decide that, in the heat of the moment when fine judgments are difficult, D did or may have done no more than that which he/she instinctively thought was necessary, then that would be strong evidence that what D did was reasonable. If the force used was or may have been reasonable in all the circumstances as D believed them to be, then you would find D not guilty. On the other hand, if you are sure the degree of force D used was unreasonable then you would find D guilty.

Route to verdict Example 5

There is no dispute that D struck W a blow to the head using the hedge-trimmer and that as a result W sustained a cut to his head. The defence raise the issue of self-defence and it is for the prosecution to prove that D was **not** acting in lawful self-defence as I have explained that to you.

Question 1

Are you sure that D was the aggressor and that he/she did not believe it was necessary to use force against W?

- If your answer is **Yes**, your verdict will be 'Guilty'.
- If your answer is **No**, go on to consider question 2.

Question 2

Are you sure that D knew his/her son had invited W into the house?

- If your answer is **Yes**, go on to consider question 3.
- If your answer is **No**, go on to consider question 4.

Question 3

If you are sure D knew W was invited into the house then has the prosecution made you sure that the amount of force used was unreasonable on the facts as D believed them to be?

- If your answer is **Yes**, your verdict will be 'Guilty'.
- If your answer is **No,** your verdict will be 'Not guilty'.

Question 4

Has the prosecution made you sure that the force used by D against W was grossly disproportionate in the sense of being completely 'over the top'?

- If your answer is **Yes**, your verdict will be 'Guilty'.
- If your answer is **No**, go on to consider question 5.

Question 5

Are you sure that, in the circumstances as D believed them to be, and having particular regard to the fact that D was confronted by someone he/she believed to be an intruder in the home, the force used by D was unreasonable?

- If your answer is **Yes**, your verdict will be 'Guilty'.
- If your answer is **No**, your verdict will be 'Not guilty'.

[**Note:** if the issue of the potential to retreat arises in a case then it should be dealt with in accordance with para 38 of *Ray*.]

Example 6: D initiating violence but claiming stage reached where acting in lawful self-defence

The prosecution allege that D approached W outside the pub and launched an unprovoked attack upon W. D accepts that initially he/she was the aggressor but says that W's reaction was to attack D in such a way that D had to use force in self-defence. As you know D has pleaded guilty to an offence of assault but denies being criminally responsible for the injuries sustained by W, which it is agreed amount to grievous bodily harm. D denies that he/she intended to cause W really serious harm, but also says that any injuries W received were in the context of D having to defend himself/herself from W.

As the burden rests upon the prosecution to prove the case, so it is for them to make you sure that D did cause really serious injury and was not acting in lawful self-defence.

The law of self-defence is really just common sense. If someone is under attack or believes that they are about to be attacked they are entitled to defend themselves so long as they use no more than reasonable force. Even though, as D admits, he/she was the first to use violence, he/she can still rely on self-defence in some circumstances.

The prosecution case is that D was the aggressor throughout and further that when D inflicted the injuries upon W he/she intended that W should suffer some really serious harm.

If someone starts an exchange of violence thereby triggering retaliation the question of whether self-defence is available depends on whether the retaliation is such that D is entitled to defend himself/herself. That may depend upon whether the violence offered in retaliation was so out of proportion to D's own actions so as to give rise to the fear on the part of D that he/she is in immediate danger from which he/she has to defend himself/herself, and whether the violence which he/she then uses is no more than was reasonable.

By way of example, if X were to slap Y's face and Y reacted by pulling out a knife and trying to stab X, then it is easy to see how a need for self-defence could arise.

The fight about which you heard went on for some time. There may be differing phases when D might have been entitled to use or threaten violence and times when D was not.

Your verdict in this case is going to depend upon your conclusions in respect of a number of matters including:

- Was D the aggressor throughout the incident or was there a time or times when D believed he/she needed to defend himself/herself?
- If D may have been acting in self-defence was the force used reasonable in the circumstances – particularly in the heat of the moment when fine judgements are difficult?
- When did W sustain the injuries relied upon by the prosecution – at a point when D was acting as an aggressor or may it have been when D was acting in lawful self-defence?
- If W sustained the injuries relied upon by the prosecution at a point when you are sure D was not acting in self-defence do they amount to really serious harm?
- If they do amount to really serious harm did D intend to cause such serious injuries?

Route to verdict Example 6

Your verdict in this case will depend upon your answers to the following questions:

Question 1

Are we sure that D was the aggressor i.e. not acting in self-defence at the stage or stages when W sustained the injuries relied upon by the prosecution?

- If your answer is **Yes**, go on to consider question 3.
- If your answer is **No**, go on to consider question 2.

Question 2

At the stage or stages when D may have been acting in self-defence are we sure that the force used by D was unreasonable in the circumstances?

- If your answer is **Yes**, go on to consider question 3.
- If your answer is **No**, then your verdict will be 'Not Guilty'.

Question 3

Are we sure that at the stage or stages when W sustained a broken jaw and fractured arm D intended to cause W really serious harm.

- If your answer is **Yes,** then your verdict will be 'Guilty'.
- If your answer is **No**, then your verdict will be 'Not Guilty of causing GBH with intent but 'Guilty' of s.20'.

Example 7: Tables turning in context of continuing incident

D is charged with affray {define offence}. If a person provokes or starts a violent exchange thereby causing retaliation (as may be said about D here), the question of whether self-defence arises may depend on whether the retaliation is such that D is entitled to defend himself/herself. That may depend upon whether the

violence offered in retaliation was so out of proportion to D's own actions as to give rise to the fear on the part of D that he/she was in immediate danger to which he/she had to react, and whether the violence which D then used was reasonable. Although the incident here was a continuing one, there may be differing phases when D might be entitled to use or threaten violence in lawful self-defence and other times when D was not. This is up to you decide.

You must consider whether D did use or threaten violence (or encourage or assist another to do so) and, if so, whether D was entitled to do so in lawful self-defence at the beginning part of the incident. You might want to consider whether D used or threatened force in lawful self-defence when at the supermarket and/or when running up the street afterwards. These different phases may give rise to different conclusions as to when if at all D was entitled to use or threaten violence. However, if you were sure that self-defence did not arise at a particular point in the continuing incident, then if the other constituent elements of the offence are proved, D would be guilty of affray. In other words, just because he/she may have been entitled to defend himself/herself at one or more phases of the incident does not mean that by defending himself/herself at that phase this provides D with a defence to the whole incident.

Example 8: Pre-planned violence

In respect of the charge of violent disorder, you have to consider whether any violence that was threatened or used was unlawful. Using or threatening violence can in some circumstances be lawful if it is in circumstances of self-defence. Where self-defence is raised it is for the prosecution to disprove it.

The law of self-defence is really just common sense. If someone is under attack or believes that they are about to be attacked they are entitled to defend themselves. But that is only so long as they use no more than reasonable force on the facts as they believe them to be. If, in respect of the defendant whose case you are considering, D did or may have believed they were under attack or believed they were about to be attacked, you must go on to consider whether D's response was reasonable on the facts as D believed them to be. If you were to consider that what D did was, in the heat of the moment when fine judgements are difficult, no more than D genuinely believed was necessary, then that would be strong evidence that what D did was reasonable; and if you consider D did no more than was reasonable, then D was acting in lawful self-defence and is not guilty of the charge. It is for you to decide whether the force used was reasonable and you must do that in the light of the circumstances as you find D believed them to be. If you are sure that even allowing for the difficulties faced in the heat of the moment D used more than reasonable force, then D was not acting in lawful self-defence and, if the other parts of the offence have been proved, D is guilty.

In the context of this case, the prosecution say this fight was not just random violence between two groups of people who happened to be in the same place at the same time. The prosecution say it is no coincidence that two groups supporting rival teams that were playing in opposition in the Champions League happened to meet in the circumstances about which you have heard. In other words, the prosecution are saying that this was football related violence entered into voluntarily by both groups of supporters. The violence that took place was planned and what they wanted to happen.

Each of the defendants claim to have come across the violence by chance and to have been dragged into it. They each assert in different ways that they were not looking for violence, were not aware of a plan for violence to take place but, when they became involved, believed it was necessary to defend themselves and/or others they were with.

If you are sure, in respect of the defendant whose case you are considering, that he/she went to the scene intending to get involved in fighting rival supporters, then no question of self-defence arises in respect of the charge of violent disorder. There are many situations where two people or two groups of people fight and both are acting unlawfully, in other words not in self-defence. Similarly, if violence is planned by a group of people who wish to fight or brawl, then that may be highly relevant as to whether at any point their actions fall within the definition of lawful self-defence. Inevitably, in any such situation there will be times when some of those involved will be on the receiving end of violence and others when they may be 'dishing it out'. That does not mean that 'defence' in such circumstances will be lawful.

If, however, in respect of any defendant whose case you are considering, you conclude that they may have become involved in the conflict in the way they have claimed, then the question of self-defence is properly raised and you will have to decide whether the prosecution have disproved it so that you are sure.

Therefore, you might want to decide this essential fact first: Has the prosecution satisfied you so that you are sure that the defendant whose case you are considering entered into the fight voluntarily? If they have made you sure of this, then you may conclude that the issue of self-defence simply does not arise.

If the prosecution have **not** made you sure a particular defendant entered into the fight voluntarily – in other words if that defendant **may** have been acting in self-defence – then you would have to go on to consider whether the actions of that defendant were reasonable. If they were or may have been reasonable then the defendant would have been acting in lawful self-defence and you would find that D not guilty.

18-2 Alibi

ARCHBOLD 4-391 and 461; BLACKSTONE'S D17.14

Legal summary

1. Alibi is defined by s.6A CPIA 1996 as:

   > "evidence tending to show that by reason of the presence of an accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission."

2. Where the Crown's case turns on D's presence at a particular place and time, and D denies such presence by asserting a positive case that they were elsewhere, D has an obligation to provide particulars of the alibi: s.6A CPIA 1996; *Rochford*[1102] [16]. Failure to disclose the alibi and the particulars or to have referred to it in interview may trigger an adverse inference warning: see Chapter 17-1 and 17-4.

3. Where D relies on alibi, it is for the Crown to disprove the alibi to the criminal standard: *Wood (No 2)*.[1103] If the alibi is demonstrably false, that fact alone does not entitle the jury to convict. The jury should, where appropriate, be reminded that an alibi is sometimes invented to bolster a genuine defence: *Lesley*.[1104] A lies direction may be needed: see Chapter 16-3.

Directions

4. An alibi is evidence that D was somewhere other than alleged by the prosecution at the time that the offence was committed.

5. It is not for D to prove he/she was elsewhere: once the issue is raised it is for the prosecution to satisfy the jury so that they are sure he/she was where they allege.

6. If the jury are sure that the alibi raised is false that does not of itself prove the guilt of D. A false alibi may be raised by a defendant who thinks that it is easier or better for them to invent an alibi than to tell the truth. A lies direction may be necessary.

7. If the jury are sure that D was present as the prosecution allege the jury must also be satisfied of any other elements of the offence that are in issue.

8. An alibi direction must be considered in the context of:

   (1) any failure to mention the alibi when interviewed under caution;

   (2) any failure to comply with provisions as to notice to be given in the defence statement;

   (3) any change from any earlier notified alibi.

[1102] [2010] EWCA Crim 1928
[1103] (1967) 52 Cr App Rep 74
[1104] [1996] 1 Cr App R 39

The existence of any of the above considerations will give rise to the need for further directions and should be discussed with the advocates before speeches.

Example

The defence is one of alibi. That is to say D says that he/she was not at the scene but elsewhere when the crime was {allegedly} being committed.

Because it is for the prosecution to prove D's guilt, he/she does not have to prove that they were at {specify place asserted by D}: it is for the prosecution to prove that he/she was at {specify place asserted by the prosecution}.

If the prosecution **do** prove that D's alibi is false, that does not in itself mean that he/she is guilty. It is something which you may take into account, but you should bear in mind that sometimes an innocent person who fears that the truth will not be believed may instead invent an alibi.

If you are sure that D was where the prosecution say they were, you must also be sure {specify any other issues/elements of the offence}.

18-3 Duress

ARCHBOLD 17-118118; BLACKSTONE'S A3.35

Legal summary

1. A defendant who commits a crime under duress may, in certain circumstances, be excused liability. The defence can arise where the duress results from threats[1105] or from D's circumstances.[1106]
2. Duress in either form is not a defence to those charged with murder, attempted murder and a limited number of other very serious offences.[1107] It is available to a conspiracy to murder: *Ness and Awan*.[1108] If manslaughter is left as an alternative then it seems appropriate to direct that the jury cannot convict of that unless sure D was not under duress.
3. The defence is not available to a person who becomes voluntarily involved in criminal activity where he/she knew or might reasonably have been expected to know that they might become subject to compulsion to commit a crime.[1109]

Duress by threats

4. The elements of the defence, set out in full in *Hasan*,[1110] are:
   (1) that D reasonably believed that threats of death or serious injury had been made against them or a member of their immediate family or someone for whom D might reasonably feel responsible.[1111] False imprisonment[1112] or threat of serious psychological injury[1113] are insufficient. (There is a defence for someone who commits a crime as a result of being trafficked if the requirements of s.45 Modern Slavery Act 2015 are satisfied and the offence is not exempt under Schedule 4 of the Act – see 18-6 below.)
   (2) that D reasonably believed the threats would be carried out (almost) immediately and the threat was effective in the sense that there was no reasonable avenue of escape open to D to avoid the perceived threat. The immediacy of the threat and the inability to take evasive action is a key aspect of the defence.[1114] It should be made clear to juries that if the retribution threatened against the defendant or their family, or a person for whom D feels responsible, is not such as D reasonably expects to follow immediately or almost immediately on their failure to comply with the threat, there may be little if any room for doubt that D could have taken evasive action, whether by going to the police or in some other way, to avoid

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1105 *Hasan* [2005] UKHL 22
1106 *Martin* [1989] 88 Cr App R 343
1107 *Howe* [1987] AC 417; Gotts [1992] 2 AC 412
1108 [2011] Crim LR 645
1109 *Hasan* [2005] UKHL 22; *Ali* [2009] EWCA Crim 716. For circumstances in which involvement in drug supply might deprive D of the defence see *Phair* [2022] NICA 66
1110 [2005] UKHL 22, at para 21
1111 *Brandford* [2016] EWCA Crim 1794
1112 *Dao* [2012] EWCA Crim 717
1113 *Baker* [1997] Crim LR 497, CA
1114 *Johnson* [2022] EWCA Crim 832

committing the crime with which D is charged.[1115] It is not necessary to spell out for the jury all the risks that D claims to have faced if they did not take a reasonable opportunity;[1116]

(3) that the threat (or belief in the threat) of death or serious violence was the direct cause of D committing the offence. It is not correct to direct the jury that the threat of death or serious injury must be the sole cause: *Ortiz*;[1117]

(4) that a sober person of reasonable firmness of D's age, sex and character would have been driven to act as D did. On characteristics, see *Bowen*:[1118] the reasonable person will not share the defendant's vulnerability to pressure, timidity, or emotional instability. Characteristics attributable to addiction to drink or drugs, are also irrelevant: *Flatt*.[1119] Battered Woman's Syndrome may be a factor to be taken into account when considering whether or not an individual is acting under duress.[1120]

5. It is for the defence to raise the issue of duress. Once raised it is for the prosecution to disprove. The defence ought to be left to the jury if there is any evidence of it.[1121] However, if no reasonable jury could conclude on the evidence that the threat was 'imminent' and/or that a sober person of reasonable firmness, sharing the characteristics of the defendant, would have been driven to commit the crime because there was, for example, reasonable opportunity for avoiding it, then the defence need not be left.[1122]

6. If the jury consider that the evidence of **each** of the above four matters is, or may be, true D is not guilty. If the prosecution satisfy the jury so they are sure that one or more of the above four matters is untrue the defence fails and D is guilty.

Duress of circumstances

7. The same restrictions on the availability apply as to duress by threats. The classic statement of the law is that in *Martin*.[1123] The threat that arises from the circumstances must be extraneous to the defendant.[1124] The threat must be operative at the time of the offence.[1125] In *Petgrave*,[1126] the Court of Appeal considered the approach a judge should adopt with regard to a submission of no case to answer based upon circumstances emerging as part of the prosecution evidence.

[1115] *Z* [2005] UKHL 22 at [28] per Lord Bingham of Cornhill
[1116] *Arldridge* [2006] EWCA Crim 1970
[1117] (1986) 83 Cr App R 173
[1118] [1996] 2 Cr App R 157
[1119] [1996] Crim LR 576
[1120] *GAC* [2013] EWCA Crim 1472, considered in *Johnson* [2022] EWCA Crim 832
[1121] Cf *Bianco* [2002] 1 Archbold News 2 which suggests that it is not appropriate to leave it to the jury if no reasonable jury properly directed could fail to find it disproved.
[1122] *Khan* [2018] EWCA Crim 78
[1123] [1989] 88 Cr App R 343. See also *Shayler* [2001] EWCA Crim 1977 at [49] per Lord Woolf CJ
[1124] *Rodger* [1998] 1 Cr App Rep 143
[1125] *Pommell* [1995] 2 Cr App Rep 607
[1126] [2018] EWCA Crim 1397

Directions

8. If an offence is committed under 'duress' D is excused criminal liability except in cases of murder, attempted murder and a limited number of other very serious offences.
9. The defence is not available to a person who becomes voluntarily involved in criminal activity where they knew or might reasonably have been expected to know that they might become subject to compulsion to commit the act now charged.
10. It is for the defence to raise the issue of duress; once raised it is for the prosecution to disprove it. The defence must adduce evidence of **each** of the following four matters:
    (1) that D reasonably believed he/she was threatened; **and**
    (2) that D was threatened in such a way that he/she believed that they, or a member of their immediate family, or someone for whom D felt responsible, would be subject to immediate or almost immediate death or serious violence and there was no reasonable avenue of escape open to D to avoid the threat/s; **and**
    (3) that the threat/s was/were the direct cause of D committing the offence; **and**
    (4) that a sober person of reasonable firmness of D's age, sex and character would have been driven to act as the defendant did.
11. If the jury consider that the evidence of each of the above four matters is or may be true, the defendant is not guilty. If the prosecution satisfies the jury so they are sure that one or more of the above four matters is untrue the defence fails and the defendant is guilty.
12. In a case of duress of circumstances, the jury should be directed:

> "to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was yes, then the jury would acquit." [1127]

NOTE: It is difficult to see how this defence can be made intelligible to a jury without a Route to verdict.

[1127] *Martin* [1989] 88 Cr App R 343

Example – Duress by threats

NOTES:

In this example it is assumed that all the elements of the offence concerned have been proved, subject to the defence of duress.

This Example has been drafted with numbered paragraphs to assist in covering the different combinations of issues that may arise.

1. D has raised the defence of duress. D says that he/she was driven to do what D did by threats, namely {specify}.
2. Because it is for the prosecution to prove D's guilt, it is for them to prove that the defence of duress does not apply in this case. It is not for D to prove that it does apply.
3. You must first decide whether the threats to which D referred were or may have been made. If you are sure that they were not made, or sure that D did not reasonably believe them to have been made, the defence of duress does not arise and your verdict will be 'Guilty'. However, if you decide that the threats were or may have been made, or that D may have reasonably have believed them to have been made then go on to answer the following questions:

   (1) First you must ask whether D acted as he/she did because they genuinely and reasonably believed that if they did not do so, D/a member of D's immediate family would be killed or seriously injured either immediately or almost immediately. If you are sure that this was not the case, the defence of duress does not apply and your verdict will be 'Guilty'. However, if you decide that this was or may have been D's belief, you must go on to consider a further question. [Here go to paragraph (2) if the issue of escape from/avoidance of the threats arises. Otherwise go to paragraph (3).]

   (2) Before acting as he/she did, did D have an opportunity to escape from/avoid the threats without death or serious injury, which a reasonable person in D's situation would have taken but D did not. [Here refer to any escape or avoidance route canvassed during the trial, e.g. calling for help or going to the police.] If you are sure that there was a course of action the defendant could have taken to avoid the threat D reasonably believed to exist without having to commit the crime, the defence of duress does not apply and your verdict will be 'Guilty'. However, if you decide there was or may have been no opportunity to escape, or avoid the threatened action, then go on to the next question.

   (3) You must ask whether a reasonable person, in D's situation and believing what D did, would have done what D did. By a reasonable person I mean a sober person of reasonable strength of character of D's age and sex [here refer to any other relevant characteristics that may have been canvassed during the trial – see the Legal summary above]. If you are sure that a reasonable person would not have done what D did, the defence of duress does not apply, and your verdict will be 'Guilty'.

However, if you decide that a reasonable person would or may have done what D did:

[**either,** if the issue referred to in paragraph (4) below does not arise,] the defence of duress does apply and your verdict will be 'Not Guilty'

[**or,** if the issue referred to in paragraph (4) below does arise,] you must go on to consider one final question.

(4) You must finally ask whether D had voluntarily put himself/herself in a position in which they knew or ought reasonably to have known that they might be compelled to commit crime by threats of violence from other people. The prosecution say that D did by {e.g. getting involved with other criminals who might make such threats if D let them down or came to owe them money]. But it is for you to decide. If you are sure that D did voluntarily put himself/herself in such a position, the defence of duress does not apply and your verdict will be 'Guilty'. However, if you decide that he/she did not do so or may not have done so, the defence of duress does apply and your verdict will be 'Not Guilty'.

Route to verdict – duress by threats

NOTES:

- In this Route to verdict it is assumed that all the elements of the offence concerned have been proved, subject to the defence of duress.
- It is also assumed that the issues referred to in questions 3 and 5 both arise. If either or both did not do so, the Route to verdict must be drafted in such a way as to reflect this.

Question 1

Was D threatened in the way they say they were?

- If you are sure that D was **not**, return a verdict of 'Guilty' and disregard the following questions.
- If you decide that D was or may have been, go to question 2.

Question 2

Did D do what he/she did because D genuinely and reasonably believed that if they did not do it, D / a member of D's immediate family would be killed or seriously injured either immediately or almost immediately?

- If you are sure that this was **not** the case, return a verdict of 'Guilty' and disregard the following questions.

- If you decide that this was or may have been the case, go to question 3.

Question 3

Before D acted as D did, did D have an opportunity to escape from/avoid the threats without death/injury to himself/herself which a reasonable person in D's situation would have taken?

- If you are sure that this **was** the case, return a verdict of 'Guilty' and disregard the following questions.
- If you decide that this was not or may not have been the case, go to question 4.

Question 4

Would a reasonable person, in D's situation and believing what D did, have been caused to do what D did?

- If you are sure that this is **not** the case, return a verdict of 'Guilty' and disregard question 5.
- If you decide that this was or may have been the case, go to question 5.

Question 5

Had D voluntarily put himself/herself in a position in which he/she knew or ought reasonably to have known that he/she might be compelled to commit crime by threats of violence made by other people?

- If you are sure that this **was** the case, return a verdict of 'Guilty'.
- If you decide that this was not or may not have been the case, return a verdict of 'Not Guilty'.

18-4 Sane automatism

ARCHBOLD 17-8787; BLACKSTONE'S A3.12

Legal summary

1. A defendant has a complete defence to any charge if they were a 'sane automaton' and that automatism was not self-induced. Sane automatism arises where the defendant claims that the act alleged to constitute a crime was involuntary and was **not** caused by a disease of the mind within the meaning of the *M'Naghten Rules*; see Chapter 18-5. Examples might include reactions to anaesthetics, states of concussion following a blow to the head and hypnotic influences.
2. In a case of sane automatism other than by intoxication:

   > "two questions fall to be decided by the judge before the defence can be left to the jury. The first is whether a proper evidential foundation for the defence of automatism has been laid. The second is whether the evidence shows the case to be one of insane automatism, that is to say, a case which falls within the *M'Naghten Rules*, or one of non-insane automatism."[1128]

3. Automatism is only available if the defendant suffered a **complete** destruction of their ability to exercise voluntary control.[1129] In the case of driving offences, it is clear that the ability to drive in a purposeful manner (steering etc.) is inconsistent with involuntariness. The onus is on the defendant to raise evidence of a sufficient case of automatism fit to leave the issue to the jury.[1130] That will usually require medical evidence.[1131] Once the issue of automatism is left to the jury the burden is on the prosecution to disprove it to the criminal standard.[1132]
4. If the automatism is self-induced (other than by taking alcohol to excess or recklessly taking drugs, whether prescribed or otherwise) the jury will need to be directed in relation to voluntary intoxication: see Chapter 9.

Directions

5. Once evidence is raised by the defence that when D did the act alleged they were unable to exercise any control over their actions, it is for the prosecution to make the jury sure that D had not completely lost their ability to exercise that control.
6. If the jury consider D was, or may have been, completely unable to exercise any control over their actions and this arose, or may have arisen, from some wholly involuntary cause D is not guilty.

[1128] *Burgess* [1991] 2 QB 92, CA
[1129] *Coley* [2013] EWCA Crim 223; *Attorney General's Reference No 2 of 1992*, 97 Cr App R 429, 434
[1130] *Hill v. Baxter [*1958] 1 QB 277 DC*; Broome v. Perkins,* 85 Cr App R 321*, DC; Burgess* [1991] 2 QB 92 CA
[1131] *Bratty v A-G for Northern Ireland* [1963] AC 386; see also *C* [2007] EWCA Crim 1862
[1132] *Bratty v A-G for Northern Ireland* [1963] AC 386 HL

7. Automatism which is self-induced (other than by taking alcohol to excess or recklessly taking drugs, whether prescribed or otherwise) – e.g. by taking alcohol while using some types of prescribed drugs or failing to have regular meals while taking insulin – may still provide a defence, provided that D was not at fault to the degree required by the offence with which he/she is charged. In some cases the question of fault may be resolved by considering whether D was reckless in causing the state of automatism to exist.

Example 1: Automatism

The central issue in this case is whether, when D {specify}, D was in control of his/her actions or whether D was, or may have been, because of {specify cause e.g. concussion}, in a state of automatism*; that is to say D's state at that time was such that D acted involuntarily and was unable to exercise any control over their actions. A person is only in a state of automatism if they are unable to exercise any control at all over their actions: someone who is partially in control of their actions is not in that state.

It is not for D to prove that he/she was in such a state but for the prosecution to prove, so that you are sure of it, that they were not. If you are sure that D was **not** in a state of automatism, then, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty. If, on the other hand, you decide that D was, or may have been, in a state of automatism, then you will find D not guilty.

As to this issue {review evidence}.

NOTE:*The word 'automatism', despite being a legal term, is used since (a) it is likely, where this is an issue, that this word will have been mentioned at some point during the case and (b) it is useful 'shorthand' to describe a complete loss of the ability to exercise control over a person's actions.

Example 2: Where automatism is self-induced – offence of specific intent

The central issue in this case is whether, when D {specify e.g. wounded W}, D was in control of his/her actions or whether D was, or may have been, in a state of automatism*; that is to say D's state at that time was such that he/she acted involuntarily and was unable to exercise any control over their actions. A person is only in a state of automatism if they are unable to exercise any control at all over their actions: someone who is partially in control of their actions is not in that state.

It is not for D to prove that he/she was in such a state but for the prosecution to prove, so that you are sure of it, that they were not. If you are sure that D was **not** in a state of automatism then, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty.

If, on the other hand, you decide that D was, or may have been, in a state of automatism, you must go on to consider what caused D to be in that state. The evidence about the cause of this state is {specify e.g. D was on a course of prescribed drugs, which were supplied with a written warning not to drink any alcohol whilst taking them, but that shortly before the incident D had drunk {e.g. seven pints of lager}.

If you decide that although D was, or may have been, in a state of automatism you are sure that this was caused by D, against written advice which D knew about, mixing prescribed drugs with alcohol then, in law, D is responsible for being in a state of automatism. In these circumstances, whilst D could not have formed any intent to {specify e.g. cause W really serious harm} and so is not guilty of {specify e.g. wounding with intent} D is nevertheless guilty of the 'simple' offence of {specify e.g. wounding} because if D had not taken alcohol whilst on a course of prescribed drugs, D would not have got into a state of automatism.

18-5 M'Naghten insanity including insane automatism

ARCHBOLD 17-7474; BLACKSTONE'S A3.23

Legal summary

1. When, at the time of the commission of the actus reus of the offence,[1133] D is suffering from a disease of the mind which gives rise to a defect of reason such that D either did not know the nature and quality of his/her act or that it was legally wrong,[1134] he/she is entitled to be found Not Guilty by Reason of Insanity.[1135] It is not sufficient for the defence that D acted under uncontrollable impulse.[1136]

2. In *Keal*,[1137] the Court explained the term 'wrong':

   > "In order to establish the defence of insanity within the M'Naghten Rules on the ground of not knowing the act was "wrong", the defendant must establish both that (a) he did not know that his act was unlawful (i.e. contrary to law) and (b) he did not know that his act was "morally" wrong (also expressed as wrong "by the standards of ordinary people"). In our judgment, "wrong" means both against the law and wrong by the standards of ordinary reasonable people. Strictly a jury must be satisfied that the defendant did not know that what he was doing was against the law nor wrong by the standards of reasonable ordinary people. In practice how the jury is directed on this issue will depend on the facts and issues in the particular case.
   >
   > [U]nder the M'Naghten Rules, the defence of insanity is not available to a defendant who, although he knew what he was doing was wrong, he believed that he had no choice but to commit the act in question."

3. It has been held that the defence is one of general application and is applicable to summary only offences and to offences in which an objective fault element applies as in harassment contrary to s.2 Protection from Harassment Act 1997.[1138] The verdict must be returned by a jury; it is not for the judge to endorse an agreed plea.

4. The question is not whether D suffers from some recognised mental illness; a defendant can be treated as insane in law if the defect of reason arises from a medical condition that affects the "mental faculties of reason memory and

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[1133] If the Crown fail to prove the actus reus he must be acquitted: *A-G's Reference (No 3 of 1998)* [2000] QB 401

[1134] *Windle* [1952] 2 QB 826; *Johnson* [2007] EWCA Crim 1978, [2008] Crim LR 132

[1135] Section 2(1) of the Trial of Lunatics Act 1883 (as amended by section 1 of the Criminal Procedure (Insanity) Act 1964

[1136] *Kopsch* (1927) 19 Cr.App.R. 50, *CCA*

[1137] [2022] EWCA Crim 341, paras 41 and 48

[1138] *Loake v CPS* [2018] 1 Cr. App. R. 16, DC

understanding"[1139] such as epilepsy,[1140] diabetes,[1141] or sleepwalking,[1142] or a tumour.[1143] It is a question of law not of medicine.

5. The burden of proof is on D to establish on the balance of probabilities that he/she was insane at the time of the offence. The jury may only return a special verdict of not guilty by reason of insanity on the evidence of two or more registered medical practitioners at least one of whom is duly approved.[1144]
6. If there is an issue as to D's mental state at the time of trial, that is dealt with by the rules governing fitness to plead: see Chapter 3-2.
7. The plea of insanity may take the form of insane automatism (i.e. that D has a total loss of control as a result of some disease of the mind). The defence is mutually exclusive from that of sane automatism which requires that the total loss of control arises from some external factor:[1145] see Chapter 18-4. It is for the judge to distinguish clearly between them as a matter of law. Where the evidence is capable of supporting both insanity and sane automatism (because the defendant suffers a combination of internal and external factors) the sane automatism defence should be left to the jury.[1146] The direction will be complicated by the fact that the burden of proof is on the Crown in sane automatism and on the defendant in a case of insanity.[1147]
8. In a case where the defence is one of self-defence based on insane delusions the jury will need careful guidance.[1148]
9. In a murder trial the Crown may, in rebuttal of a defence of diminished responsibility prove the defendant's insanity: see Chapter 19-1.

Directions

10. Explain to the jury that every person is presumed to be sane and to possess a sufficient degree of reason to be responsible for his/her crimes unless the contrary is proved.
11. It is for D to prove, on the balance of probabilities, that as a result of disease of the mind he/she was labouring under such a defect of reason that D did not know (a) the nature and quality of his/her act or (b) that what he/she was doing was wrong.

[1139] *Sullivan* [1984] AC 156
[1140] *Sullivan* [1984] AC 156
[1141] *Hennessy* [1989] 2 All ER 9
[1142] *Burgess* [1991] 2 QB 92
[1143] *Kemp* [1957] 1 QB 399
[1144] Criminal Procedure (Insanity) Act 1964 s.6
[1145] *Burgess* [1991] 2 QB 92.
[1146] *Roach* [2001] EWCA Crim 2698
[1147] *Burns* (1973) 58 Cr App Rep 364
[1148] *Oye* [2013] EWCA Crim 1725

Example 1

D has raised the defence of insanity; insanity being a legal term used to describe the effect of a medical condition on the functioning of the mind. Insanity does not have to be permanent or incurable: it may be temporary and curable.

In law, a person is presumed to be sane and reasonable enough to be responsible for their actions. But if a person proves that it is more likely than not that, when they did a particular act, because they were suffering from a disease of the mind either they did not know what they were doing or they did not know that what they were doing was wrong, by the standards of reasonable ordinary people, D is to be found 'not guilty by reason of insanity'.

You should address this aspect of the case in two stages:

Firstly, you must decide whether D has proved that at the time D {specify action/s} it is more likely than not that he/she was suffering from a disease of the mind. In this case you have heard evidence from {specify witnesses and their opinions}.

If D has not proved that he/she was suffering from a disease of the mind, then D does not have a defence of insanity and, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty.

If, however, you decide that it is more likely than not that D was suffering from a disease of the mind, then you must go on to decide whether, as a result of that disease, it is more likely than not that:

- either D did not know what they were doing when D {specify}; and/or
- D did not know that what they were doing when D {specify} was wrong by the standards of reasonable ordinary people.

If D has not proved either of these things, then he/she does not have a defence of insanity and, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty. If D has proved that it is more likely than not that as a result of their disease of mind they did not know what they were doing and/or they did not know that what they were doing was wrong, then you will find D not guilty by reason of insanity.

NOTE: In many cases there is no issue that D was suffering from a disease of the mind; the real issue is whether as a result of that D did not know what D was doing and/or that what D was doing was wrong. Directions must be tailored to reflect this.

Example 2: In a homicide case where it is agreed that D is at least entitled to have the charge of murder reduced to manslaughter on the grounds of diminished responsibility

The charge on the indictment is murder. The offence of murder is committed when someone uses unlawful violence resulting in the death of a person, intending to kill that person or to cause them grievous bodily harm (meaning really serious bodily injury).

D accepts that he/she violently assaulted V, causing injuries which resulted in V's death. On the basis of the psychiatric evidence D also accepts that, when he/she did so, he/she intended to cause at least really serious bodily injury. Were it not for

the fact that he/she was very unwell at the time, therefore, D would be guilty of murder.

But D was very unwell, so much so that it is agreed that D is entitled at least to the partial defence of manslaughter by reason of diminished responsibility. As its name suggests, this defence reduces the level of criminal responsibility to one of manslaughter.

The partial defence of diminished responsibility is available to a defendant where he/she can show that at the time of killing someone:

1. they were suffering from an abnormality of mental functioning;
2. arising from a recognised medical condition; which
3. substantially impaired their ability to understand the nature of their conduct and/or form a rational judgment and/or exercise self-control; and
4. that such abnormality of mental functioning provided an explanation for their conduct.

The psychiatrists agree that these elements are all satisfied, and the prosecution accept that the defence has been made out.

There is thus no issue but that D is entitled to the partial defence. Accordingly, if you are not satisfied that he/she was legally insane (see further below) at the time of the killings you will find D 'Not guilty of murder but guilty of manslaughter'.

Defence of insanity

In normal circumstances, the burden of proving that a defendant has committed the offence on the indictment is on the prosecution. But in this case the killing is admitted in circumstances where, were it not for D's mental illness, it would amount to the offence of murder. So the prosecution has nothing to prove.

The law is that defences of diminished responsibility and of insanity are for a defendant to establish, on the balance of probabilities. That means: more likely than not.

In this case there is no issue about diminished responsibility as the prosecution have accepted it. So the defence do not have to establish it.

What remains is the defence of insanity. Legal insanity is a distinct concept, different from what a layperson may think of as insanity. It requires a defendant to show (on the balance of probabilities) that, at the time of committing of the act, he/she:

1. was experiencing disrupted thinking (defect of reason), from a recognised mental illness (disease of the mind), such that
2. they did not know the nature and quality of the act(s) they were doing, or, if they did know it, they did not know what they were doing was wrong.

'Wrong' in this context means that (a) he/she did not know that his/her act was against the law and (b) he/she did not know that his/her act was wrong 'by the standards of ordinary people'.

At the time of the killing D was suffering from a mental illness (paranoid schizophrenia) which caused him/her to experience delusions. The prosecution accepts that in the light of the evidence of his/her illness, the requirement in (1) above is satisfied.

The psychiatrists are agreed that D knew the nature and quality of the act he/she was doing i.e. he/she knew that he/she was mortally striking the person he/she killed.

So the only issue which you have to decide concerns whether D knew that what he/she was doing was wrong. For the defence to be made out in this case, the defence must satisfy you that it was more likely than not when he/she killed V, D did not know what he/she was doing was against the law.

This is an entirely subjective enquiry, meaning that you are concerned with what was/was not in D's own mind at the time.

Accordingly, you should ask yourselves the following question:

Are we satisfied that it is more likely than not that when D killed V he/she did not know that what he/she was doing was against the law?

- If your answer is Yes, you will return a verdict of 'Not Guilty by reason of insanity'.
- If your answer is No, your verdict will be 'Not Guilty of murder but Guilty of manslaughter'.

18-6 Defences available to people subject to slavery or other relevant exploitation

ARCHBOLD 19-464; BLACKSTONE'S B22.26

Legal summary[1149]

1. Section 45 Modern Slavery Act 2015 (MSA) creates a specific defence for defendants who may have been the subject of slavery or a relevant form of exploitation.[1150] Schedule 4 lists offences that are excluded from the ambit of the defence. The elements of the defence differ where the defendant is under 18. The judge, as well as the defence and prosecution, must be alert to the possibility that D is a victim of modern slavery or trafficking. It may become apparent from the evidence, even if not expressly raised by D.[1151]
2. Judges should be alert to the fact that under Article 4 of the European Convention on Human Rights (prohibition of slavery and forced labour),[1152] police and other investigators have a positive duty to investigate possible offences of human trafficking (including slavery, servitude and forced and compulsory labour) (victims of such are collectively referred to as victims of trafficking abbreviated to 'VOTs'); see *VCL v UK*.[1153] A breach of Article 4 may lead to the CPS or other prosecuting authority not identifying a VOT. That may lead to a failure properly to apply the CPS guidance.[1154] That in turn may be an abuse of process: the abuse jurisdiction protects VOTs separately from but alongside s.45.[1155] Further, at an abuse hearing the judge may consider a Single Competent Authority ('SCA') finding that D is a VOT, even though SCA decisions are not admissible at trial (see *Brecani*[1156]): the prosecution need 'clear reasons' to depart from that decision.

[1149] With enormous thanks to Ben Douglas-Jones KC and UTJ Michelle Brewer who volunteered to review this section, as a result of which it has been significantly changed and improved since the last edition.

[1150] The defence created by s.45 does not apply to offences committed before 31 July 2015: see *CS* [2021] EWCA Crim 134

[1151] *N* [2019] EWCA Crim 984

[1152] Article 4, ECHR includes human trafficking; see *VCL v UK* [2021] 73 EHRR 9

[1153] [2021] 73 EHRR 9 at [148] to [162], and [197] to [199].

[1154] CPS Legal Guidance on 'Suspects in a Criminal Case who might be Victims of Trafficking or Slavery'.

[1155] Where (1) there are indicators that D might be a VOT; but (2) there is no SCA finding following a National Referral Mechanism referral; and (3) the prosecution does not accept that D is a VOT, it may be appropriate to adjourn the proceedings. See, *R v D* [2018] EWCA Crim 2995 at [21]-[25]. For relevant principles of abuse, see *R v AAD* [2022] 1 WLR 4042 at [110] to [143]; and *R v AFU* [2023] 1 Cr App R 16, at [105]-[138]. In abuse hearings, judges should give deference to the prosecutor's decision to prosecute. The decision must be 'clearly flawed' to be an abuse on *AFU* grounds; see *Henkoma* [2023] EWCA Crim 808 at [37] and [38].

[1156] [2021] EWCA Crim 731

3. For someone 18 or over at the time of the acts constituting the alleged offence the defence applies where D:
   (1) does the conduct constituting the offence because they are compelled[1157] to by another person or by D's circumstances; and
   (2) the compulsion is attributable to slavery or is a direct consequence of a person being, or having been, a victim of slavery or a victim of human trafficking (see ss.1 and 3 of the Act);[1158] and
   (3) a reasonable person in the same situation as D and of D's age and sex, sharing any of D's physical or mental illness or disability characteristics (see s.45(5)) would have had no realistic alternative to doing the act.
4. For a person who is under 18 when they do the relevant conduct which constitutes the offence the defence applies where:
   (1) D did the act as a direct consequence of being, or having been, the victim of slavery or having been a victim of human trafficking; and
   (2) a reasonable person in the same situation as D and having the D's relevant characteristics (see s.45(5)) would do that act.
5. If the defence is raised on the evidence then it is for the prosecution to prove that it does not apply.[1159]
6. The importance of ensuring the direction for a D aged under 18 complies with the legislative scheme was emphasised in *Farrel*,[1160] *ADG* and *BIJ*.[1161]
7. It is important not to conflate the separate and distinct elements of the defence for (i) those aged 18 and older and (ii) those under the age of 18 at the time of the acts alleged: see *NHF*.[1162]

Directions

8. The defence may arise in a variety of ways and not all the potentially relevant factors will be present in every case. It will be necessary to discuss the directions with the advocates in order to identify how the matter may be left for the jury to consider.
9. Schedule 4 to the Act lists a substantial number of offences in respect of which the defence does not apply.[1163]

[1157] In *AAD* [2022] EWCA Crim 106 the Court emphasised that s.45 requires 'compulsion'. Mere causation by the acts of the trafficker is insufficient. In this respect, the statutory defence may be narrower in scope than pre-Act abuse of process applications: see for example *AGM* [2022] EWCA Crim 920; *BYA* [2022] EWCA Crim 1326

[1158] For a helpful illustration, see *BLS* [2022] EWCA Crim 1079

[1159] *MK* [2018] EWCA Crim 667

[1160] [2022] EWCA Crim 859

[1161] [2023] EWCA Crim 1309

[1162] [2022] EWCA Crim 859

[1163] Karl Laird has provided a valuable analysis of s.45 in his Criminal Law Review article [2016] Crim L.R. 395

10. The court in *MK* held that s.45 "…does not implicitly require the defendant to bear the legal or persuasive burden of proof of any element of the defence. The burden on a defendant is evidential. It is for the defendant to raise evidence of each of those elements and for the prosecution to disprove one or more of them to the criminal standard in the usual way."[1164]
11. The differences between the defences depending on whether D is under 18 or not are significant and will result in very different directions being given to the jury.[1165]
12. The 'relevant characteristics' identified in s.45(5) mirror the common law position so far as duress is concerned and thus will be subject to the same limitations identified in *Bowen*.[1166] An issue may arise as to whether a 'reasonable person in the same situation' as D should be assessed in the context of D's experience of slavery or having been a victim of human trafficking.
13. With a D aged 18 or over the jury may need assistance as to the meaning of 'no realistic alternative'.

Directions on compulsion, slavery, servitude, forced and compulsory labour and relevant exploitation including trafficking

14. Where D is an adult (aged 18 or over), by s.45(1)(c) and (3) the defence applies if D was compelled to commit the alleged offence and the compulsion was 'attributable to', or a "direct consequence of [D] being, or having been, a victim of" slavery [including servitude, debt bondage, serfdom, or forced or compulsory labour ('slavery or derivative offences')] (an offence under s.1) or of "relevant exploitation" (within the meaning of s.3).
15. Where D is a child (under 18), by s.45(4) the alleged offence must be a 'direct consequence' of being, or having been, the victim of slavery or derivative offences or human trafficking.

Prosecution stance

16. The prosecution may often accept that D is a victim of slavery or derivative offences and/or relevant exploitation including trafficking ('trafficking'). Often the components of modern slavery or trafficking will be clearly established on the evidence. The jury should then be directed that whether D is a victim of slavery, etc or trafficking is not in issue.
17. In such a case, with an adult, the issue is then whether a reasonable person in the same situation as D and having D's age, sex and any physical or mental illness or disability would have had no realistic alternative to doing the act.
18. In such a case, with a child, the issue is then whether a reasonable person in the same situation as D and having D's age, sex and any physical or mental illness or disability would have done that act.

[1164] [2018] EWCA Crim 667 at [45].
[1165] See *ADG and BIJ* [2023] EWCA Crim 1309
[1166] [1996] 2 Cr App R 157 and see 18-4 para 4(4) above.

Slavery or derivative offences or trafficking in issue

19. Where slavery or derivative offences and/or trafficking are in issue, it is for the prosecution to prove that D is not a victim of slavery, servitude, debt bondage, serfdom, forced or compulsory labour and 'relevant exploitation'.[1167]

20. Because slavery or derivative offences are hierarchical, from slavery (most serious) to forced and compulsory labour (least serious in the hierarchy), if the jury is sure that D was not subjected to forced or compulsory labour, they will necessarily be sure that D was not subjected to servitude, serfdom and slavery. Therefore, it will not normally be necessary to include slavery or servitude in the s.45 defence direction (because, if the jury are sure that D is not a victim of forced and compulsory labour, they will also be sure he/she is not a victim of slavery or servitude).

21. Debt bondage involves different considerations and there should be a separate direction concerning debt bondage where that is disclosed on the evidence. For completeness, suggested directions on slavery and derivative offences are included below.

Slavery, servitude, forced and compulsory labour ['slavery and derivative offences']

22. Slavery and derivative offences "… are to be construed in accordance with Article 4 of the Human Rights Convention [the prohibition of slavery and forced labour]" (s.1(1)). In the context of s.45, a s.1 offence may be committed by a breach of D's Article 4, ECHR rights.[1168] This includes trafficking in human beings ('THB'), as defined in Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings ('ECAT').[1169]

Slavery: ownership of D

23. The definition of slavery is not exclusively defined in s.1. In the context of s.45, it is where someone treats D as belonging to them, by exercising power over D as they might over an animal or an object.[1170]

Slavery: trafficking in human beings

24. Where D's account suggests he/she is a victim of THB (which will almost always be the case when a s.45 defence is raised), the jury must be directed to consider whether D is a victim of THB (s.1(2)).

25. An adult D is a victim of THB (as defined by Article 4, ECAT) if (1) the act, (2) the means and (3) the purpose of trafficking are present. For a child, D is a victim of THB if (1) the act and (2) the purpose of trafficking are present (the means are not necessary with a child):

    "a "Trafficking in human beings" shall mean

[1167] *MK and Gega* [2018] EWCA Crim 667
[1168] Section 1(2).
[1169] *Rantsev* (2010) 51 E.H.R.R. 1 and *V.C.L. and A.N. v. UK* (2021) 73 E.H.R.R. 9.
[1170] See K(S) [2011] EWCA Crim 1691; Archbold 19-438; and Human Trafficking and Modern Slavery Law and Practice 2nd ed at 4.7.

[The act]

the recruitment, transportation, transfer, harbouring or receipt of persons,

[The means]

by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person,

[The purpose]

for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; …"[1171]

Consent

26. When considering whether D is a victim of slavery, etc or trafficking the consent of D to the exploitation is irrelevant where D is a child or for an adult, where any of the 'means' of trafficking have been used.

Practices Similar to Slavery (servitude and debt bondage)

27. Practices similar to slavery[1172] are just below slavery in terms of hierarchy of denial of autonomy. They comprise (in the context of s.45):
    (a) 'Servitude' (including serfdom):
        (i) D's obligation to provide services to another, where the obligation is imposed by the use of coercion;[1173] and
        (ii) the obligation of D to live on another person's property where there is no possibility of D altering his/her circumstances.[1174]
    (b) Debt bondage: This is where someone tells D that they owe a debt (often for travel from their country of origin or travel to the UK; for losing drugs in the UK they are being made to sell; or for accommodation/living costs, whether during travel from abroad or in the context of being exploited in the UK). D is then made to work off the debt where terms may not be defined or limited in time and the debt never (or never materially) reduces.

Forced and Compulsory Labour

28. 'Forced or compulsory labour' is work exacted from D under the 'menace of a penalty' and performed against D this is where the work or service is carried out through physical or mental constraint.[1175]

[1171] Article 4, ECAT.
[1172] Defined within Article 1 of the Supplementary Convention on the Abolition of Slavery, Slave Trade, and Institutions and Practices Similar to Slavery, 1956 and such practices are within the scope of Article 4, ECHR
[1173] *K(S)*; *Archbold* 19-438.
[1174] *Siliadin* (2006) 43 EHRR 16
[1175] *R v K(S)*; *Archbold* 19-438. Derisory pay is not enough in itself.

29. Where D is made to work by the use or threat of:
    (a) physical violence;
    (b) psychological violence;
    (c) D's movements being restricted;
    (d) withholding D's wages or other promised benefits;
    (e) withholding documents valuable to D, like his/her identity document or residence permit;
    (f) reporting D to authorities (such as police or immigration) and the threat of deportation;
    (g) dismissal from employment in the cannabis house;
    (h) being excluded from future work;
    (i) being excluded from the community and social life;
    (j) being deprived of food;
    (k) being deprived of shelter;
    (l) being deprived of other necessities; or
    (m) being moved to even worse working conditions

    that is capable of amounting to forced or compulsory labour.
30. Low pay on its own will not amount to forced or compulsory labour.

'Relevant exploitation' (trafficking under the law of England and Wales)

31. 'Relevant exploitation' is defined in ss.2 and 3. It includes where D is:
    (a) subjected to slavery, servitude or forced or compulsory labour;[1176]
    (b) the victim of something done involving an offence related to indecent images of children or which would do if carried out in England and Wales;[1177]
    (c) the victim of something done which involves a sexual offence or which would do if carried out in England and Wales;[1178]
    (d) encouraged, required or expected to do anything amounting to an organ removal offence or which would do if carried out in England and Wales;[1179]
    (e) subjected to force, threats or deception designed to induce him/her to provide services or benefits or to enable another person to acquire benefits;[1180]

[1176] Section 3(2) MSA 2015.
[1177] Section 3(3)(a)(i) MSA 2015.
[1178] Section 3(3)(a)(ii) MSA 2015.
[1179] Section 3(4) MSA 2015.
[1180] Section 3(5) MSA 2015.

(f) used, or there is an attempt to use D, to provide services or benefits or to enable another person to acquire benefits having chosen D for that purpose on the grounds that D is a child, is mentally or physically ill or disabled, or has a family relationship with a particular person, and but for that ground D would be likely to refuse to be used for that purpose.[1181]

32. Judges need to consider tailoring a 'relevant exploitation' direction where D's case is he/she was a VOT. However, a direction will rarely be necessary if a direction concerning trafficking in human beings (see above) is given.

Expert evidence

33. Relevant psychiatric or psychological evidence as to the mental state of the defendant is admissible. Opinion evidence of trafficking experts, as to the veracity of the defendant's account, is inadmissible. Expert evidence on other issues may be admissible and the observations of the Court in *AAD* need to be considered.[1182]

Example directions on slavery, etc, and exploitation

Example 1 (D aged 18 or over)

D is alleged to have committed an offence of production of cannabis and the defence raised is that D was compelled to act as a gardener having been trafficked within the UK for that purpose. D alleges that an agent paid for him/her to come to the UK which he did for a better life. After arriving he/she was told they had to repay £16,000 (the value of D's parents' house) and the agent threatened to report D to the authorities so that he/she would be deported (leaving him/her in debt) if he/she did not stay at the property and tend the plants. He/she worked for three months and received no money and was told the debt remained outstanding.

- It is not in dispute that D knowingly cultivated cannabis plants.
- The defence case is that D was compelled to do this because he/she was recruited in the UK for the purpose of being forced to work as a 'gardener' in cannabis factories like the one found by the police when D was arrested.

You must not convict D unless the prosecution make you sure that:

(1) D was not a victim of modern slavery or human trafficking; or, even if elements of modern slavery or human trafficking were or may have been present;

(2) a reasonable person in the same situation as D and having D's age, sex and any physical or mental illness or disability would have had a realistic alternative to assisting in the cultivation of cannabis.

[1181] Section 3(6) MSA 2015.

[1182] *AAD* [2022] EWCA Crim 106; at [86]-[87]: the Court of Appeal: there may be discrete issues that properly require explanation by way of expert evidence, for instance as to the defendant's psychiatric or psychological state or the detailed mores of people trafficking gangs operating in countries that are outside the court's own knowledge and experience.

In order to be sure that D was not a victim of modern slavery and/or human trafficking, you need to consider the following:

- Whether D was subject to debt bondage as I shall define that concept to you.
- Whether D was subject to forced and compulsory labour, again as I shall define that to you.
- Whether D had been trafficked and whether that was done for the purpose of D being used unfairly and for the profit of those in this cannabis growing business.
- Whether D was misled as to his/her pay and/or abused by reason of vulnerability arising from D's immigration status so he/she had no real or acceptable alternative but to work in the cannabis house.

If you are sure that in all the relevant circumstances of the case a reasonable person would have had a realistic alternative then D would be 'Guilty' of the offence charged. If the prosecution have failed to make you sure of that then you would find D 'Not Guilty'.

I am going to set out the relevant definitions of the concepts I have just outlined in the context of a series of questions that will lead you to your verdict. That is called a route to verdict and in this particular case it is as follows:

Route to verdict

Debt bondage

In the context of this case debt bondage would arise if D was told by an agent that he owed a debt for the travel cost from Vietnam to the UK and he/she was made to work off the debt without knowing how long he/she had to work for or that the debt would never really go down? Accordingly, the first question you have to address is as follows:

Question 1

Has the prosecution made you sure that D was not in debt bondage?

- If **yes**, consider Question 2.
- If **no**, consider Question 6.

Forced and compulsory labour

In the context of this case forced and compulsory labour would arise if D was made to look after the cannabis plants through the threat of reporting D to authorities (such as police or immigration), the threat of deportation, restricting his/her movements or not paying him/her. Accordingly, the second question you have to address is as follows:

Question 2

Has the prosecution made you sure that D was not subject to forced and compulsory labour?

- If **yes**, consider Question 3.
- If **no**, consider Question 6.

Trafficking in human beings

This arises when a person is recruited, moved or harboured (in effect hidden) in order to cultivate cannabis. Accordingly, the third question you have to address is:

Question 3

Has the prosecution made you sure that D was not recruited, moved or harboured (hidden) to cultivate the cannabis?

- If **yes**, you will find D 'Guilty'.
- If **no**, consider Question 4.

Question 4

Has the prosecution made you sure that the recruitment, movement or hiding of D was not for the purpose of using D unfairly for the advantage of the person(s) who would profit from the cannabis business?

- If **yes**, you will find D 'Guilty'.
- If **no**, consider Question 5.

Question 5

Has the prosecution made you sure that D was not made to work in the cannabis house by misleading him/her as to the pay he/she would receive or abusing the fact that he/she was vulnerable without immigration status in the UK so he/she had no real or acceptable alternative but to work in the cannabis house?

- If **yes**, you will find D 'Guilty'.
- If **no**, consider Question 6.

Question 6

Has the prosecution made you sure that D was not pressured or driven to cultivating the cannabis because of the debt bondage, forced or compulsory labour or trafficking in human beings?

- If **yes**, you will find D 'Guilty'.
- If **no**, consider Question 7.

Question 7

Has the prosecution made you sure that a reasonable person in the same situation as D and having D's age, sex and any physical or mental illness or disability [outline any relevant evidence] would have had a realistic alternative to assisting in the cultivation of cannabis?

- If **yes**, you will find D 'Guilty'.
- If **no**, you will find D 'Not Guilty'.

Example 2 (D aged under 18)

At the time of the allegation with which this case is concerned, D was aged 16.

D is alleged to have committed an offence of production of cannabis and the defence raised is that D did so as a direct consequence of having been trafficked

within the UK for that purpose. D alleges that an agent paid for him/her to come to the UK which he/she did for a better life. After arriving D was told he/she had to repay £16,000 (the value of D's parents' house) and the agent threatened to report D to the authorities so that he/she would be deported (leaving him/her in debt) if D did not stay at the property and tend the plants. D worked for three months and received no money and was told the debt remained outstanding.

- It is not in dispute that D knowingly cultivated cannabis plants.
- The defence case is that D was caused to do this because he/she was recruited in the UK for the purpose of being forced to work as a 'gardener' in cannabis factories like the one found by the police when D was arrested.

You must not convict D unless the prosecution make you sure that:

(1) D was not a victim of modern slavery or human trafficking; OR

(2) even if elements of modern slavery or human trafficking were or may have been present, that a reasonable person in the same situation as D and having D's age, sex and any physical or mental illness or disability would not have cultivated cannabis.

In order to be sure that D was not a victim of modern slavery and/or human trafficking, you need to consider the following:

- Whether D was subject to debt bondage as I shall define that concept to you.
- Whether D was subject to forced and compulsory labour, again as I shall define that to you.
- Whether D had been trafficked and whether that was done for the purpose of D being used unfairly and for the profit of those in this cannabis growing business.
- Whether D was misled as to his/her pay and/or abused by reason of vulnerability arising from D's immigration status so he/she had no real or acceptable alternative but to work in the cannabis house. If you are sure that in all the relevant circumstances of the case a reasonable person of the same age as D and with D's characteristics would not have done the act then you would find D guilty. If the prosecution have failed to make you sure of that then you would find D not guilty.

I am going to set out the relevant definitions of the concepts I have just outlined in the context of a series of questions that will lead you to your verdict. That is called a route to verdict and in this particular case it is as follows:

Route to verdict

Debt bondage

In the context of this case debt bondage would arise if D was told by an agent that he/she owed a debt for the travel cost from Vietnam to the UK and he/she was made to work off the debt without knowing how long he/she had to work for or that the debt would never really go down? Accordingly, the first question you have to address is as follows:

Question 1

Has the prosecution made you sure that D was not in debt bondage?

- If **yes**, consider Question 2.
- If **no**, consider Question 6.

Forced and compulsory labour

In the context of this case forced and compulsory labour would arise if D was made to look after the cannabis plants through the threat of reporting D to authorities (such as police or immigration), the threat of deportation, restricting his/her movements or not paying him/her. Accordingly, the second question you have to address is as follows:

Question 2

Has the prosecution made you sure that D was not subject to forced and compulsory labour?

- If **yes**, consider Question 3.
- If **no**, consider Question 6.

Trafficking in human beings

This arises when a person is recruited, moved or harboured (in effect hidden) in order to cultivate cannabis. Accordingly, the third question you have to address is:

Question 3

Has the prosecution made you sure that D was not recruited, moved or harboured (hidden) to cultivate the cannabis?

- If **yes**, you will find D 'Guilty'.
- If **no**, consider Question 4.

Question 4

Has the prosecution made you sure that the recruitment, movement or hiding of D was not for the purpose of using D unfairly for the advantage of the person(s) who would profit from the cannabis business?

- If **yes**, you will find D 'Guilty'.
- If **no**, consider Question 5.

Question 5

Has the prosecution made you sure that D was not working in the cannabis house as a direct consequence of being misled as to the pay he/she would receive or abusing the fact that he/she was vulnerable without immigration status in the UK so he/she had no real or acceptable alternative but to work in the cannabis house?

- If **yes**, you will find D 'Guilty'.
- If **no**, consider Question 6.

Question 6

Has the prosecution made you sure that D was not cultivating the cannabis as a direct consequence of debt bondage, forced or compulsory labour or trafficking in human beings?

- If **yes**, you will find D 'Guilty'.
- If **no**, consider Question 7.

Question 7

Has the prosecution made you sure that a reasonable person in the same situation as D and having D's age, sex and any physical or mental illness or disability [outline any relevant evidence] would not have cultivated cannabis?

- If **yes**, you will find D 'Guilty'.
- If **no**, you will find D 'Not Guilty'.

18-7 Consent where charged with strangulation

ARCHBOLD 19-358e; BLACKSTONE'S B2.194[1183]

Legal summary

1. Section 75A Serious Crime Act 2015 (introduced by the Domestic Abuse Act 2021 with effect from 7 June 2022) creates the new offence of 'strangulation or suffocation'. A defendant commits the offence in circumstances where they intentionally strangle another person or where the defendant does any act that "(i) affects B's ability to breathe and (ii) constitutes battery of B": s.75A(1).
2. By s.75A(2) it is "a defence…for A to show that B consented to the strangulation or other act". The defence does not apply, however, if "(a) B suffers serious harm as a result of the strangulation or other act, and (b) A either- (i) intended to cause B serious harm, or (ii) was reckless as to whether B would suffer serious harm": s.75A(3).
3. A defendant seeking to rely upon the defence on s.75A(2) has an evidential burden but once the issue is raised it is for the prosecution to prove the contrary to the criminal standard: s.75A(4).
4. 'Serious harm' for the purposes of s.75A(3)(a) is defined as "(a) grievous bodily harm, within the meaning of s.18 of the Offences Against the Person Act 1861, (b) wounding within the meaning of that section, or (c) actual bodily harm, within the meaning of s.47 of that Act": s.75A(6).
5. The offence may also be prosecuted where the relevant acts are done outside the United Kingdom: s.75B.
6. There is as yet no guidance from the Court of Appeal as to the way in which the defence should be summed up.[1184]
7. A defendant can rely on consent or a mistaken belief in consent[1185] of the complainant (a) where the harm caused does not amount to ABH or GBH; and (b) even where the injury is ABH or GBH ('serious harm' within the language of the section) if it was caused accidentally (i.e. not intentionally or recklessly).

Directions

8. It is suggested that the directions will need to be discussed with the advocates in order to identify how the matter may be left for the jury to consider.
9. It will be important to explain the concept of the evidential burden that rests on the defence but also to ensure that the jury understand what must be proved and to what standard. It may also be important to explain in clear terms how

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[1183] See also Kelly and Ormerod [2021] Crim LR 532

[1184] *Cook* [2023] EWCA Crim 425 provides some guidance on sentence.

[1185] As to the potential relevance of a mistaken belief in consent see *Kelly and Ormerod*, "Non-fatal Strangulation and Suffocation" [2021] Crim L.R. 525 and a contrasting viewpoint in *Nott and Simmons*, "Crossing the Rubicon: implications of 75A of the Serious Crime Act 2015 for consent and reasonable belief in consent in Sexual Offences Act 2003 offences" [2023] Crim L.R. 512.

injuries sustained by the complainant may mean the defendant cannot rely upon the defence of consent.

10. Concerns have been expressed as to how juries should be assisted to understand a case where no visible injuries have resulted. This issue is going to depend upon the evidence in a particular case and it is beyond the scope of this work to try and anticipate what may be said to a jury about that. It is, however, suggested that directions dealing with the conditioned response to domestic violence (see Chapter 20 and example directions 14 and 15) may be relevant.

Example

{D charged with strangulation of W. The prosecution case is that D strangled W in the course of a violent assault. W alleges that as a result W passed out, and that W was left with pain and bruising to the neck area.

The defence case accepts that on occasion D strangles W but only in circumstances of consensual sexual activity. D accepts some consensual strangulation on the day in question but denies attacking W as alleged and denies that anything D did caused W any injury.}

In order to prove an offence of strangulation the prosecution must make you sure of the following two things:

(a) D intentionally strangled W; and

(b) W did not consent to that strangulation, or even if W may have consented, W in fact sustained actual bodily harm as a result of D's act of strangulation **and** D intended that W should sustain that injury or was reckless as to whether actual bodily harm would be caused D's actions.

First issue – strangulation

- Strangulation has no special legal definition and is an ordinary, common word. In this case, it means D placing hands around W's neck and applying force.
- Intentional simply means deliberately and not by accident.
- W says that in the course of a violent argument D, using his/her hands, applied force to W's neck until W passed out. If you are sure that that is what happened, that is undoubtedly an act of strangulation and would involve the intentional application of force.
- D admits that he/she has strangled W, but only in very different circumstances, namely when engaged in consensual sexual intercourse. That is what D says occurred on the day in question – not a violent argument but strangulation during consensual sexual activity.
- If you are not sure that D strangled W, your verdict will be 'Not Guilty'.
- If you are sure that the defendant did strangle W, you must go on to determine whether or not that occurred with or without consent.

Second issue – absence of consent

- It is asserted that D only ever strangled W in the course of consensual sexual activity. It is therefore for the prosecution to prove that an act of strangulation occurred without the consent of W. The prosecution of course maintain that the act of strangulation occurred as part of an attack on W rather than in the course of sexual activity. This is a factual issue for you to resolve.
- Consent means agreement by choice by someone with the freedom and capacity to make that choice.
- If you are sure that W did not consent to being strangled, then D would be guilty of the offence of strangulation.
- If you conclude that the W did, or may have consented to the strangulation, you must then go on to determine what (if any) level of injury was caused.

Third issue – what (if any) level of injury was caused

- The prosecution maintain that the act of strangulation resulted in W sustaining actual bodily harm. This is denied by D.
- Actual bodily harm means any bodily injury which is more than trivial or trifling. Such injury does not have to be permanent.
- If you are sure that actual bodily harm was sustained as a result of D strangling W, you must then go on to determine what D's state of mind was at the time of the strangulation.
- If W may have been consenting to an act of strangulation that you are sure took place, and you are not sure that W sustained actual bodily harm, then your verdict would be 'Not guilty'.

Fourth issue – what was the defendant's state of mind

- If you have concluded that W did or may have consented to the strangulation, and that the act resulted in him/her sustaining actual bodily harm, then it is for the prosecution to prove, so that you are sure, that D either intended to cause actual bodily harm, or was reckless as to whether actual bodily harm would be caused.
- How do you determine what someone intended? The answer is by looking at all of the circumstances including anything said or done by D.
- D would be reckless if D was aware of a risk that W would sustain actual bodily harm as a result of being strangled, and D took that risk when it was unreasonable to do so in the circumstances that were known to D.
- If you are sure that D either intended actual bodily harm would be caused or was reckless as to whether actual bodily harm would be caused, then D cannot rely upon W's consent as a defence, and in those circumstances your verdict would be 'Guilty'.
- If you are not sure that D either intended actual bodily harm would be caused or was reckless as to whether actual bodily harm would be caused, then your verdict will be 'Not guilty'.

Route to verdict

In order to reach your verdict in this case you must answer the following questions:

Question 1

Are you sure that D intentionally strangled W?

- If your answer is **no**, your verdict is 'Not guilty'.
- If your answer is **yes**, go on to answer Q2.

Question 2

Are you sure that W did not consent to that strangulation?

- If your answer is **yes**, your verdict is 'Guilty'
- If your answer is **no**, go on to answer Q3.

Question 3

Are you sure that W sustained actual bodily harm (harm that is more than trivial or trifling) as a result of that strangulation?

- If your answer is **yes**, go on to answer Q4.
- If your answer is **no**, your verdict is 'Not guilty'.

Question 4

Are you sure that D intended to cause W actual bodily harm or was reckless as to whether W would suffer actual bodily harm as a result of that strangulation?

- If your answer is **yes**, your verdict is 'Guilty'.
- If your answer is **no**, your verdict is 'Not guilty'.

19. HOMICIDE

19-1 Murder

ARCHBOLD 19-1; BLACKSTONE'S B.1

Although this section is focussed principally on partial defences to murder, as well as directions relevant to manslaughter, the most complex circumstance in which a killing comes to be tried by a jury is when the suspect has been charged with murder. The standard range of defences (duress, duress of circumstances and necessity excepted) will apply to a charge of murder as they may to any other charge. The most common alternative verdict when someone is tried on a charge of murder is manslaughter.

The purpose of this introductory section is to consider the offence of murder in overview only, primarily to provide some context for that which follows in the rest of this chapter.

Legal summary

1. Murder is the unlawful killing of another 'under the King's peace', with the intention to kill or to do that other grievous bodily harm. The available alternative verdicts open to a jury are those identified in s.6(2) Criminal Law Act 1967. Even where a count charging manslaughter does not feature on the indictment it is permissible for the jury to be discharged from returning a verdict on murder but to nonetheless convict of manslaughter. In such circumstances, it is not permissible for the prosecution to seek a retrial on the charge of murder: see *JB*.[1186]
2. There is no longer a limitation that the death must occur within a year and a day of the defendant's conduct, but in any case where three years have elapsed the AG's consent is required for a prosecution.[1187]
3. Where the killing involves alleged participation by more than one defendant particular care will be needed when directing the jury – see Chapter 7-4 above and *Jogee*.[1188]

Directions

4. Other than for duress, duress of circumstances and necessity, the general defences apply as in respect of any other charge (self-defence, insanity, intoxication etc). In addition, there may be a need to address the partial defences referred to later in this section. It is suggested that this is an area that will always call for both written directions as well as a route to verdict.[1189]

[1186] [2013] EWCA Crim 356
[1187] Law Reform (Year and a Day Rule) Act 1996 s.1 and s.2.
[1188] [2016] UKSC 387; [2017] AC 387 and see *Archbold* 19-23 et seq and *Blackstone's* A4.1 et seq
[1189] See *Grant and Ors* [2021] EWCA Crim 1243 and in particular para 50.

Example 1: Single D denial of intent

Following the argument in the bar D and W went outside and violence resulted. D admits stabbing W with a knife that D says was picked up from the table near to where they were fighting. D also admits there was no lawful reason that could justify the use of the knife. D denies, however, that he/she intended to kill or cause W really serious harm.

Murder is the unlawful killing of another with the intention either to kill or to cause that other person really serious physical injury. The only issue here is that of intent.

The prosecution allege that D intended to kill W, or at the very least intended that W would be caused some really serious physical harm.

D denies that intent, but does accept that stabbing W was unlawful and as a result, that he/she is guilty of the lesser offence of manslaughter.

Intention is an ordinary English word with which you are all familiar.

{In rare cases it may be appropriate to provide the jury with some guidance as to the issue of intent}

If you are sure that D intended to kill W, or cause W really serious harm, then your verdict will be 'Guilty'.

If you are not sure D intended to kill W or cause W really serious harm then your verdict will be 'Not Guilty of murder but Guilty of manslaughter'.

Example 2: Single D issue alibi

It is agreed between the prosecution and the defence that W was murdered. W was attacked as he/she walked through the park and a number of witnesses saw the attacker approach W from behind and hit W repeatedly over the head with the heavy iron bar that the police later recovered. W suffered catastrophic injuries as a result of which W died. Nothing could be done at the scene to save him/her.

The prosecution allege that the person who struck those fatal blows with the iron bar was this defendant. D denies that to be the case and told you he/she was at home with their partner at the time of the attack. The defence is one of alibi.

{See Chapter 18-2 and direct as appropriate on the issue of alibi}

If you are sure that D was the person who attacked W as alleged then your verdict will be 'Guilty'. If you are not sure, your verdict will be 'Not Guilty'.

Example 3: Two Ds on trial – other suspects not identified or arrested and prosecution unable to identify who within the entire group caused the fatal injury

The prosecution allege that these two Ds, along with at least one other, took part in a planned attack upon W, one at least of the attackers being armed with a knife. It is not in dispute that W received two stab wounds, the one to his/her chest piercing his/her heart with fatal consequences.

Both of the defendants are charged with murder. Murder is the unlawful killing of another with the intention either to kill or to cause that other person really serious physical injury.

There is no dispute that the person(s) who stabbed W committed murder. Each D admits presence at the scene but denies being involved in the violence that took place.

The question for you to answer is whether the D whose case you are considering was responsible for either (a) stabbing W or (b) assisting or encouraging the stabber(s) to do so.

Assisting or encouraging

1. The law states that a defendant may be guilty of a crime even if the crime is actually carried out by another person. If a defendant intends that a crime should be committed and intentionally assists or encourages it to be committed, he/she is guilty of that crime, even if somebody else actually carries it out.
2. There are two ways in which one or both of these defendants could be guilty of the charge of murder. First, a defendant would be guilty if he/she stabbed and killed W intending to kill or cause really serious harm. Secondly, a defendant would be guilty if he/she deliberately provided assistance or encouragement to the stabber so to do, intending that W would be killed or caused really serious harm.
3. Simply knowing what was going to happen but not participating is not enough. Merely being present at the scene would not be enough. But, if a defendant by his/her presence did assist or encourage by, for example, contributing to the force of numbers AND intended by his/her presence to help or encourage others to commit the intended crime, then he/she may be just as guilty as those who carry it out.
4. In this case, the prosecution say that the evidence shows that the defendants were acting together, with each of them sharing at least the intent to cause really serious bodily injury. Whether they were acting together, and if so with what intent, is an important matter for you to consider.
5. It is the prosecution case that at least one of the attackers was armed with a knife and that, together with others at the scene, the group chased W with the joint intention that W should be attacked and stabbed. The prosecution say the participation in the chase provided at least encouragement to the person who stabbed, and that it can be inferred from the use and/or knowledge of weapons that those participating all intended that W be caused at least serious bodily injury. The prosecution allege that at the very least these defendants were encouraging the attack.
6. As I have already directed you, you must consider the evidence for and against each defendant separately. Each defendant denies any involvement in the killing of W but accepts presence at the scene. Each denies any plan to attack and stab W or participation in an attack upon W. They each say whoever stabbed W was acting entirely alone and in an unpredictable way. They each say they did not intend that W or any person should be caused at least serious bodily injury.

Before you can convict the D whose case you are considering, the prosecution must make you sure:

a) First, that D was either the person who inflicted the fatal wound upon W or was, by their joining in the attack/chase, intentionally assisting and/or encouraging the person who did. If you are not sure that he/she did stab **or** not sure that he/she assisted or encouraged the stabber, then your verdict will be not guilty.

b) If you are sure that the defendant whose case you are considering, played either one of those two roles the prosecution must next make you sure that when D did so he/she intended either that W should die or be caused really serious bodily injury.

   In considering whether the prosecution have made you sure that the defendant whose case you are considering had one of these intentions you should consider all of the circumstances, including the level of violence in which D took part, whether D knew that another or others of the group had a knife or knives and what if anything they agreed about their attack on W.

   A defendant's knowledge or ignorance of whether another or others in the group were carrying knives will be evidence going to what D's intention was, and it may be strong evidence one way or the other, but it is not necessarily conclusive in deciding whether he/she is guilty.

   If you are sure that the defendant whose case you are considering had such an intention then your verdict will be guilty of murder. If you are not sure that he/she did have such an intention then you must go on to consider the alternative offence of manslaughter.

c) A defendant would be guilty of manslaughter if he/she intentionally participated in an offence (such as an assault on W) in the course of which death was caused, and a reasonable person would have realised that in the course of that offence some physical harm might be caused to another.

   If you are sure that this was the case then your verdict would be not guilty of murder but guilty of manslaughter. If you are not sure that this was the case you will find the defendant not guilty of murder and not guilty of manslaughter.

In order to reach your verdict in respect of each defendant you will need to address these questions:

Route To verdict

Question 1

Are we sure that the defendant whose case we are considering either inflicted the fatal wound to W or intentionally assisted/encouraged another to do so?

- If your answer is **Yes** go on to consider question 2.
- If your answer is **No** then your verdict will be 'Not Guilty'.

Question 2

Are we sure that the defendant whose case we are considering intended that W should be killed or be caused really serious physical harm?

- If your answer is **Yes** then your verdict will be 'Guilty'.
- If your answer is **No** then go on to consider question 3.

Question 3

Are we sure that the defendant whose case we are considering intentionally encouraged or assisted in the attack on W and that a reasonable person would have realised that as a result W might suffer some physical harm?

- If your answer is **Yes** then your verdict will be 'Not Guilty of murder but Guilty of manslaughter'.
- If your answer is **No** then your verdict will be 'Not Guilty'.

19-2 Diminished responsibility – abnormality of mental functioning

ARCHBOLD 19-79; BLACKSTONE'S A3.35

NOTE: The term 'diminished responsibility' survives as the statutory title of this partial defence but whenever it is raised the focus is on abnormality of mental functioning arising from a recognised medical condition and the use of the words 'diminished responsibility', depending on the circumstances, may not be helpful when directing the jury.

Legal summary

1. Section 52 Coroners and Justice Act 2009 substituted a new form of the partial defence of diminished responsibility into s.2 Homicide Act 1957 applicable in relation to any murder wholly after 4 October 2010.
2. The partial defence is available only to murder. It is not available following a finding of unfitness to plead[1190] under the Criminal Procedure (Insanity) Act 1964, s.4A(2).
3. It requires the defendant charged with murder to prove on the balance of probabilities[1191] that:
   (1) D was suffering from an 'abnormality of mental functioning'; and
   (2) the abnormality of mental functioning must have arisen 'from a recognised medical condition'; and
   (3) there was a substantial impairment of D's ability to do one or more of the things in s.2(1A), i.e. (a) to understand the nature of his/her conduct; (b) to form a rational judgment; and (c) to exercise self-control; and
   (4) the abnormality of mental functioning from a recognised medical condition must have been a cause or contributory cause of (or possibly merely an explanation of) the accused's conduct in killing.
4. In practice, the defence will only be available if D adduces expert evidence of his/her mental state.[1192] On the circumstances in which murder should be withdrawn because the expert opinion on the abnormality is uncontradicted, see below, paragraphs 19-22.
5. *Curran*[1193] addressed the unusual situation where a defendant, having been convicted of murder *in absentia*, wished to argue on appeal that he suffered from diminished responsibility at the time of the offence, despite the fact that he continued to deny having caused the death. The application for leave to appeal was rejected on the ground that in such circumstances there was "no basis upon which the psychiatric evidence may find purchase". The court did not, however, "say that a defendant will only be able to pursue a partial defence of diminished

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1190 *Antoine* [2001] 1 AC 340 HL
1191 *Foye* [2013] EWCA Crim 475. It was confirmed in *Wilcocks* [2017] EWCA Crim 2043 that there is a legal burden on the defence to the civil standard, which does not breach Art. 6(2) ECHR
1192 *Bunch (Martin John)* [2013] EWCA Crim 2498
1193 [2021] EWCA Crim 1999

responsibility in circumstances where he/she personally admits the actus reus and also an intention to kill or commit grievous bodily harm".[1194]

(1) Abnormality of mental functioning

6. D has to prove an abnormality of mental functioning, and the mental functioning must relate to one of the three capacities in subs (1A) – D's capacity to understand the nature of his/her conduct, form a rational judgment or exercise self-control. Expert evidence will be crucial to establish that there is an abnormality of mental functioning.

7. There is no requirement for the abnormality of mental functioning to be discernible to the lay person. In *Blackman*[1195] the LCJ stated, at [34]

> "The symptoms of an adjustment disorder could be masked and not apparent. Often an adjustment disorder was not apparent to the person suffering from it. A person with an adjustment disorder, as with other mental disorders, could plan and act with apparent rationality."

(2) Recognised medical condition

8. The abnormality of mental functioning must arise 'from a recognised medical condition'. Whether something is a medical condition is capable of being answered by an expert, but the question is not one of medicine but of law. This was confirmed in *Dowds*,[1196] in which the Court of Appeal held that even though voluntary 'acute intoxication' is a medical condition, in that it is recognised as being such by both diagnostic medical manuals, it is not a '**recognised** medical condition' for the purposes of establishing diminished responsibility.

(3) Mental responsibility substantially impaired

9. The defendant has to show a substantial impairment of his/her ability to do any of these:

   (1) to understand the nature of D's conduct;

   (2) to form a rational judgement;[1197]

   (3) to exercise self-control.[1198]

10. These are matters of psychiatry. The question is whether there is a 'substantial impairment' of one or more of these abilities. Since the question whether there is impairment of ability is a purely psychiatric question, it would also seem to be appropriate for the expert to offer an opinion on whether there is 'substantial' impairment.

[1194] At para 39.
[1195] [2017] EWCA Crim 190
[1196] [2012] EWCA Crim 281
[1197] See *Conroy* [2017] EWCA Crim 81. In describing this element, avoid semantic distinctions between rational judgement and ability rationally to form a judgement.
[1198] See *Byrne* [1960] 2 QB 396; and *Khan* [2009] EWCA Crim 1569

11. The impairment must be substantial. That term is to be interpreted as in *Golds*[1199] where the Supreme Court concluded that the jurisprudence on how to direct jurors was clear. Paragraphs 23 and 24 below are based on this decision. Judges should have particular regard to paragraph 43 of the decision, in which the Supreme Court answered the questions certified by the Court of Appeal thus:

> "(1) Ordinarily in a murder trial where diminished responsibility is in issue the judge need not direct the jury beyond the terms of the statute and should not attempt to define the meaning of "substantially". Experience has shown that the issue of its correct interpretation is unlikely to arise in many cases. The jury should normally be given to understand that the expression is an ordinary English word, that it imports a question of degree, and that whether in the case before it the impairment can properly be described as substantial is for it to resolve.
>
> (2) If, however, the jury has been introduced to the question of whether **any** impairment beyond the merely trivial will suffice, or if it has been introduced to the concept of a spectrum between the greater than trivial and the total, the judge should explain that whilst the impairment must indeed pass the merely trivial before it need be considered, it is not the law that **any** impairment beyond the trivial will suffice. The judge should likewise make this clear if a risk arises that the jury might misunderstand the import of the expression; whether this risk arises or not is a judgment to be arrived at by the trial judge who is charged with overseeing the dynamics of the trial. Diminished responsibility involves an impairment of one or more of the abilities listed in the statute to an extent which the jury judges to be substantial, and which it is satisfied significantly contributed to his committing the offence. Illustrative expressions of the sense of the word may be employed so long as the jury is given clearly to understand that no single synonym is to be substituted for the statutory word:…"

In *Squelch*,[1200] the trial judge directed the jury that:

> ""Substantially" is an ordinary English word on which you will reach a conclusion in this case, based upon your own experience of ordinary life. It means less than total and more than trivial. Where you, the jury, draw the line is a matter for your collective judgment."

The Court of Appeal upheld and commended this direction, noting that:

> "It most emphatically is not the case, particularly in the light of the decision of the Supreme Court in *R v Golds*[1201] (which post-dated this trial), that a detailed direction as to the meaning of the word "substantially" as used in the section is required."[1202]

[1199] [2016] UKSC 61, paras 37 - 43
[1200] [2017] EWCA Crim 204
[1201] [2016] UKSC 61
[1202] [35] per Davis LJ

(4) An explanation for D's conduct in killing

12. The defence is narrowed further by the requirement that the abnormality of mental functioning, arising from a recognised medical condition and substantially impairing the defendant's ability in a relevant manner, must also 'explain' D's acts in killing. By subsection (1B) 'an explanation' for D's conduct is provided "if it causes, or is a significant contributory factor in causing, D to carry out that conduct." In the vast majority of cases the issue of a causal link will not generate special problems.

13. It is possible, however, for an argument to be advanced that a causal link does not need to be established. Subsection (1B) does not say that for the defence to succeed a sufficient explanation can **only** be provided if the abnormality of mental functioning is a cause. On this basis a causal link is just one of the ways in which the killing might be 'explained'. There may therefore be cases where the abnormality provides an explanation sufficient to mitigate the conduct to manslaughter even if there is no causal link.

14. The language in Parliamentary debates was clearly envisaging a causal link and that seems to be the way it was interpreted in *Golds* by the Supreme Court. Psychiatrists may be more comfortable expressing an opinion that the medical condition 'explains' the killing than that it caused it.

Intoxicated defendants

15. The Court of Appeal in *Foy*[1203] has summarised the different categories of case as follows:

> "69. The current legal position appears to be this.
>
> 70. Where the killing occurs when the defendant is in a state of acute voluntary intoxication, even if that voluntary intoxication results in a psychotic episode, then there is no recognised medical condition available to found a defence of diminished responsibility: see *Dowds* [2012] EWCA Crim 281, [2012] 1 Cr App R 34; *Lindo* [2016] EWCA Crim 1940. This is so whether the intoxicant is alcohol or drugs or a combination of each.
>
> 71. Where, however, the consumption of the intoxicant is as a result of an addiction such as alcohol dependency syndrome, then, depending on the circumstances, there may be a recognised medical condition giving rise to an abnormality of mental functioning which can found the defence of diminished responsibility: *Dowds* (cited above); *Stewart* [2009] EWCA Crim 593, [2009] 2 Cr App R 30.
>
> 72. What is the position, however, where there is an abnormality of mental functioning arising from a combination of voluntary intoxication and of the existence of a recognised medical condition? What is the position, where the voluntary intoxication and the concurrent recognised medical condition are both substantially and causally operative in impairing the defendant's ability and explaining the defendant's act?
>
> …

[1203] [2020] EWCA Crim 270

74. In *Dietschmann* [2003] UKHL 10 [2003] 2 Cr App R 4, the House of Lords considered this very issue, in the context of the defence being raised under the provisions of the Homicide Act 1957 in its original form. It was decided that, for the defence to be available, the abnormality of mind did not need to be the sole cause of the defendant's acts in doing the killing: even if the defendant, in that case, would not have killed had he not taken alcohol, the causative effect of the drink did not necessarily prevent an abnormality of mind from substantially impairing the mental responsibility for the fatal acts. A corresponding approach was subsequently taken by the Court of Appeal in cases such as *Stewart* (cited above).

75. Those were cases under the former legislation. But it has been decided that a corresponding approach is also to be taken under the current legislation. The relevant authority is that of a constitution of this court in *Kay and Joyce* [2017] EWCA Crim 647, [2017] 2 Cr App R 16. In each case which was the subject of such decision, the relevant defendant suffered from paranoid schizophrenia. Each defendant also, at the time of killing, was heavily intoxicated. Dealing with the case of *Kay*, Hallett LJ (Vice President), said this at paragraph 16:

> "…The law does not debar someone suffering from schizophrenia from relying on the partial defence of diminished responsibility where voluntary intoxication has triggered the psychotic state, but he must meet the criteria in section 2 (1). He must establish, on the balance of probabilities, that his abnormality of mental functioning (in this case psychotic state) arose from a recognised medical condition that substantially impaired his responsibility. The recognised medical condition may be schizophrenia of such severity that, absent intoxication, it substantially impaired his responsibility (as in the case of *Jenkin*); the recognised medical condition may be schizophrenia coupled with coupled with drink/drugs dependency syndrome which together substantially impair responsibility. However, if an abnormality of mental functioning arose from voluntary intoxication and not from a recognised medical condition an accused cannot avail himself of the partial defence. This is for good reason. The law is clear and well established: as a general rule voluntary intoxication cannot relieve an offender of responsibility for murder, save where it may bear on the question of intent."

77. Finally, for present purposes, we refer to the case of *Golds* [2016] UKSC 61, [2017] 1 Cr. App. R 18, albeit that was not a case involving intoxication. In that case it was confirmed that, notwithstanding the essentially psychiatric aspects of all elements of the defence, whether the impairment was sufficiently substantial remained a matter of fact and degree for the jury. The Supreme Court rejected the notion that any impairment beyond the trivial would suffice. Aside from that, it was to be left to the jury to decide whether in any given case the impairment was of sufficient substance or importance to meet the statutory test. Although this approach has been the subject of academic criticism to the effect that it leaves so important an issue as in effect undefined for the jury, and with consequential room for the approach to be adopted to vary from case to case, it is to be presumed that such an approach

is based on pragmatic considerations in the context of jury trials. As said by Lord Judge LCJ in *Stewart* (cited above) at paragraph 35:

> "We acknowledge that this decision will rarely be easy. Indeed it is fair to say that diminished responsibility has always raised complex and difficult issues for the jury, not least because the defence usually involves conflicting medical evidence addressing legal, not medical concepts, for a jury of lay persons to decide. The jury is often called upon to confront problems relating to the operation of the mind with which they will be unfamiliar. Nevertheless the resolution of these problems continues to be the responsibility of the jury, and when addressing their responsibility they are inevitably required to make the necessary judgments not just on the basis of expert medical opinion but also by using their collective common sense and insight into the practical realities which underpin the individual case.""

16. In *APJ*,[1204] the court recognised the potentially distinct situation where D's intoxication was involuntary. In the earlier case of *Kay*,[1205] Hallett LJ had also recognised this possibility stating: "The appellant in this case, therefore, had to establish either that his intoxication *was involuntary* and together with the schizophrenia substantially impaired his responsibility (as the defence experts argued)…").

Withdrawing murder

17. The expert may now offer opinions on:
    (1) whether there is an abnormality of mental functioning;
    (2) whether there is a recognised medical condition;
    (3) whether the defendant had a substantial impairment of ability to understand/form rational judgment/exercise control; and
    (4) whether it is a cause or explanation for the killing.
18. The judge may withdraw murder where there is uncontradicted medical evidence of diminished responsibility, even if there is some other evidence of murder. The Supreme Court in *Golds*,[1206] commenting on the earlier case law including in particular *Brennan*,[1207] suggested how the jury should be directed where murder is left to them despite uncontradicted medical evidence of diminished responsibility. Paragraph 28 below is based on this part of the judgment.
19. In *Blackman*,[1208] the Court of Appeal applying *Golds* referred to "the prosecution's right (if not duty) to assess the medical evidence and to challenge it, where there is rational basis for doing so" and observed that it will be "a rare case" where the judge withdraws the charge of murder when the prosecution does not accept diminished responsibility [43] per Lord Chief Justice.

[1204] [2022] EWCA Crim 942
[1205] [2017] EWCA Crim 647
[1206] [2016] UKSC 61 paras 44-51
[1207] [2014] EWCA Crim 2387
[1208] [2017] EWCA Crim 190

20. Note that in *Hussain*,[1209] the Court of Appeal emphasised that "neither the judgment in *Golds* nor the judgment in *Brennan* to the extent it survives *Golds* changed the law. In future we do not expect reliance to be placed on any judgment predating *Golds* on this issue."

> "43. It is important to note the emphasis in the *Golds* judgment not only on the prosecution's right (if not duty) to assess the medical evidence and to challenge it, where there is a rational basis for so doing, but also on the primacy of the jury in determining the issue. It is clear that a judge should exercise caution before accepting the defence of diminished responsibility and removing the case from the jury (see paragraph 50). The fact that the prosecution calls no evidence to contradict a psychiatrist called by the defence is not in itself sufficient justification for doing so. In the light of the judgment in *Golds*, we see no reason not to follow the broad approach of this court in *R v Khan (Dawood)* [2009] EWCA Crim 1569, [2010] 1 Cr App R 4, to which reference was made in *Brennan*, which we would express as follows: it will be a rare case where a judge will exercise the power to withdraw a charge of murder from the jury when the prosecution do not accept that the evidence gives rise to the defence of diminished responsibility."

Procedural relationship with insanity

21. Where D, being charged with murder, raises the defence of diminished responsibility and the Crown have evidence that D is insane within the *M'Naghten Rules*, they may adduce or elicit evidence which tends to show that this is so. This is settled by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1964, s.6 as amended[1210] – resolving a conflict in the cases. That Act also provides for the converse situation: where D sets up insanity, the prosecution may contend that D was suffering only from diminished responsibility. The roles of prosecution and defence may be reversed, according to which of them is contending that D is insane. It seems clear that the Crown must establish whichever contention it puts forward beyond a reasonable doubt[1211] so it must follow that D rebuts the Crown's case if D can raise a doubt.[1212]

Disposal and jury

22. The disposal on conviction is not something for the jury's consideration: *Edgington*.[1213]

[1209] [2019] EWCA Crim 666. See also, to similar effect: *Sargeant* [2019] EWCA Crim 1088

[1210] By s.52(2) of the 2009 Act, 'In section 6 of the Criminal Procedure (Insanity) Act 1964 (c.84) (evidence by prosecution of insanity or diminished responsibility), in paragraph (b) for "mind" substitute "mental functioning"'.

[1211] *Grant* [1960] Crim LR 424, Paull J

[1212] In *Ranwell* Exeter CC 21/11/19 May J ruled s.6 does not affect the burden of proof, it simply permits the Crown to call or elicit evidence to counter the contention as to effect of mental state made by the defendant.

[1213] [2013] EWCA Crim 2185

Directions

23. In practice this defence is sometimes raised in conjunction with others such as self-defence (Chapter 18-1); lack of intent (Chapter 8-1); and loss of control (Chapter 19-3).

24. It is suggested that the direction to the jury should follow as closely as possible the provisions of s.2(1), (1A) and (1B) Homicide Act 1957 set out in s.52(1) Coroners and Justice Act 2009.

25. The jury should be provided with a written summary of the law and a list of questions (route to verdict).

26. The direction must refer to the following essential features of the partial defence:

    (1) The defence of abnormality of mental functioning reduces what would otherwise be an offence of murder to one of manslaughter.

    (2) It is for D to establish the defence, on the balance of probabilities.

    (3) The defence will be made out if, when D killed or was a party to the killing of W, D was suffering from an abnormality of mental functioning which:

        (a) arose from a recognised medical condition (s.2(1)(a)); and

        (b) substantially impaired D's ability to understand the nature of D's conduct and/or to form a rational judgment and/or to exercise self-control (s.2(1)(b) and (1A)); and

        (c) caused or was a significant contributory factor in causing D to kill or be a party to the killing of W (ss.2(1)(c) and (1B)).

27. In practice medical evidence will be adduced on some or all of the matters referred at paragraph 24(3) above. A direction on expert evidence (see Chapter 10-3 above) will therefore be necessary, as will a careful analysis of the medical evidence.

28. In relation to paragraph 24(3)(b) above it will usually be unnecessary or inappropriate to explain or define the meaning of 'substantially' beyond saying that it is an ordinary English word and that it is for the jury to decide, using its collective common sense, whether the impairment was of such a degree as to make it substantial.

29. However, if:

    (1) reference has been made during the trial to the meaning of 'substantially' and/or to the degree of impairment required; or

    (2) the jury ask about any such matters; or

    (3) the judge senses that the jury might misunderstand any such matters

    the judge should explain that the impairment will be 'substantial' if the jury, using its collective good sense, decides that it is more than merely trivial **and** is of such a degree as to make it substantial. It may be helpful to illustrate the required degree of impairment by adjectives such as 'significant', 'serious' or 'considerable' as long as the jury are reminded that in the end the question for them is whether it is 'substantial'.

30. Where there is uncontradicted medical evidence supporting a plea of diminished responsibility, but the judge rules that D should nevertheless be tried for murder, the judge should:

    (1) give a direction on expert evidence (see Chapter 10-3 above);

    (2) remind the jury that the expert evidence is uncontradicted;

    (3) indicate to the jury the reasons for which the prosecution say the jury should reject the expert evidence (e.g. the brutality of the killing or the degree of planning involved); but

    (4) give the jury appropriate cautionary warnings (e.g. that brutal killings may be the products of disordered minds and that planning may be consistent with disordered thinking); and

    (5) advise the jury against attempting to make themselves amateur psychiatrists and that they would probably wish to accept the uncontradicted expert evidence unless there was some identified reason for not doing so.

Example

It is not in dispute that D killed W with the intention either of killing W or causing W really serious injury. This would ordinarily make D guilty of murder but D has raised the defence of diminished responsibility which, if proved, reduces an offence of murder to one of manslaughter.

It is for D to establish this defence but D is not required to prove it to the same high standard as the prosecution by making you sure of it. Instead it must be proved that it is more likely than not that the defence applies.

In order to do so D must establish that all of the following four things are more likely than not to have existed:

1. that when D killed W, D was suffering from an abnormality of mental functioning; and
2. that D's abnormality of mental functioning arose from a recognised medical condition; and
3. that D's abnormality of mental functioning substantially impaired D's ability to understand the nature of his/her conduct and/or to form a rational judgment and/or to exercise self-control; and
4. that D's abnormality of mental functioning caused, or was a significant contributory factor in causing, D to kill W.

[Where any of these four elements are not in issue, this should be made clear to the jury; where any element is in issue the evidence relating to it and any arguments raised by the defence and prosecution about it should be summarised.]

If, but only if, the defence establish that all four of these things are more likely than not to have been the case, then D will be not guilty of murder but guilty of manslaughter. If D fails to establish that any one of these things is more likely than not to have been the case, then the defence of diminished responsibility is not available to D and D will be guilty of murder.

Route to verdict

Question 1

When D stabbed W, is it more likely than not that D was suffering from an abnormality of mental functioning?

- If your answer is Yes, go on to consider question 2.
- If your answer is No, your verdict will be 'Guilty of Murder' and you will go no further.

Question 2

Is it more likely than not that D's abnormality of mental functioning arose from a recognised medical condition?

- If your answer is **Yes**, go on to consider question 3.
- If your answer is **No**, your verdict will be 'Guilty of Murder' and you will go no further.

Question 3

Is it more likely than not that the abnormality of mental functioning substantially impaired D's ability to understand the nature of his/her conduct [and/or to form a rational judgment and/or to exercise self-control]?

- If your answer is **Yes**, go on to consider question 4.
- If your answer is **No**, your verdict will be 'Guilty of Murder' and you will go no further.

Question 4

Is it more likely than not that the abnormality of mental functioning caused, or was a significant contributory factor in causing, D to stab W?

- If your answer is **Yes**, your verdict will be 'Not guilty of Murder but guilty of Manslaughter'.
- If your answer is **No**, your verdict will be 'Guilty of Murder'.

19-2 (A) Infanticide and diminished responsibility

1. In *Tunstill*[1214] the Court of Appeal undertook a detailed analysis of infanticide and its relationship with diminished responsibility. The key issue on appeal was one that bears directly on the ambit of the offence, but had previously been addressed only in obiter dicta. D gave birth to a live infant in her bathroom and then stabbed the baby 14 times with scissors before disposing of the body in the household rubbish. A defence of diminished responsibility was supported by two forensic psychiatrists. One diagnosed paranoid schizophrenia. The other considered that D had been suffering from severe depression with psychotic symptoms at the material time. Each considered that the trauma of giving birth had exacerbated the underlying problem, but the prosecution expert considered that there was insufficient evidence to establish diminished responsibility, and the jury appear to have accepted this opinion, convicting D of murder.

2. Infanticide, as a possible alternative verdict to murder or manslaughter, was not left for the jury to consider. The defence had submitted that it should be. It would have offered D the advantage that, in contrast to diminished responsibility, the burden of disproving it would have been on the prosecution. The trial judge held, on the basis of Judge LJ's observations in *Kai-Whitewind*,[1215] that there was no evidence to support such a verdict. Judge LJ had said (obiter at para 134):

   > "Under [the Infanticide Act 1938] s.1(2) provision is made for infanticide to be an alternative verdict available to the jury trying a mother for murder of her infant child. It does however require evidence that the 'balance of her mind was disturbed' either because the mother has not recovered from giving birth to the child, or the effect of lactation on her. No other circumstances are relevant."

3. The trial judge took this to mean that if a mother's post-birth mental disorder was not exclusively caused by the effects of having given birth, but based, even in part, on a pre-existing mental disorder, a verdict of infanticide could not be supported. The Court of Appeal disagreed. Treacy LJ explained:

   > "30. It seems to us that to interpret Judge LJ's dictum as to "other circumstances" as applying to a situation such as the present one is unnecessarily harsh and runs counter to the intent of the legislation.
   >
   > 31. The phrase "by reason of" in s.1(1) does not in our judgment necessarily need to be read as if it said, "solely by reason of". It seems to us that as long as a failure to recover from the effects of birth is an operative or substantial cause of the disturbance of balance of mind that should be sufficient, even if there are other underlying mental problems (perhaps falling short of diminished responsibility) which are part of the overall picture.
   >
   > 32. The words "by reason of" import a consideration of causation. As the wording of s.1(1) shows, the relevant causation is that the balance of a mother's mind is disturbed as a result of not having fully recovered from the effect of giving birth to her child: there is no required causal link between the disturbance of balance of mind and the act or omission causing death. Our

[1214] [2018] EWCA Crim 1696
[1215] [2005] 2 Cr App R 457

> law is familiar with the notion that in considering causation a person's conduct need not be the sole or main cause of the prohibited harm. It is sufficient if a person's conduct is a contributory cause."

Since the jury were not given the opportunity to consider a verdict of infanticide, D's conviction for murder was unsafe. A retrial was ordered.

19-3 Loss of control

ARCHBOLD 19-54; BLACKSTONE'S B1.24

Legal summary

1. Sections 54 to 56 Coroners and Justice Act replaced the common law provocation defence. The defence is available only to a charge of murder, whether as a principal or secondary party.[1216] If successful it results in a manslaughter conviction. The defence may be pleaded alongside diminished responsibility. Note the different burdens of proof (as under the old law).

Elements of the defence

2. There are three main elements to the defence:
   (1) A loss of self-control.
   (2) The loss of self-control must be attributable to a qualifying trigger.
   (3) A person of D's age and sex, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
3. General guidance on the operation of these provisions is to be found in *Clinton*;[1217] *Dawes*;[1218] and *Gurpinar*.[1219] As the Lord Chief Justice emphasised in *Gurpinar* it "should rarely be necessary to look at cases decided under the old law of provocation. When it is necessary, the cases must be considered in the light of the fact that the defence of loss of control is a defence different to provocation and is fully encompassed within the statutory provisions."

Commencement

4. Sections 54 to 56 came into force on 4 October 2010. The provisions do not operate retrospectively. The common law defence of provocation continues to apply in any case in which the 'relevant event', such as an act which caused or contributed to the death, occurred before this date.[1220]

Withdrawing the defence

5. Under s.54(5) and (6), the defence must be left if "sufficient evidence is adduced to raise an issue with respect to the defence" and this is when "evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply." If there is sufficient evidence, the defence should be left to the jury even if D does not rely on it.

[1216] Section 54(8)
[1217] [2012] EWCA Crim 2
[1218] [2013] EWCA Crim 322
[1219] [2015] EWCA Crim 178
[1220] Coroners and Justice Act 2009 Schedule 22, para.7

6. In *Dawes*,[1221] the Lord Chief Justice observed that the section requires a judgment, not the exercise of a discretion. Irrespective of whether D has positively advanced the defence, the task of the trial judge requires:

> "… a commonsense judgment based on an analysis of all the evidence. To the extent that the evidence may be in dispute, the judge has to recognise that the jury may accept evidence which is most favourable to the defendant, and reject that which is most favourable to the prosecution, and so tailor the ruling accordingly. That is merely another way of saying that in discharging this responsibility the judge should not reject disputed evidence which the jury might choose to believe."

7. In *Gurpinar*[1222] it was made clear that if there is not 'sufficient' evidence on any one of the three elements, the defence should not be put to the jury. In deciding whether to withdraw the defence, the judge must bear in mind that the jury may take a different view of the evidence and favour the defendant:

> "However as the Act refers to "sufficient evidence", it is clearly the judge's task to analyse the evidence closely and be satisfied that there is, taking into account the whole of the evidence, sufficient evidence in respect of each of the three components of the defence …
>
> As the task facing the trial judge is to consider the three components sequentially, and then to exercise a judgement looking at all the evidence, it follows from the terms of the Act (as clearly set out in both *Clinton* and *Dawes*) that if the judge considers that there is no sufficient evidence of loss of self-control (the first component) there will be no need to consider the other two components. Nor if there is insufficient evidence of the second will there be a need to address the third.
>
> …a trial judge must undertake a much more rigorous evaluation of the evidence before the defence could be left to the jury than was required under the former law of provocation." [12] – [14]

8. The judge is bound to consider the weight and quality of the evidence in coming to a conclusion: see *Jewell*[1223] at paragraphs 51-54.

9. In *Gurpinar*, the Lord Chief Justice commented at [15] that:

> "…a judge must be assisted by the advocates. It is generally desirable that the possibility of such an issue arising should be notified to the judge as early as possible in the management of the case, even though it may not form part of the defence case. If, at the conclusion of the evidence, there is a possibility that the judge should leave the issue to the jury when it is not part of the defence case, the judge must receive written submissions from the advocates so that he can carefully consider whether the evidence is such that the statutory test is met."

[1221] [2013] EWCA Crim 322. See also *Workman* [2014] EWCA Crim 575 *Jewell* [2014] EWCA Crim 414

[1222] [2015] EWCA Crim 178

[1223] [2014] EWCA Crim 414

10. As Lord Thomas CJ stated in *Gurpinar*:

> "the three limbs of the defence should be analysed sequentially and separately. However, it is worth emphasising that in many cases where there is a genuine loss of control, the remaining components are likely to arise for consideration simultaneously or virtually so, at or very close to the moment when the fatal violence is used."

11. In a number of judgments the Court of Appeal has upheld the decision of the trial judge not to leave Loss of Control to the jury. See for example:
    (1) Where there is no evidence of loss of control: *Workman*;[1224] *Charles*.[1225]
    (2) Where there is no evidence of a qualifying trigger: of violence *Jewell*;[1226] or of grave circumstances etc: *McDonald*;[1227] *Martin*,[1228] *Dawson.*[1229]
    (3) Where there is no evidence that a jury could conclude that a person of the same age and sex as D in his/her circumstances might have acted in a similar way: *Christian*;[1230] *Goodwin*;[1231] *Meanza*;[1232] *Dawson*.[1233]

12. In *Goodwin*[1234] Davis LJ summarised the approach in the following helpful terms (at para 33):

> "We think that in a case of this kind there are a number of general considerations which need to be borne in mind which we should list. In doing so, we do not proffer this list as being necessarily an exhaustive list of the kinds of points that a trial judge, where such an issue arises, will need to bear in mind.
>
> (1) The required opinion is to be formed as a common sense judgment based on an analysis of all the evidence.
>
> (2) If there is sufficient evidence to raise an issue with respect to the defence of loss of control, then it is to be left the jury whether or not the issue had been expressly advanced as part of the defence case at trial.
>
> (3) The appellate court will give due weight to the evaluation ("the opinion") of the trial judge, who will have had the considerable advantage of conducting the trial and hearing all the evidence and having the feel of the case. As has been said, the appellate court "will not readily interfere with that judgment".

1224 [2014] EWCA Crim 5
1225 [2013] EWCA Crim 120
1226 [2014] EWCA Crim 41
1227 [2016] EWCA Crim 1529
1228 [2017] EWCA Crim 1359
1229 [2021] EWCA Crim 40
1230 [2018] EWCA Crim 134
1231 [2018] EWCA Crim 228
1232 [2017] EWCA Crim 445
1233 [2021] EWCA Crim 40
1234 [2018] 4 W.L.R. 165

(4) However, that evaluation is not to be equated with an exercise of discretion such that the appellant court is only concerned with whether the decision was within a reasonable range of responses on the part of the trial judge. Rather, the judge's evaluation has to be appraised as either being right or wrong: it is a "yes" or "no" matter.

(5) The 2009 Act is specific by section 54(5) and (6) that the evidence must be "sufficient" to raise an issue. It is not enough if there is simply some evidence falling short of sufficient evidence.

(6) The existence of a qualifying trigger does not necessarily connote that there will have been a loss of control.

(7) For the purpose of forming his or her opinion, the trial judge, whilst of course entitled to assess the quality and weight of the evidence, ordinarily should not reject evidence which the jury could reasonably accept. It must be recognised that a jury may accept the evidence which is most favourable to a defendant.

(8) The statutory defence of loss of control is significantly differently (sic) from and more restrictive than the previous defence of provocation which it has entirely superseded.

(9) Perhaps in consequence of all the foregoing, "a much more rigorous evaluation" on the part of the trial judge is called for than might have been the case under the previous law of provocation.

(10) The statutory components of the defence are to be appraised sequentially and separately; and

(11) Not least, each case is to be assessed by reference to its own particular facts and circumstances."

13. The Court added that:

> "putting it bluntly, there is no room for what may be called a "defensive" summing up on such an issue. A trial judge cannot – tempting though it may sometimes seem – simply leave loss of control to the jury in order to seek to avoid generating a potential ground of appeal …" [35]

No considered desire for revenge

14. The defence cannot apply where there is "a considered desire for revenge" (s.54(4)) even if D lost control as a result of a qualifying trigger. It may be worth considering this qualification before any other element of the defence.

15. There is nothing to suggest that D needs to have formed the considered desire for revenge before any potential qualifying trigger arises.

16. The restriction must also be seen in combination with the requirement in s.55(6)(a) and/or (b): Even if D has lost self-control, if D's loss of control was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence, the qualifying triggers are not available. In *Clinton and Ors*,[1235] it was held that the greater the level of deliberation, the less likely it

[1235] [2012] EWCA Crim 2

will be that the killing followed a true loss of self-control. The Lord Judge CJ explained:

> "In the broad context of the legislative structure, there does not appear to be very much room for any "considered" deliberation. In reality, the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self-control." [10]

In that case (*Evans*, conjoined with *Clinton* on appeal), the trial judge had directed that if the jury found that the attack was 'deliberate and considered' or 'thought about' the defence was not available.

No defence if self-induced trigger

17. D's fear of serious violence or sense of being seriously wronged is to be disregarded if D brought that state of affairs upon him/herself by, for example, looking for a fight by inciting something to be said or done (s.55(6)(a) or (b)), as the case may be.

Loss of control

18. The loss of control does not have to be sudden, as reaction to circumstances of extreme gravity may be delayed. The length of time between the qualifying trigger and the killing will remain important, but it is no longer essential that the time gap is short. The loss of control must be temporary. It may follow from the cumulative impact of earlier events. It is a subjective test: *Dawes*.[1236] If D is of an unusually phlegmatic temperament and it appears that D did not lose self-control, the fact that a reasonable person in like circumstances would have done so will not assist D in the least. The test may be best understood as being founded on whether D has lost the ability to maintain D's actions in accordance with considered judgment or whether D had lost normal powers of reasoning. It is a high threshold.

> "For the individual with normal capacity of self-restraint and tolerance, unless the circumstances are extremely grave, normal irritation, and even serious anger do not often cross the threshold into loss of control."[1237]

The Court in *Gurpinar*[1238] found it unnecessary to resolve "whether the loss of self-control had to be a total loss or whether some loss of self-control was sufficient."

19. Sustained, even gratuitous violence may not be evidence of a loss of control. In *Dawson*[1239] Fulford LJ observed (at para 23):

> "It is important in this context to emphasise that attacks leading to death can be unnecessarily brutal and prolonged for a wide range of reasons that do not involve loss of control, and a so-called "frenzied attack" may be the result, for instance, of anger, a desire for revenge, sadism or a wish to "send a message" so as to intimidate or impress others or simply because the attack

[1236] [2013] EWCA Crim 322
[1237] *Dawes* (above)
[1238] [2015] EWCA Crim 178 at [18] to [21]
[1239] [2021] EWCA Crim 40. See also *Goodwin* at [46]

is continued for as long as it takes to achieve the desired outcome of the victim's death. Whether the extreme nature of an attack of this kind sufficiently indicates the possibility of loss of control will often depend on the other evidence in the trial."

20. The jury should be directed to consider the loss of control element before examining the qualifying triggers. The burden is on the Crown to disprove the element once D has raised evidence of it.

Qualifying triggers

21. D's loss of control must have been attributable to one or both of two specified 'qualifying triggers':
    (1) D's fear of serious violence from W against D or another identified person; and/or
    (2) things done or said (or both) which:
        (a) constitute circumstances of an extremely grave character; and
        (b) cause D to have a justifiable sense of being seriously wronged.

Fear of serious violence

22. Section 55(3) provides:

> "This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from W against D or another identified person."[1240]

23. The defence is limited under this qualifying trigger to cases where D fears violence from W to himself/herself or an identified other. There is no requirement that the fear is of imminent serious violence. The relationship between this defence and self-defence under s.76 Criminal Justice and Immigration Act 2008 needs to be approached with care.
    (1) This defence is available only on a charge of murder. Self-defence is available on any charge.
    (2) The defence of self-defence is available if D believes there is a threat to D or others of **any** violence. The defence is available if D believes him/herself to be at risk of serious violence. Violence in s.55 is undefined.
    (3) If the degree of force used by D is, viewed objectively, excessive, that will deprive D of a defence of self-defence, but will not automatically deprive D of the loss of control defence. The question is whether a person with a normal degree of tolerance and self-restraint 'might use' such force.
    (4) The position will be even more complex where D has killed when attacking a trespasser in a dwelling and the self-defence plea is based on s.76 Criminal Justice and Immigration Act 2008 as amended by the Crime and Courts Act 2013: see Chapter 18-1 paragraph 7.

[1240] See *Skilton (Adam)* [2014] EWCA Crim 154

(5) Self-defence and this s.54 defence may both be pleaded. Care is needed. Unlike self-defence, D has lost control. Unlike self-defence, D can rely on fear of future non-imminent attack. If D has intentionally killed W, pleads self-defence but is alleged to have used excessive force, the complete defence of self-defence might fail, but D may still be able to rely on the partial defence, the excessive amount of force being explicable by reference to the 'loss of self-control'.[1241] Section 54(5) requires only that sufficient evidence is adduced to raise an issue under s.54(1). Thereafter, the prosecution shoulders the legal burden of proving, to the criminal standard of proof, that the defence is not satisfied.

(6) Where self-defence is raised, it does not follow, automatically or routinely, that loss of control should also be left to the jury. As Davis LJ observed in *Martin*:[1242]

> "That most certainly is not the law and indeed is wholly contrary to the designedly limited nature of the defence as conferred by the 2009 Act. At all events, where it is in any murder trial sought to be said that there is not only a defence of self-defence arising but also a defence of loss of control arising, then most certainly a "rigorous evaluation" of the evidence is always required before the issue can be left to the jury."

(7) As with self-defence, in *Asmelash*,[1243] the Lord Chief Justice held that the jury ought to be directed to consider whether they were sure that a person of D's sex and age with a normal degree of tolerance and self-restraint and in the same circumstances, **but unaffected by alcohol**, would not have reacted in the same or similar way.

Things said or done; circumstances of an extremely grave character, etc.

24. There must be some evidence of the qualifying trigger. The 2009 Act follows the old law on this: *Acott*.[1244] As Lord Judge commented in *Clinton*,[1245] "the question whether the circumstances were extremely grave and whether the defendant's sense of grievance was justifiable require objective evaluation." This was reiterated in *Dawes*,[1246] in which the Court stated that whether a circumstance is of an **extremely** grave character and whether it leads to a **justifiable** sense of being seriously wronged requires objective assessment by the judge at the end of the evidence. The existence of a qualifying trigger is **not** defined solely on the defendant's say so. The defendant must have been caused by the things done or said to have a "justifiable sense of being seriously wronged" (s.55(4)). The Lord Chief Justice in *Dawes*[1247] stated that the fact of the breakup of a relationship, of itself, will not normally constitute circumstances of an extremely

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1241 See for example *Goodwin* [2018] EWCA Crim 2287 para 44
1242 [2017] EWCA Crim 1359 para 50. See generally 'Withdrawing the Defence' at paras 5 to 12 above.
1243 [2013] EWCA Crim 157
1244 [1996] 2 Cr. App. R. 290
1245 [2012] EWCA Crim 2
1246 [2013] EWCA Crim 322
1247 [2013] EWCA Crim 322

grave character and entitle the aggrieved party to feel a justifiable sense of being seriously wronged.

25. D's loss of control that is attributed to anything said or done and which constitutes sexual infidelity it is to be disregarded (s.55(6)(c)). Sexual infidelity **on its own** cannot qualify as a trigger for the purposes of the second component of the defence. Problematic situations will arise when the defendant relies on an admissible trigger (or triggers) for which sexual infidelity is said to provide an appropriate context for evaluating whether the trigger relied on is a qualifying trigger for the purposes of subsection 55(3) and (4). When this situation arises the jury should be directed:
    (1) as to the statutory ingredients required of the qualifying trigger(s);
    (2) as to the statutory prohibition against sexual infidelity on its own constituting a qualifying trigger;
    (3) as to the features identified by the defence (or which are apparent to the trial judge) which are said to constitute a permissible trigger(s);
    (4) that, if these are rejected by the jury, in accordance with (b), sexual infidelity must then be disregarded;
    (5) that if, however, an admissible trigger may be present, the evidence relating to sexual infidelity arises for consideration as part of the context in which to evaluate that trigger and whether the statutory ingredients in (a) may be established.
26. It is possible for a defendant to rely on both qualifying triggers in combination – that D killed having lost control because D was in fear of serious violence and had a justifiable sense of being seriously wronged.

Degree of tolerance and self-restraint

27. Under s.54(1)(c) the requirement is that "a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D." This is an objective test.

    By s.54(3):

    > "In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint."

28. The reference to 'tolerance' excludes the person with unacceptable attitudes as well as those with an unacceptable temper. Guidance was proffered by the Lord Chief Justice as to how this limb of the defence ought to be applied in a case where D is voluntarily intoxicated in *Asmelash*.[1248] There is now no positive requirement that D's individual circumstances have to affect the gravity of the triggering conduct in order for them to be **included** in the jury's assessment of what the person of D's age and sex might have done. Section 54(3) only appears to exclude a circumstance on which D seeks to rely if its **sole** relevance

[1248] [2013] EWCA Crim 157

is to diminish D's self-restraint. The circumstance has to be relevant to D's conduct and not to the conduct or words of those that triggered D's loss of control.

29. In *Christian*[1249] the Court of Appeal upheld the decision of the trial judge not to leave Loss of Control, the appellant having stabbed four people, two of them fatally. The issue for the jury was self-defence.

> "The judge was fully entitled, in our view, to conclude that such ferocious multiple stabbings with that intent could not conceivably be consistent with the notional reasonable man's possible reaction. In our view, that conclusion was supported by the evidence viewed most favourably towards the defence and was reasonable, and in any event not one which this court could properly review as a ground of appeal.": Simon LJ at [33]

Defendants with diagnosed mental conditions

30. A mental condition may be relevant to the **gravity** of the qualifying trigger under s.55(3) and (4) but not to "the circumstances of D" for the purposes of s.54(3) if its only relevance is to his general capacity for tolerance or self-restraint. In the conjoined appeals of *Rejmanski and Gassman*,[1250] D1, a former soldier, was diagnosed as suffering from PTSD and D2 from Emotionally Unstable Personality Disorder. In each case the Court of Appeal decided that the jury should be directed to ignore the medical condition when considering the third element of the defence, as it bore on the defendant's general capacity for tolerance and self-restraint. In a judgment delivered by Hallett LJ, the Court said that:

> "in assessing the third component, the defendant is to be judged against the standard of a person with a normal degree, and not an abnormal degree, of tolerance and self-restraint. If, and in so far as, a personality disorder reduced the defendant's general capacity for tolerance or self-restraint, that would not be a relevant consideration. Moreover, it would not be a relevant consideration even if the personality disorder was one of the "circumstances" of the defendant because it was relevant to the gravity of the trigger. Expert evidence about the impact of the disorder would be irrelevant and inadmissible on the issue of whether it would have reduced the capacity for tolerance and self-restraint of the hypothetical "person of D's sex and age, with a normal degree of tolerance and self-restraint".

31. If the mental disorder has a relevance to D's conduct other than a bearing on D's general capacity for tolerance or self-restraint, it is not excluded by subsection (3) and the jury will be entitled to take it into account as one of D's circumstances. The court emphasised that it will be necessary to identify 'with some care' how the mental disorder is said to be relevant as one of D's circumstances. The court also emphasised that it must not be relied upon to undermine the principle that the conduct of D is to be judged against 'normal' standards, rather than the abnormal standard of an individual defendant.

[1249] [2018] EWCA Crim 1344

[1250] [2017] EWCA Crim 2016. See also *Wilcocks* [2017] EWCA Crim 2043. For an application of *Rejmanski*, see *Sargeant* [2019] EWCA Crim 1088, at paras 40-46.

32. The court explicitly rejected the argument that if a disorder is relevant to the gravity of the qualifying trigger, and evidence of the disorder is admitted in relation to the gravity of the trigger, the jury would also be entitled to take it into account in so far as it bore on D's general capacity for tolerance and self-restraint.

33. It follows that psychiatric evidence as to impaired ability to exercise self-control may be relevant to a defence of Diminished Responsibility and / or to the gravity of a qualifying trigger, but not to the third limb of Loss of Control: see *McGrory*.[1251]

Directions

34. The need for a direction about loss of control will arise only if sufficient evidence is adduced to raise the defence, as to which see ss.54(5) and (6) Coroners and Justice Act 2009.

35. In practice, this defence is often raised in conjunction with others such as self-defence (Chapter 18-1) lack of intent (see Chapter 8-1) and abnormality of mental functioning (Chapter 19-1).

36. It is suggested that the direction to the jury should follow the provisions of ss.54 and 55 of the 2009 Act as closely as possible, and should avoid as far as possible efforts to paraphrase or re-state those provisions.

37. Given the complexity of the defence, it will be essential in almost all cases to provide the jury with a written summary of the law and/or a list of questions (route to verdict).

38. The direction must refer to the following essential features of the defence:

    (1) The defence of loss of control reduces what would otherwise be an offence of murder to one of manslaughter (s.54(7)).

    (2) It is not for D to prove that the defence applies. It is for the prosecution to make the jury sure that it does not (s.54(5)).

    (3) The defence does not apply if, when D killed W, D was acting in a considered desire for revenge (s.54(4)).

    (4) The defence is available to D only if:

        (a) D's killing or being a party to the killing of W resulted or might have resulted from D's loss of self-control, whether sudden or not (s.54(1)(a) and (2)); **and**

        (b) the loss of control was or might have been caused by D's fear of serious violence from W against D or another identified person and/or by a thing or things done or said, or both, which constituted circumstances of an extremely grave character and caused D to have a justifiable sense of being seriously wronged (ss.54(1)(b) and 55(1) to (5) – and **note** that it may be necessary to expand this part of the direction by reference to s.55(6)); **and**

[1251] [2013] EWCA Crim 2336

39. The direction should identify in summary form any evidence which is capable of supporting or undermining any of the propositions referred to at 5(3) and (4) above that arise as issues in the case.

Example

D admits that he/she killed W by stabbing W and that at the time D did so D intended to kill or cause W really serious injury. That would normally make D guilty of murder. However, D relies on the defence of loss of self-control. If that defence applies to D in this case, it would not excuse D completely, but it would reduce D crime from murder to manslaughter.

Because it is the prosecution's task to make you sure of D's guilt, it is for them to prove that the defence of loss of self-control does not apply in this case. D does not have to prove that it does.

The first matter to consider is whether or not D stabbed W as the result of a loss of self-control. If you are sure that D did not in fact lose self-control at all, then the defence of loss of self-control would not apply and your verdict would be 'Guilty of Murder'. Or, if you are sure that D acted as he/she did in a considered desire for revenge, whether this was done calmly or in anger, then D would not have lost self-control and the defence would not apply. [Here summarise the evidence about this and arguments relied on by the prosecution and the defence.]

If you decide that D did lose or may have lost self-control the next matter to consider is what triggered it.

D cannot rely on a loss of self-control unless it was triggered by either or both of the following two things:

(1) D feared serious violence from W against D [or another identified person].

(2) Something(s) done or said (or both) which constituted circumstances of an extremely grave character and caused D to have a justifiable sense of being seriously wronged.

[If necessary expand this part of the direction by reference to s.55(6).]

If you are sure that D's loss of self-control was **not** triggered by either of these things, the defence of loss of self-control would not apply and your verdict would be 'Guilty of Murder'. [Here summarise the evidence about this and arguments relied on by the prosecution and the defence.]

If you decide that D's loss of self-control was or may have been triggered by one or both of these things, you will then have to consider, finally, whether a person of D's sex and age, with a normal degree of tolerance and self-restraint and in D's circumstances, might have reacted in the same or a similar way to D. [If necessary expand this part of the direction by reference to s.54(3).]

If you are sure that such a person would **not** have reacted in such a way, the defence of loss of self-control would not apply and your verdict would be 'Guilty of Murder'. If however you decide that such a person would or may have reacted in such a way then the defence of loss of self-control would apply and your verdict would be 'Not Guilty of Murder but Guilty of Manslaughter'. [Here summarise the evidence and arguments relied on by the prosecution and the defence.]

Route to verdict

Question 1

When D caused the fatal injury to W, are you sure that D had **not** lost his/her self-control?

- If your answer is **Yes**, your verdict will be 'Guilty of Murder' and you will go no further.
- If your answer is **No**, go on to consider question 2.

Question 2

Are you sure that any loss of self-control was **not** triggered by:

(a) D's fear of serious violence from W against D [or another identified person]; and/or

(b) Something(s) said or done (or both) which amounted to circumstances of an extremely grave character and caused D to have a justifiable sense of being seriously wronged?

- If your answer is **Yes**, your verdict will be 'Guilty of Murder' and you will go no further.
- If your answer is **No**, go on to consider question 3.

Question 3

Are you sure that a person of D's sex and age, with a normal degree of tolerance and self-restraint, and in D's circumstances, would **not** have reacted in the same or a similar way to D?

- If your answer is **Yes**, your verdict will be 'Guilty of Murder'.
- If your answer is **No**, your verdict will be 'Not Guilty of Murder, but Guilty of Manslaughter'.

19-4 Gross negligence manslaughter

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Legal summary

1. One form of involuntary manslaughter is gross negligence manslaughter. It differs significantly from unlawful act manslaughter (which requires an unlawful **act**; intentionally performed; in circumstances rendering it dangerous (in the sense that a reasonable and sober person possessed of information by presence at the scene would realise that it might cause some bodily harm to a person) causing death.[1252])
2. In contrast, gross negligence manslaughter, as defined by the House of Lords in *Adomako*,[1253] requires proof that D was in breach of a duty of care under the ordinary principles of negligence; the negligence must have caused death; and it must, in the opinion of the jury, amount to **gross** negligence. The question, 'supremely a jury question', is: "having regard to the risk of death involved, [was] the conduct of the defendant . . . so bad in all the circumstances as to amount in [the jury's judgement] to a criminal act or omission?"
3. The offence may arise in a variety of circumstances including where D has supplied W with drugs and W has self-administered but D has in some way further caused or contributed to W's death.[1254] It also arises in complex cases alleging medical negligence.[1255] It can also arise for example where D is operating a business selling substances online which are falsely advertised as safe for human consumption.[1256] [see below].

The elements of the offence

4. A full recent statement of the offence has been provided by Sir Brian Leveson P in *Rose*[1257] as supplemented in *Kuddus*.[1258]
5. There are six elements which the prosecution must prove in order for a person to be guilty of an offence of manslaughter by gross negligence:
   (1) The defendant owed an existing duty of care to the victim.
   (2) The defendant negligently breached that duty of care.
   (3) That breach of duty gave rise to an obvious and serious risk of death.
   (4) It was also reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death.
   (5) The breach of that duty caused the death of the victim.

1252 See *Goodfellow* (1983) Cr App R 23
1253 [1995] 1 A.C. 171
1254 See *Evans* [2009] EWCA Crim 650. Following the decision of the House of Lords in *Kennedy (No 2)* [2008] 2 AC 169, D cannot be convicted of unlawful act manslaughter on the basis of the act of supply to W who self-administers the drugs.
1255 See *Sellu* [2016] EWCA Crim 1716, *Rudling* [2016] EWCA Crim 741; *Bawa-Garba* [2016] EWCA Crim 1841; *Rose* [2017] EWCA Crim 1168
1256 See *Rebelo* [2021] EWCA Crim 306
1257 [2017] EWCA Crim 1168
1258 [2019] EWCA Crim 837

(6) The circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

6. The question of whether there is a serious and obvious risk of death must exist at, and is to be assessed with respect to, knowledge at the time of the breach of duty.
7. A recognisable risk of something serious is not the same as a recognisable risk of death.
8. A mere possibility that an assessment might reveal something life-threatening is not the same as an obvious risk of death. An obvious risk is a present risk which is clear and unambiguous, not one which might become apparent on further investigation.[1259]

Duty

9. 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.[1260] That decision is to be made by applying the 'ordinary principles of negligence' to determine whether the defendant owed a duty to the victim, albeit not all civil law principles will be relevant. (The duty is not displaced by relying on the victims' being jointly engaged with D in a criminal enterprise: *ex turpi causa*;[1261] nor by a plea of *volenti non fit injuria*.[1262]) Particular care will be needed in several situations including:
   (1) Where the allegation is a breach of duty by omission, it must be established that D owes a duty to act.
   (2) In the context of drug supply followed by neglect, a duty could arise if, *inter alia*, D had created or **contributed** to the creation of a state of affairs (W's danger) which D knew, or ought reasonably to have known, had become life-threatening. The duty on D is to act by taking reasonable steps to save the other's life by calling medical assistance.[1263]
   (3) In the context of suppliers of food to the public, Sir Brian Leveson, P commented in *Kuddus* that:

> "The scope of the duty owed to any individual will be determined by the circumstances (or, as described in *Honey Rose*, the factual matrix). Thus, a restaurateur must obviously take reasonable steps not to serve food to a customer that is injurious to all and any members of the public. In relation to allergens (such as peanut protein) which may have an adverse effect on a sub-set of the population, the scope of the duty owed to members of the class (or subset) of allergy sufferers may well extend to identifying by warning in a menu or otherwise the presence of such allergens in food with the request that notice be given to the restaurant if, in a particular case, such an allergen is likely to cause harm."

1259 *Rose* [2017] EWCA Crim 1168, para 77
1260 See *Evans* [2009] EWCA Crim 650
1261 *Wacker* [2003] QB 1203
1262 *Winter and Winter* [2010] EWCA Crim 1474
1263 *Evans* [2009] EWCA Crim 650

Breach

10. Expert evidence will be critical in establishing whether there has been a breach of the duty. The duty may be set out in statute, arise under contract, by custom etc. The standards to be expected of the person in complying with that duty could derive from numerous sources.

A serious and obvious risk of death in fact

11. The defendant's breach of duty "must give rise to (1) a risk of death, that was (2) obvious and (3) serious. These are objective facts, which are not dependent upon the state of mind or knowledge of the defendant. If there is a real issue as to their existence, each must be proved by relevant and admissible evidence." per Sir Brian Leveson P in *Kuddus*.[1264]

Risk of death reasonably foreseeable

12. As the Court of Appeal made clear in *Rudling*,[1265] at the time of the breach of duty, there must be a risk of death, not merely serious harm or illness; the risk must be serious; and the risk must be obvious. "A mere possibility that an assessment might reveal something life-threatening is not the same as an obvious risk of death". An obvious risk is a present risk which is clear and unambiguous, not one which might become apparent on further investigation.[1266] In assessing either the foreseeability of the risk of death or the grossness of the conduct in question, the jury are not entitled to take into account information which would, could or should have been available to the defendant had he not breached the duty in question.[1267]
13. In some cases the foreseeability of there being a significant risk of death arising from the breach of duty will be obvious to the particular defendant. Examples of this, as recognised in *Winterton*, might be the anaesthetist in *Adomako* and the doctors in *Misra and Strivastata* in which "the warning signs and serious and obvious risk of death were there for them to see".[1268] Of course it is not necessary that the particular defendant did in fact see the risk. It is enough that he/she "either did see them and ignored them, or failed to do so in circumstances that would provoke an objective observer to say, 'but on the facts and in their position they should have done'."[1269]

Grossness

14. The question is whether the risk would have been obvious to the reasonably prudent and skilful doctor, anaesthetist, electrician, etc. The courts have emphasised that to repeat the word 'gross' is insufficient. The jury need to understand that they must be sure of a failure that was not just serious or very serious but 'truly exceptionally bad'.[1270] The offence does not require *mens rea*. There is no need to prove the defendant's state of mind and in particular their

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[1264] At para 53
[1265] *Rudling* [2016] EWCA Crim 741
[1266] [2016] EWCA Crim 741, paras 39–41
[1267] *Rose* [2017] EWCA Crim 1168
[1268] [2018] EWCA Crim 2435 para 29
[1269] *Winterton* para 29
[1270] *Sellu* [2016] EWCA Crim 1716 at para 152

foresight of the risk of harm or death. However, the courts have held that there may be cases in which the defendant's state of mind is 'relevant to the jury's consideration when assessing the grossness and criminality of his conduct'.[1271] This approach has been endorsed on a number of occasions, and it has been recognised that it may operate in the accused's favour.[1272]

Causation

15. The ordinary principles of causation apply: see Chapter 7.1. D's breach of duty must have caused or made a significant contribution to the death.[1273] The grossly negligent conduct of D need not be the sole or principal cause of death. However the prosecution must prove to the criminal standard that the gross negligence was at least a substantial (that is, more than minimal) contributory cause of death.
16. *Broughton*[1274] concerned a failure to obtain medical assistance. In such a case, the prosecution must prove that, at a time when the deceased's condition was such that there was an obvious and serious risk of death, timely medical attention would have saved the life of the deceased. "To be sure that the gross negligence caused the death the prosecution must exclude realistic or plausible possibilities that the deceased would anyway have died." [23] The Court emphasised that *Broughton* was "one of those rare cases … where the expert evidence was all that the jury had to assist them in answering the question on causation". Expert evidence of a 90% chance of survival with medical help "was not capable of establishing causation to the criminal standard". [103]
17. Where, despite D's breach of duty, W did or might have made a fully free, voluntary and informed decision to risk death and that eclipsed D's gross negligence, the chain of causation would be broken: *Rebelo*.[1275] It is important to focus on whether W's decision is truly free and informed particularly where it is suggested that D's deception perpetrated upon W may have deprived W of the level of volition required in making a decision about the risk.[1276]

Directions

18. Duty: Identify the duty alleged by the Crown and direct the jury on which facts they need to be sure for that duty to exist in law. Direct that if they are sure of such facts, then there is, as a matter of law, a relevant duty on D.
19. Breach: Identify the alleged breach of that duty whether by act or omission. In some cases the Crown may rely on the cumulative effect of breaches; in others a single breach may be the exclusive focus.[1277] The jury will need explicit guidance on which aspect of the defendant's conduct they must focus on in deciding whether there was a breach.[1278]

[1271] *A-G's Reference (No 2 of 1999)* [2000] Crim LR 475 Cf *S* [2015] EWCA Crim 558
[1272] *R v DPP, ex p Jones* [2000] IRLR 373, DC; *R (Rowley) v DPP* [2003] EWHC 693 (Admin)
[1273] *Zaman* [2017] EWCA Crim 1783
[1274] [2020] EWCA Crim 1093
[1275] [2021] EWCA Crim 306
[1276] *Rebelo* [2021] EWCA Crim 306; *Field* [2021] EWCA Crim 380
[1277] See e.g. *Sellu* [2016] EWCA Crim 1716
[1278] See *Sellu* [2016] EWCA Crim 1716

20. Risk of death: The jury must be sure that there was an obvious and serious risk of death (nothing less) when D breached the duty: *Misra*,[1279] *Singh*.[1280] The direction in *Singh* should be followed: 'the circumstances must be such that a reasonably prudent person would have foreseen a serious and obvious risk not merely of injury, even serious injury, but of death'. The question of whether there was a risk of death is an objective question – not a question about whether D foresaw any such risk: *S*;[1281] *Kuddus*.[1282]
21. Obvious risk: The risk must be obvious to the reasonable professional in D's shoes, who demonstrates the same level of negligence as D. The test is not whether the reasonable professional who had **not** been negligent would have appreciated the existence of a serious and obvious risk of death; the risk must be assessed with reference to D's negligent standard.[1283]
22. Exceptionally bad: The jury need to be sure that the breach is sufficiently grave to be one deserving to be criminal and to constitute manslaughter. A clear warning as to the high threshold is required. The courts have emphasised that to repeat the word 'gross' is insufficient. The jury need to understand that they must be sure of a failure that was not just serious or very serious but 'truly exceptionally bad'.[1284] Sir Brian Leveson P stated:

    > "What is mandatory is that the jury are assisted sufficiently to understand how to approach their task of identifying the line that separates even serious or very serious mistakes or lapses, from conduct which was 'truly exceptionally bad and was such a departure from that standard [of a reasonably competent doctor] that it consequently amounted to being criminal'."[1285]

23. Causation: The prosecution must prove that D's breach of duty caused or made a significant contribution to the death.[1286] In *Bawa-Garba*, the Court of Appeal held that the judge's direction to the jury that D could only be guilty if her acts or omissions made a significant contribution to D dying as and when he did was unassailable.[1287]

1279 [2004] EWCA Crim 2375 para 51
1280 [1999] Crim LR 582. Official Transcript on Westlaw: *Singh (Gurphal)*
1281 [2015] EWCA Crim 558
1282 [2019] EWCA Crim 837
1283 *Rose* [2017] EWCA Crim 1168; *Rudling* [2016] EWCA Crim 741
1284 *Sellu* [2016] EWCA Crim 1716 para 152
1285 *Sellu* [2016] EWCA Crim 1716 para 152. Langley J's direction to the jury in *Misra* [2005] 1 Cr App R 21 was cited with approval. See also *Bawa-Garba* [2016] EWCA Crim 1841, [36]
1286 *Zaman* [2017] EWCA Crim 1783
1287 [2016] EWCA Crim 1841 para 33

A written route to verdict is strongly encouraged: *Sellu*.[1288]

Note that trials will typically involve a great deal of expert evidence and guidance at Chapter 10-3 is to be followed. The Court in *Sellu* emphasised how important the experts' evidence will be in assisting the jury in determining whether D's degree of negligence crossed the high threshold necessary for it to constitute gross negligence. Care will be needed to guard against the jury's role as the ultimate decision-maker from being usurped by the experts.[1289]

Trials of Gross Negligence Manslaughter often involve highly technical, expert-heavy evidence. All cases are fact specific. Accordingly, the Editors have not proposed a Route to verdict but would commend the structure set out under Directions above.

[1288] [2016] EWCA Crim 1716
[1289] *Sellu* [2016] EWCA Crim 1716 para 142

19-5 Unlawful act/Constructive act manslaughter

ARCHBOLD 19-11011; BLACKSTONE'S B1.52

Legal summary

1. The elements of unlawful act / constructive act manslaughter are different to the elements of gross negligence manslaughter and they are not to be confused.
2. In *Goodfellow*[1290] Lord Lane CJ stated that:

   > "The questions which the jury have to decide on the charge of manslaughter of this nature are: (1) Was the act intentional? (2) Was it unlawful? (3) Was it an act which any reasonable person would realise was bound to subject some other human being to the risk of physical harm, albeit not necessarily serious harm? (4) Was that act the cause of death?"

3. A useful rule of thumb is to begin by asking what would have been charged if no one had died. Each of the elements of the offence requires further elaboration.

<u>An unlawful act</u>

4. It is clear that a crime (sometimes referred to as the 'base offence' on which the manslaughter is constructed) must be committed. It is not sufficient that a civil wrong is committed.[1291] All elements of the offence must be proved,[1292] and any defences that have been advanced must be disproved.[1293] The offence will usually be an offence against the person but need not be so.[1294]
5. It is desirable for the Crown to specify the offence that it is alleged was the base offence on which the manslaughter charge is constructed.
6. It is unclear whether the base offence that must be proved needs to be one of mens rea or whether it is sufficient that it is a crime of negligence or strict liability. Prosecutions have been successful based on such crimes.[1295] However, there is authority from the House of Lords that conduct that becomes criminal simply because of its negligent performance is not sufficient.[1296]
7. Unlawful act manslaughter is a basic intent offence. It is no excuse for D to claim that he/she lacked the mens rea for the base offence because of voluntary intoxication.[1297]
8. There must be an unlawful 'act'; a crime of omission (such as child neglect) will not suffice.[1298]

[1290] (1986) 83 Cr App R 23
[1291] *Franklin* (1883) 15 Cox CC 163. See gross negligence manslaughter in such instances.
[1292] *Lamb* [1967] 2 QB 981
[1293] *Scarlett* [1993] 4 All ER 629 (self-defence); *Slingsby* [1995] Crim LR 570 (consent to assault in sexual context).
[1294] E.g. arson; *Goodfellow* (1986) 83 Cr App R 23
[1295] *Meeking* [2012] 1 WLR 3349 (RTA 1988, s. 22A(1)(b)); *Andrews* [2003] Crim LR 477 (Medicines Act 1968)
[1296] *Andrews v DPP* [1937] AC 576 (driving without due care and attention)
[1297] *Lipman* [1970] 1 QB 152
[1298] *Lowe* [1973] QB 702

Intentionally performed

9. This element rarely raises any challenge. The prosecution must prove the mens rea for the base offence.[1299]

Dangerous

10. The seminal decision on the point remains *Church*,[1300] where Edmund Davies J said (at p. 70):

> "...the unlawful act must be such as all sober and reasonable people *would* inevitably recognise ***must*** subject the other person to, at least, the risk of some [physical] harm resulting therefrom, albeit not serious harm." (emphasis added)

11. The test is an objective one.[1301] The accused's subjective perception of the risk of harm is not determinative but may nonetheless be highly relevant to the terms in which the jury should be directed.
12. The sober and reasonable person is deemed to have knowledge of those facts known to the accused at the time of,[1302] and acquired during,[1303] the commission of the offence.
13. The requirement is for a likelihood of physical harm.[1304]
14. Particular care is needed when the allegation is of a joint venture.[1305]
15. Where it is alleged that the unlawful act which caused death is a violent assault on W, there may be no need for the direction to the jury to refer to the full *Church* test. It may suffice that the jury are sure D personally foresaw a risk of some harm to someone by his actions. That may be less confusing for the jury than the *Church* formula.
16. Where the unlawful act alleged to have caused death is not one involving an assault by D on W (e.g. criminal damage) the full *Church* formula should be adopted in any directions. This aspect of the UAM test fell to be considered in *Nica*,[1306] the prosecution arising from the death of 39 Vietnamese refugees in a sealed container lorry. In rejecting the defence arguments on appeal the court stated that it was not "open to this court to re-cast the law to achieve the objective of reform". The dangerousness test is an objective one.

1299 *Lamb* [1967] 2 QB 981
1300 [1966] 1 QB 59
1301 *F (J)* [2015] 2 Cr App R (S) 5 (64) (Ds aged 15 and 16 guilty of criminal damage by arson. Liability for manslaughter involves an objective test.
1302 *Ball* [1989] Crim LR 730
1303 *Watson* [1989] 2 All ER 865
1304 *Dawson* (1985) 81 Cr App R 150
1305 *Bristow* [2013] EWCA Crim 1540. See the commentary at [2014] Crim LR
1306 [2021] EWCA Crim 1790

Causation

17. The unlawful act must cause death.

18. Where D supplies drugs to W who self injects and dies, D is not, without more,[1307] guilty of unlawful act manslaughter;[1308] W's free and informed act has broken the chain of causation. For example, in cases involving the supply of drugs to another it may be necessary to direct the jury not just to consider D's knowledge and intention but also the capacity of the deceased to make an informed decision whether to take the substance supplied. If, having supplied the drugs, D owes some other duty to W and has breached that duty that may give rise to liability for gross negligence manslaughter.[1309]

Whether to leave manslaughter as an alternative verdict to murder[1310]

19. By s.6(2) Criminal Law Act 1967 on an indictment for murder, if D is found not guilty of murder, D may be found guilty of manslaughter (or attempted murder or causing grievous bodily harm with intent).

20. In *Coutts*,[1311] Lord Bingham provided guidance as follows:

> 23. "The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support … I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency."

21. Lord Rodger[1312] expressed the test as follows: Manslaughter should be left to the jury "whenever …it arises as a viable issue on a reasonable view of the evidence".

22. The approach to be adopted is helpfully summarised by Gross LJ in *Barre*.[1313]

[1307] e.g. where D has assisted in inserting the needle: *Burgess* [2008] EWCA Crim 516
[1308] *Kennedy No 2* [2005] UKHL 3838
[1309] See *Evans* [2009] EWCA Crim 650
[1310] As to leaving Manslaughter by reason of Diminished Responsibility, see 19-5. As to Manslaughter by reason of Loss of Control, see 19-12 to 19-15.
[1311] [2006] UKHL 39
[1312] Para 85
[1313] [2016] EWCA Crim 216 para 22

23. Whether in any particular case the alternative verdict must be left to the jury is necessarily fact specific. For recent examples of the Court of Appeal upholding the approach of the trial judge, see: *Barnard*[1314] and *Braithwaite*.[1315]

24. In *Alagbaoso* the Court upheld the decision of the trial judge not to leave manslaughter, on the ground of lack of intent, where the real issue was self-defence. However, the Court emphasised that 'self-defence' and 'lack of intent' are not necessarily mutually exclusive.[1316]

Leaving different forms of manslaughter

25. Where the Crown alleges that the conduct could constitute gross negligence manslaughter and unlawful act manslaughter it may be better to indict for one offence of manslaughter and allege both unlawful act and gross negligence not as true alternatives but to demonstrate the different ways in which the offence could be committed. It would then be appropriate to ask the jury to return a verdict on each.

Example 1: Punch by D followed by death of W – D had been drinking

The prosecution case is that D had been drinking heavily and, having lost his/her temper, punched W who later died. D has agreed striking W but has said that he/she was not acting unlawfully but was acting in lawful self-defence.

The prosecution have to prove the case, so it is for them to make you sure that D was the aggressor and was not acting in lawful self-defence.

The law of self-defence is really just common sense. If someone is under attack or believes that they are about to be attacked they are entitled to defend themselves so long as they use no more than reasonable force. In this case when D struck W he/she says it was because he/she believed W was about to hit them.

If on the evidence you are sure that D was the aggressor and did not believe they were under threat from W then no question of self-defence arises and, subject to the other elements of the offence being proved, your verdict will be one of 'Guilty'.

If, however you consider it was or may have been the case that D was, or believed they were under attack, or believed they were about to be attacked, you must go on to consider whether D's response was reasonable. If you were to consider that what D did was, in the heat of the moment when fine judgments are difficult, no more than D genuinely believed was necessary, that would be strong evidence that what D did was reasonable; and if you consider D did no more than was reasonable, D was acting in lawful self-defence and is not guilty of the charge. It is for you to decide whether the force used was reasonable and you must do that in the light of the circumstances as you find D believed them to be.

1314 [2019] EWCA Crim 617
1315 [2019] EWCA Crim 597
1316 [2021] EWCA Crim 1997 para 34 – a case complicated by the fact that the young defendant, with "intellectual difficulties", was not asked in evidence as to his intent at the time of the stabbing.

In respect of the reasonableness or otherwise of D's actions the fact that he/she had been drinking is something of which you will need to take account. If you are sure that D's action in striking W was the result of a drunken mistake by D, and one that he/she would not have made had he/she been sober, then D's actions would not have been reasonable. If, on the other hand, D may or would have acted in the way that he/she did had D been sober then the fact that D was affected by alcohol could not operate so as to make his/her actions unreasonable. If you are sure that even allowing for the difficulties faced in the heat of the moment D used more than reasonable force, then D was not acting in lawful self-defence and, if the other parts of the offence have been proved, D is guilty.

Route to verdict

Question 1

Have the prosecution made you sure that when D deliberately stuck W, D did **not** honestly believe that he/she needed to use force to defend himself/herself from an imminent attack by the deceased?

- If the prosecution have **not** made you sure of this then D was or may have been acting in self-defence and go to Question 2.
- If the prosecution have made you sure of this then D was not acting in self-defence and go to Question 3.

[**Note:** a mistaken belief as to the need for self-defence arising solely from D's state of intoxication does not provide a defence.]

Question 2

Have the prosecution made you sure that the force used by D was not reasonable in the circumstances as D honestly believed them to be?

- If the prosecution have **not** made you sure of this then D was or may have been acting in **lawful** self-defence, your verdict will be 'Not Guilty'.
- If the prosecution have made you sure of this then D was not acting in lawful self-defence and go to Question 3.

[**Note:** a mistaken belief as to the amount of force needed for self-defence arising solely from D's state of intoxication does not provide a defence.]

Question 3

Are you sure that a **sober** and reasonable person inevitably would have realised that the deceased might suffer some physical harm albeit not necessarily really serious harm as a result of the unlawful and deliberate act (the punch) committed by D?

- If your answer is **No**, your verdict will be 'Not Guilty' and you will go no further.
- If your answer is **Yes**, go on to consider Question 4.

Question 4

Are you sure that D's act caused the death?

- If your answer is **No**, your verdict will be 'Not Guilty'.
- If your answer is **Yes**, your verdict will be 'Guilty'.

[**Note:** Question 4 is necessary only if causation is in issue. In most cases the written direction will note that causation is not in dispute. There may be scope in certain circumstances for an alternative reflected in a separate count to be left to the jury in the event that they conclude that D's act did not cause the death.]

20. SEXUAL OFFENCES

20-1 Sexual offences – The dangers of assumptions

ARCHBOLD 20-20; BLACKSTONE'S B3.39

Legal summary

1. In *D*[1317] the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In short, these were that (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; (ii) some may complain immediately whilst others feel shame and shock and not complain for some time; and (iii) a late complaint does not necessarily mean it is a false complaint. The court also acknowledged that a judge is entitled to refer to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner. There may be cases where guidance on myths and stereotypes may be appropriate to benefit a defendant.[1318]
2. This approach has been endorsed on numerous occasions by the Court of Appeal, as explained in *Miller*:[1319]

   > "In recent years, the courts have increasingly been prepared to acknowledge the need for a direction that deals with what might be described as stereotypical assumptions about issues such as delay in reporting allegations of sexual crime and distress (see, for example, R v. MM [2007] EWCA Crim 1558, R v. D [2008] EWCA Crim 2557 and R v. Breeze [2009] EWCA Crim 255)."

3. In *Miller*, the Court of Appeal endorsed the following passage from the 2010 Bench Book "Directing the Jury":

   > "The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its

[1317] [2008] EWCA Crim 2557. See also *Breeze* [2009] EWCA Crim 255

[1318] [2019] EWCA Crim 665 where D was charged with making false rape complaints, although in the circumstances of the case the court did not assess that the failure to give such guidance undermined the safety of the conviction.

[1319] [2010] EWCA Crim 1578

intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice."

4. The use of such a direction, properly tailored to the case does not offend the common-law principle that judicial notice can be taken only of facts of particular notoriety or common knowledge.[1320] It is a matter of judgement for the trial judge as to the extent to which a jury should be given warnings about such matters that are not legal directions.[1321] A direction of this kind may also fall to be given in cases other than ones that involve sexual allegations, for example where a jury may need assistance as to how someone may be conditioned by the experience of long term domestic abuse. Parties are not permitted to adduce generic expert evidence of the range of known reactions to non-consensual sexual offences.

5. This direction may be given at the outset of the case [see Chapter 1-3 and/or as part of the summing up. Whenever it is given it is advisable to discuss the proposed direction with the advocates.[1322] Considerable care is needed to craft the direction to reflect the facts of the case[1323] and to retain a balanced approach.[1324]

6. In *GJB*[1325] the CA approved the direction of the trial judge in *Miller* on the delay issue. "We entirely accept that in a suitable case, and this was one, the judge is entitled to and should comment on the reluctance or difficulty of the victim of sexual abuse to speak about it for long afterwards. In this connection, we refer to the judgments of this Court in *D (JA)*[1326] and in *Miller*.[1327] However, it is important that the comment should not assume the guilt of the defendant, and that the defendant's case should be made clear. The direction in *Miller* was described as a model in this respect. The summing up in that case included the following passage:

> "You are entitled to consider why these matters did not come to light sooner. The defence say that it is because they are not true. They say that the allegations are entirely fabricated, untrue and they say that had the allegations been true you would have expected a complaint to be made earlier and certainly once either defendant … was out of the way … of the complainant. The defence say that she could have complained to her mother or her grandmother before she left the country or to her mother on the plane, or to the headmaster of the school … or to the social worker who came on one occasion to speak to her (although again bear in mind there is no evidence that the complainant was ever given any contact details or instructions as to how to make such a complaint), or that she could have complained sooner to a family or extended family member once she was safe in Jamaica.

1320 *Miller* [2010] EWCA Crim 1578
1321 *Hepburn* [2020] EWCA Crim 820
1322 *Miller* [2010] EWCA Crim 1578
1323 *Smith* [2012] EWCA Crim 404
1324 *CE* [2012] EWCA Crim 1324
1325 *GJB* [2011] EWCA Crim 867; *F* [2011] EWCA Crim 1844
1326 [2008] EWCA Crim 2557
1327 [2010] EWCA Crim 1578

On the other hand the prosecution say that it is not as simple as that. When children are abused they are often confused about what is happening to them and why it is happening. They are children and if a family member is abusing them in his own home or their own home, to whom can they complain? A sexual assault, if it occurs, will usually occur secretly. A child may have some idea that what is going on is wrong but very often children feel that they are to blame in some way, notwithstanding circumstances which an outsider would not consider for one moment them to be at blame or at fault. A child can be inhibited for a variety of reasons from speaking out. They may be fearful that they may not be believed, a child's word against a mature adult, or they may be scared of the consequences or fearful of the effect upon relationships which they have come to know, or their only relationship.""

7. In *KC*[1328] the court urged caution as to the provision of written guidance relating to evidence, as distinct from written directions of law contextualised by reference to the evidence. In *Bhatt*[1329] the court emphasised the value of directions addressing myths and stereotypes, in particular at paragraphs 72 and 73, stating: "We accept that the effect of each direction may be to bolster the evidence of a victim; but it only bolsters their evidence to the extent necessary to prevent unfairness to the victim caused by the stereotypical thinking against which it warns".

8. There is a particular need for caution in respect of evidence of demeanour other than:

   (1) when the evidence of the demeanour has been observed or recorded close in time to the circumstances of the alleged offence; and/or

   (2) in the course of:

      (a) providing the account by way of an ABE process (the recording of which features as evidence in the case); or

      (b) giving 'live' evidence, whether by way of a s.28 process or otherwise.

9. This topic has been addressed in cases such as *Keast*,[1330] *Miah*[1331] and *Zala*.[1332] For evidence about the demeanour of a witness at other times to be admissible there needs to be a "concrete basis for its relevance" and that "in the overwhelming majority of cases, such evidence should not be adduced" not least because to admit it could lead "to a number of collateral witnesses being called to explain the reaction of the victim (or alleged victim)", *Miah* para [16]. In so far as evidence may feature in a particular case great care will need to be exercised when crafting the terms in which the jury are to be directed about that and in the circumstances no example direction has been provided. The admission of such evidence should be a rare event and the circumstances sufficiently variable that a 'standard' direction is unlikely to be of help.

[1328] [2022] EWCA Crim 1378
[1329] [2022] EWCA Crim 926
[1330] [1998] Crim LR 748
[1331] [2014] EWCA Crim 938
[1332] [2014] EWCA Crim 2181

10. In *McPartland*[1333] the court considered the issue of disclosure applications relating to a complainant's mobile phone. The court held that it was not entirely usual practice for a complainant's phone to be examined and what was a reasonable line of enquiry depended on the facts of the particular case.[1334]
11. Consideration should be given as to whether a similar warning might be appropriate in cases of domestic abuse (see examples 15 and 16 below).

Directions

12. There is a possibility that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this. This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both the prosecution and the defence. Inappropriate comments in advocates' final speeches can usually be dealt with by a suitable direction.[1335] The judge must not give any impression of supporting a particular conclusion but should warn the jury against approaching the evidence with any preconceived assumptions.
13. Depending on the evidence and arguments advanced in the case, guidance may be necessary on one or more of the following supposed indicators relating to the evidence of the complainant:
    (1) Of untruthfulness:
        (a) Delay in making a complaint.
        (b) Complaint made for the first time when giving evidence.
        (c) Inconsistent accounts given by the complainant.
        (d) Lack of emotion/distress when giving evidence.
    (2) Of truthfulness:
        (a) A consistent account given by the complainant.
        (b) Emotion/distress when giving evidence.
    (3) Of consent and/or belief in consent:
        (a) Clothing worn by the complainant said to be revealing or provocative.
        (b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others.
        (c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.
        (d) Some consensual sexual activity on the occasion of the alleged offence.

1333 [2019] 4 WLR 153
1334 *Charnock* [2021] EWCA Crim 100; failure by a complainant to provide her phone did not render the conviction unsafe.
1335 *Le Brocq v Liverpool CC* [2019] EWCA Crim 1398

(e) Lack of any use or threat of force, physical struggle and/or signs of injury. Again it may be necessary to alert the jury to the distinction between submission and consent.

(4) Background of defendant:

(a) A defendant who is in an established sexual relationship;

(b) Sexual orientation if that has the potential to be an issue.

14. Such directions must be crafted with care and should always be discussed with the advocates in advance. Thought should be given as to when may be the most appropriate time to give such directions: at the outset of the trial and in the course of summing up?

15. It is of particular importance in cases of this nature to listen to the closing speeches of the advocates with care and if necessary review the directions to be given.

16. One of the advantages of delivering a split summing up is that by so doing the judge may deter advocates from making 'bad' points or at least ones that may need to be addressed by further directions/comments on the relevant point in the second stage of the summing up.

17. The examples given below will need to be adjusted so as to fit in with the circumstances of the particular case in which they are to be used. It will also be necessary to elide that which is said about assumptions with the directions necessary as to consent and reasonable belief in consent as dealt with in 20-4 below. Reference should be had to that section when settling upon the totality of that which needs to be said to the jury on this topic.[1336]

Example 1: Avoiding assumptions about rape and other sexual offences

It would be understandable if some of you came to this trial with assumptions about the crime of rape. But as a juror you have taken a legal oath or affirmation to try D based only on the evidence you hear in court. This means that none of you should let any false assumptions or misleading stereotypes about rape affect your decision in this case. To help you with this I will explain what we know about rape/sexual offences from experience that has been gained in the criminal justice system.

We know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people, quite often when the people involved are known to each other or may be related.

[1336] In The end-to-end rape review report on findings and actions, (2021) the government stated that it had "invited the judiciary to consider Review findings when updating the Crown Court Compendium" CP 437 (June 2021), p.17. The example directions on the dangers of assumptions were extensively reviewed and revised in the December 2020 edition of the Compendium. All directions are as a matter of course subject to further review and, where necessary, amendment with each revision of the Compendium. For further discussion on the importance of myths see the Law Commission Consultation Paper.

We also know that there is no typical response to rape.

People can react in many different ways to being raped. These reactions may not be what you would expect or what you think you would do in the same situation.

So all of you on this jury must make sure that you do not let any false assumptions or stereotypes about rape affect your verdict. You must make your decision in this case based only on the evidence you hear from the witnesses and the law as I explain that to you.

Example 2: Delay (in the context of the complainant's allegations)

When you consider why this allegation was not made earlier, you must not assume that because it was delayed it is untrue. The fact that a complaint is made late does not make the allegation untrue. And a complaint is not necessarily true just because it was made immediately.

The defence say that because the complaint was not made at the time this means W is not telling the truth and that W has made up the story. This was suggested to W in evidence. But W said {insert e.g. that W was a child aged 12 and afraid to tell anyone because D had told W that if W did so W would not be believed and this was "our little secret"; and that W only overcame this fear when W's own daughter was approaching the age that W was when W said D did this to W}.

To decide this point, you should look at all the circumstances. This includes the reason W gave for not complaining at the time. Different people react to situations in different ways. Some people may tell someone about it straight away. But others may not feel able to do so. This can be out of shame, shock, confusion or fear of getting into trouble, not being believed, or causing problems for other people. It is your job to consider whether or not any of those things affected W's decision not to complain at that time and whether or not that impacts upon W's reliability as a witness.

I am explaining these points so that you will think about them in your deliberations. I am not expressing any opinion. It is for you to decide whether or not W's evidence is true.

Example 3: Complaint made for the first time when giving evidence

Until W gave evidence W had not mentioned {specify} to anyone before. The defence say this shows W has invented this allegation and was "making it up as he/she went along" [if applicable: and that all of W's story is untrue]. The prosecution say that {e.g. it is not surprising that when W was having to think about things which happened a long time ago and answer detailed questions about them this triggered W's memory so that W was then able to remember this for the first time}.

You need to consider both of these arguments. When you do, you should remember that the timing of a complaint does not determine whether it is true or not. Just because someone only mentions an incident at a later time does not mean that it cannot be true. Equally, just because someone consistently makes the same allegation does not mean it must be true.

If someone has a shocking or upsetting experience of the kind the prosecution alleges took place their memory may be affected in different ways. This may affect that person's ability to take in and recall the experience. Also, some people may go over an event afterwards in their minds many times and their memory may be clearer. But other people may try to avoid thinking about an event at all, and they may have difficulty recalling the event accurately or even at all. [If it is in dispute that there was anything shocking or upsetting consider adding: Your assessment of this factor will be influenced by your conclusions as to the facts of this case.]

I am explaining these points so you will think about them. I am not expressing any opinion. It is for you to decide whether or not W's evidence is true. When you consider this you should look at all of the circumstances of W's original complaint. These include the account W gave to the police officer in the interview, the way W gave evidence and what W said in reply to the suggestion that W had invented this [if applicable: and all of W's account].

If you are sure W's account is true, then you may rely on it in reaching your verdict. But you cannot rely on it if you are not sure it is true, or if you are sure it is not true.

Example 4: Inconsistent accounts

When you consider this allegation, you must not assume that the evidence W gave in court is untrue because W said something different to another person.

You heard that when W gave a statement to/was interviewed by the police W said {insert}. But when giving evidence in court W said {insert}.

[Either] It is agreed that these two accounts are inconsistent. You have to consider why they are inconsistent.

[Or] You need to compare these two accounts. If you find they are inconsistent, you will have to consider why they are inconsistent.

Just because W has not given a consistent account does not necessarily mean that W's evidence is untrue. Experience has shown that inconsistencies in accounts can happen whether a person is telling the truth or not. This is because if someone has a traumatic experience such as the kind alleged in this case, their memory may be affected in different ways. It may affect that person's ability to take in and later recall the experience. Also, some people may go over an event afterwards in their minds many times and their memory may become clearer or can develop over time. But other people may try to avoid thinking about an event at all, and they may then have difficulty in recalling the event accurately. Your assessment of this factor will be influenced by your conclusions as to the facts of this case. You must form a view of what happened in this case based on all the evidence you have heard.

I am explaining these points so that you think about them in your deliberations. I am not expressing any opinion. It is for you to decide whether or not W's evidence is true. To answer this question, you must look at all of the evidence. This includes any inconsistencies. And you must decide what effect these have on W's truthfulness. If you are sure that W's account is true, then you can rely on it in reaching your verdict. But you cannot rely upon it in reaching your verdict if you are not sure it is true, or if you are sure that it is not true.

Example 5: Consistent account

The prosecution asks you to find that W's account is true because W has been consistent in what W said to {e.g. a relative/the police} and in W's evidence in court about this [alleged] incident. Just because a person gives a consistent account about an event does not necessarily mean that account must be true, any more than inconsistent accounts must be untrue.

When you decide if W's account is true you need to look at all of the evidence. Once you have looked at all the evidence, if you are sure that W's account is true then you can rely on it in reaching your verdict. But you cannot rely on it in reaching your verdict if you are not sure it is true, or if you are sure that it is untrue.

Example 6: Display of emotion/distress or lack of it at time of first complaint

Scenario 1: Strong display of emotion

You will recall that W was sobbing when the police located him/her in [X location] and W told them that he/she had been {raped/assaulted} by D.

The prosecution suggests that the state W was in when the police found him/her supports their case that D had just attacked W. The defence on the other hand suggests that W's sobbing may have been something of an act.

Scenario 2: Lack of display of emotion

You will recall that W appeared calm or unemotional when he/she spoke to the police shortly after W told them that he/she had been {raped/assaulted] by D. The prosecution suggests that this lack of emotion was due to the shock of what had happened to W. The defence on the other hand suggests that this lack of emotion was because W was making up the allegation.

When you consider the emotional state of W you need to bear in mind two things. First, there is no 'normal' reaction to a [rape or sexual assault]. Some people will show emotion or distress and may cry. But other people will seem very calm or unemotional. Second, it is possible for someone to put on an act if they choose to.

If you are sure that W's behaviour at the time was genuine then it may help you decide whether the prosecution has proved its case. On the other hand, if you are not sure that W's behaviour at the time was genuine, then it would not provide support for the prosecution case.

The warning I am giving you is that you should consider this issue with care. You should avoid making an assessment based on any preconceived idea you may have about how you think someone should behave in this situation.

Example 7: Display of emotion/distress or lack of it when providing account to the police played to the jury and/or when giving evidence

When W gave evidence W appeared calm and unemotional/When W gave evidence he/she was crying and appeared to find it difficult to talk about the allegations.

You should not assume that the way W gave evidence is an indication of whether or not the allegation is true. Witnesses react to giving evidence about allegations of rape/sexual assault in a variety of ways. Some people will show emotion or

distress and may cry. But other people will seem very calm or unemotional. The presence or absence of emotion or distress when giving evidence is not a good indication of whether the person is telling the truth or not.

Example 8: Clothing worn by the complainant said to be revealing or provocative

[Questioning on this subject should have been restricted, but there will be occasions where such evidence has emerged.]

When W went out on the evening of {date} W was dressed in {specify}. The defence suggested to W that this was because W was looking for sex. You will also remember W's response that {insert}.

You must not assume that the way W was dressed meant W was looking to have sex or willing to have sex if the opportunity came up. Just because someone dresses in revealing clothing it does not mean that they are inviting or willing to have sex. It also does not mean that someone else who sees that person and interacts with them could reasonably believe that that person would consent to sex simply because of the way they are dressed.

Example 9: Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others

W has accepted that he/she was very drunk on the night of {insert}. But it is important you do not assume that this means he/she was either looking for, or willing to have, sex. When it was suggested to W that he/she was out that night to get drunk and then to have sex, W said {insert}. You must not assume that because W was drunk he/she must have wanted sex. People do go out at night and get drunk, sometimes for no reason at all. It would be wrong to think that just because a person is drunk they must be out looking for, or willing to have, sex. It would also be wrong to think that someone else who sees and interacts with that person could reasonably believe that person would consent to sex.

[Bear in mind that in an appropriate case there will be a need to direct the jury that drunken consent may still be true consent.]

Example 10: Previous sexual activity between the complainant and the defendant

W and D know each other, and they have had sexual intercourse on a number of previous occasions. Just because W had consensual sexual intercourse with D on other occasions, this does not mean that W must have consented to sexual intercourse with D on this occasion. It also does not necessarily mean that this would have given D grounds for reasonably believing that W consented to sexual intercourse on this occasion. A person who has freely chosen to have sexual activity with someone in the past does not, as a result, give general consent to sexual intercourse with that person on any other occasion. Each occasion is specific. A person may want to have sex with someone on one occasion, but not at another time and will not consent to it.

You must not assume that because W had had sexual intercourse with D on a number of previous occasions this, in itself, gave D grounds for reasonably believing that W was consenting on this occasion. You must decide this issue by looking at all of the evidence.

Example 11: Some consensual sexual activity on the occasion of the alleged offence

It is agreed that on the night in question W took D back to W's home. There W gave D a cup of coffee and for a while they kissed one another, and this was something W consented to. According to W, he/she then said that he/she had to get up early the next morning and asked D to leave but D refused to go and then forcibly had sexual intercourse with W against his/her will. According to D, the kissing led to further sexual touching and then to sexual intercourse to which W fully consented.

It is for the prosecution to prove that W did not consent to sexual intercourse with D, and you must decide this issue by looking at all the evidence. When you do it is important you know that just because W let D into his/her home and willingly engaged in kissing D, this does not mean that W must have wanted to go on to have sexual intercourse and must have consented to it. A person who engages in sexual activity is entitled to choose how far that activity goes. And that person is also entitled to say "No" if the other person tries to go further. The fact that W willingly engaged in kissing D does not mean that W must have wanted to have sexual intercourse with D.

If you are sure that W did not consent to sexual intercourse with D, the prosecution must also prove that D did not reasonably believe W was consenting to sexual intercourse. You must decide this by looking at all of the evidence. And you must not assume that because W had been kissing D willingly before sexual intercourse took place this gave D reasonable grounds for believing that W consented to having sexual intercourse with D.

Example 12: Fear; although no use or threat of force, physical struggle and/or injury

It is not suggested that D threatened W with force or that D used any force on W, either before or at the time that D had sexual intercourse with W. W accepts that he/she did not put up a struggle against D, and it is agreed that W did not suffer any injury.

The defence say this is because W fully consented to what took place. But W told you that when D started to undo D's trousers and then undid W's jeans he/she was so frightened that they could not move. W said he/she was "frozen with fear". By looking at all of the evidence you will have to decide which account you believe. But it is important for you to know that just because D did not use or threatened to use any force on W, and W did nothing to prevent D from having sexual intercourse with him/her and was not injured, this does not mean that W consented to what took place or that what W said happened cannot be true.

Experience has shown that different people can respond to unwanted sexual activity {adapt to reflect facts of the case} in different ways. Some may protest and physically resist throughout the event. But others may be unable to protest or physically resist. This may be out of fear or because they are not a very forceful person.

In law there is a difference between consent and submission. A person consents if they agree to something when they are capable of making a choice about it and are free to do so. Consent can be given enthusiastically or with reluctance, but it is still consent. But when a person gives in to something against his/her free will, that is not consent but submission. They may submit due to threats, out of fear or by persistent psychological coercion. In those situations, they do not have free choice and this does not amount to consent freely given.

If a person decides not to struggle or gives up struggling, that is not the same thing as consent. A person can in some circumstances simply let the sexual activity take place because they feel they cannot act to stop it or because that is the only way they see the incident ending. Such actions or inactions are not an agreement by choice. On the other hand, reluctant but free agreement is not the same thing as submission, and is still consent even if reluctantly given. The fact that consent is given reluctantly or even out of a sense of duty may still be a valid consent.[1337]

It is for you to decide what the situation was in this case by considering all of the evidence. Remember the prosecution must prove W did not consent to having sexual intercourse with D and D did not reasonably believe that W consented. What the prosecution do **not** have to prove is:

- that D used or threatened to use any force or that W put up a struggle or was injured;
- that W communicated his/her lack of consent to D.

When deciding whether D reasonably believed W was consenting, you should consider how W behaved before or during intercourse.

Example 13: Defendant is in an established sexual relationship with another person

It is not disputed that W was raped. What is disputed is whether it was D who raped W. The evidence that identifies D as the person responsible for the rape is challenged.

You heard from D and also from D's partner that they have a mutually fulfilling sex life. D claims he/she had no need to have sexual intercourse with a stranger and had much to lose by doing so.

You will consider this evidence when you decide whether it was D who raped W. But you must not assume that a person who is in a relationship, and/or has a fulfilling sex life, will not want to engage in sexual activity with someone else. In explaining this I am not suggesting what you should make of the evidence of D or

[1337] See 20-4 4 below: In *Zafar,* Pill J directed that: "C may not particularly want sexual intercourse on a particular occasion, but because it is her husband or her partner who is asking for it, she will consent to sexual intercourse. The fact that such consent is given reluctantly or out of a sense of duty to her partner i[t i]s still consent."

of their partner. I am simply alerting you to the danger of making an assumption which may not be valid.

Example 14: Defendant is a gay man and alleged victim a child of same gender

{Adapt appropriately for gender}

You have heard that D is gay and is married to/lives with/goes out with {specify}. You have heard this as part of the background to the case. It is not relevant to the issue of guilt.

It is no more likely that a man who has sex with other men will have a sexual interest in young boys than it is that a man who has sex with women will have an interest in young girls. The fact that D is gay is of no significance at all.[1338]

Example 15: Background of domestic abuse

W told you of a troubled relationship in which W had been both verbally and physically abused by D. W told you that whilst they separated at times D would contact W and they would get back together, D always promising that things would be different from before. It is the experience of the courts that people who are in an abusive relationship may struggle to extricate themselves from it for a whole range of reasons including fear, lack of resources, family responsibilities, cultural or societal concerns and/or their own conflicting emotions towards their abuser. Further, their capacity to react to events may be compromised or blunted by their lived experience. Where the abuse is not physical but psychological, emotional and/or financial, those subject to it may not even recognise themselves as victims of abuse, particularly where the behaviours develop over time. Whether that is relevant here will depend upon your assessment of the evidence that you have heard. Do not fall into the trap of assessing someone's behaviour by reference to how you think you may or may not have acted or reacted in their position. Put aside any assumptions you may have had and make your judgments in this case based only on the evidence which you have heard, assessing the accounts of D and W within the evidential context and the context of their wider relationship.

Example 16: Domestic abuse in context of 'loss of control'

One of the issues in this trial is the degree to which D was or was not the subject of domestic abuse on the part of W. The prosecution suggest that in so far as there was friction in the relationship D is choosing to exaggerate and/or invent behaviour on the part of the deceased in order to support a defence of 'loss of self-control'. The defence, however, suggest that the deceased was, at times, an abusive partner who mistreated the defendant both physically and mentally; that D was a victim of what we would term these days coercive and controlling behaviour. The defence also suggest that D adopted a strategy of seeking to conceal from others, even those closest to them, the reality of D's life and how D's partner was behaving towards D.

[1338] *Laws-Chapman* [2013] EWCA Crim 1851

In assessing this area of the case you should be careful not to engage in any misguided stereotypical thinking. For example, it would be wrong to think that a partner in a relationship who is assaulted by the other will, on the first occasion that happens, leave and never come back – some may do so, others may forgive and stay and others still may come to be conditioned to endure such behaviour over time. It is common experience that victims of domestic abuse may try and hide what is going on, even from those closest to them. It is common experience that abusive relationships may last for a long time and that victims of abuse may struggle to remove themselves from such a situation. Where the abuse is not physical, but is psychological, emotional and/or financial, those subject to it may not even recognise themselves as victims of abuse, particularly where the behaviours develop over time.

There is no such thing as a typical victim of domestic abuse and no such thing as a typical abuser; domestic abuse can occur irrespective of age, gender and social circumstances.

Whether and to what extent there was domestic abuse taking place in this relationship you will need to determine with care, in accordance with the burden and standard of proof and in the light of all the evidence in the case. I am explaining these points so that you think about them in your deliberations. I am not expressing an opinion. You will of course take account of the arguments presented by the advocates in deciding the extent to which this issue assists you in reaching your conclusions.

20-2 Sexual offences – historical allegations

ARCHBOLD: 4-465 and 20-19; BLACKSTONE'S: B3.3

Legal summary

1. It is important in historic cases that the judge gives full and detailed reasons for decisions and provides clear guidance for the jury on the difficulties faced by the defence as a result of the lapse of time.
2. As the Court made clear in *PS*.[1339] The essential matters that a direction should address were identified as being:

   "i) delay can place a defendant at a material disadvantage in challenging allegations arising out of events that occurred many years before, and this was particularly so in this case when the defence was essentially a simple denial (the defendant was saying that he had not acted as alleged);[1340]

   ii) the longer the delay, the more difficult meeting the allegation often becomes because of fading memories and evidence is no longer available – indeed, it may be unclear what has been lost;

   iii) when considering the central question whether the prosecution has proved the defendant's guilt, it is necessary particularly to bear in mind the prejudice that delay can occasion; and

   iv) a summary of the main elements of prejudice that were identified during the trial." [35] per Fulford LJ
3. Having reviewed a number of authorities[1341] Fulford LJ remarked that:

   "no two cases are the same and whether a direction on delay is to be given and the way in which it is formulated will depend on the facts of the case. We stress, therefore, that the need for a direction, its formulation and the matters to be included will depend on the circumstances of, and the issues arising in, the trial."
4. The court suggested that the problems of delay are:

   "often (although not necessarily always) best addressed by a short, self-contained direction that focuses on the defendant rather than amalgamating it with other aspects of the relevance of delay, for instance as regards the victim or victims. The risk of combining and interweaving the potential consequences of delay for the accused with the other delay-related considerations ("putting the other side of the coin") is that the direction, as the principal means of protecting the defendant, is diluted and its force is diminished."[37]

[1339] [2013] EWCA Crim 992
[1340] Applied in a different context in *Warren and Ors* [2021] EWCA Crim 413
[1341] *Henry* (1998) 2 Cr App R 61; *Graham* [1999] 2 Cr App R 201; *M* [2000] 1 Cr App R 49

5. As regards the absence of documents and witnesses, see *D*[1342] where D was convicted of sexual offences on his nieces and daughter between 39 and 63 years earlier. The Court was clear – the length of delay is nothing more than a statement of fact. What matters is not how long it is since the alleged offence but whether the delay has an effect on the fairness of the trial and the safety of any resultant convictions. There is no general principle that delay in cases involving young children should result in the evidence being excluded or that the trial should be stopped.[1343]

Directions

6. In some cases of alleged historical sexual abuse, complaints may have been made before, sometimes a long time before, the complaint which has given rise to the investigation and prosecution with which the jury are concerned. In some cases such earlier complaints may have been made to a friend or a family member, in others they may have been made to the police or some other person in authority. There may be one or more records of such complaints. However, a person such as an independent counsellor to whom such complaints have been made, is not an expert witness entitled to give opinion evidence as to the reliability of such complaints, either generally or in respect of the particular complainant(s).[1344]
7. In these cases, evidence of such complaints may be adduced as hearsay, to establish consistency or inconsistency, to rebut a suggestion of recent fabrication or, possibly, to refresh memory. If such evidence is adduced in this way, appropriate directions must be given: see Chapter 14 above.
8. If the jury are being invited to make the assumption that if the allegation were true, complaint would have been made at the time, the jury should be directed accordingly: see Chapter 20-1 above.
9. Judges should be alert to the date of any alleged offence and to D's age at that time. If the alleged offence was before 30 September 1998 and D was aged between 10 and 13 inclusive at that time *doli incapax* must be considered: see Chapter 7-1 above.
10. Such directions must be crafted with care and discussed with the advocates. It may also be necessary to discuss these directions after speeches, depending on the arguments advanced by the advocates.

Examples

See the Examples in Chapter 14-12 and Example 1 in Chapter 20-1.

[1342] [2013] EWCA Crim 1592; and see also *Hewitt* [2020] EWCA Crim 1247 and *PR* [2019] EWCA Crim 1225
[1343] *DL* [2019] EWCA Crim 1249
[1344] *SJ* [2019] EWCA Crim 1570

20-3 Sexual offences – grooming of children

ARCHBOLD: 20-103; BLACKSTONE'S: B3.93 and 124

Legal summary

1. Although an offence of meeting a child following sexual grooming is created by s.15 Sexual Offences Act 2003, other behaviour, often innocent itself but intended to gain favour with and/or the trust of a child with a view to sexual activity, is properly described as 'grooming'. See also now s.15A Sexual Offences Act 2003.[1345]

Directions

2. Where grooming is alleged to have occurred, whether or not this gives rise to a separate count on the indictment, the concept of grooming and the potential difficulties of a witness' realisation and/or recollection of innocent attention becoming sexual should be explained.

Example 1: Young child

The prosecution case is that before D sexually assaulted W, D 'groomed' W. That means D won W's trust by doing things that would normally be innocent, such as playing games with W including play-fighting and tickling, before D touched W sexually. In this situation, a child is unlikely to realise that he/she is at any risk at all. And when the touching changes from something 'innocent' to something sexual, the child may not realise there is anything wrong. The child may accept the sexual touching without any feeling of discomfort or dislike. A child might not make any complaint about it or resist or protest when it happens again. In these circumstances a child is unlikely to be able to say when 'innocent' touching changed to sexual touching.

In explaining this I am not suggesting what you should decide did, or did not, happen. I am simply making sure you understand a potential difficulty a child in such a situation could face. It is for you to decide whether or not W was in this situation.

Example 2: Older child

You heard evidence in this case that W was 12 years old and in the care of the Local Authority when he/she met D.

The prosecution say that because of W's situation, he/she was especially impressionable and vulnerable. W has said in evidence that when he/she first met D, W was impressed by {specify e.g. rides in D's car/gifts of alcohol, flattery etc.} and that W liked D. W also said he/she became prepared to do things for D that W would not otherwise have done.

[1345] In force 3 April 2017 SI 2017/451, reg 2

In many relationships, sexual or otherwise, one person will try to please the other person with gifts {or other forms of attention}. But in this case the prosecution say that the purpose of D's gifts was to make W dependent upon D and to remove W's capacity to say no.

The defence say there was no sexual relationship between D and W, and even though W was 12, W got alcohol from a variety of sources and was in no way dependant on D.

You must look at the evidence of the relationship between W and D. If you are sure that the gifts etc. were intended to and did make W so dependent on D that W was prepared to submit to {specify}, whether or not that was true consent. But if you are not sure and you believe D's account is or may be true, then the prosecution will have failed to prove that W did not consent when {specify}.

NOTE: For a further comprehensive direction on the difference between consent and compliance or submission, approved by the Court of Appeal, see *Ali and Ashraf*.[1346]

[1346] [2015] EWCA Crim 1279 para 15

20-4 Sexual offences – consent and reasonable belief in consent

ARCHBOLD 20-23; BLACKSTONE'S B3.30

Legal summary

1. When the charges involved are those under ss.1-4 Sexual Offences Act 2003, the Crown must prove that W was not consenting to the act alleged.

General consent cases

2. Otherwise than in the exceptional cases under ss.75 and 76 [see below] the jury is to determine whether W was consenting, applying the definition of consent provided in s.74:

> "For the purposes of this part, a person consents if he or she agrees by choice and has the freedom and capacity to make that choice".

3. An absence of consent can therefore arise by reason of mere lack of agreement as well as by force, threat of force, fear of force, a lack of capacity owing to unconsciousness,[1347] sleep,[1348] drink or drugs: for capacity and voluntary intoxication see Chapter 20-5.

4. The jury may need to be alerted to the distinction between consent and mere submission: see *Doyle*[1349] in which the Court of Appeal described the distinction between (i) reluctant but free exercise of choice, especially in a long-term loving relationship, and (ii) unwilling submission due to fear of worse consequences. In *Zafar,* Pill J directed that: "C may not particularly want sexual intercourse on a particular occasion, but because it is her husband or her partner who is asking for it, she will consent to sexual intercourse. The fact that such consent is given reluctantly or out of a sense of duty to her partner i[t i]s still consent."

5. There have been a number of recent cases in which judges have had to direct juries in cases where apparent consent, particularly of young victims or those in ongoing relationships, arises out of prior abuse.[1350] In *Ivor*[1351] the court addressed the relevance that may attach to a defendant's knowledge of an imbalance in a complainant's relationship in the context of the issue of reasonable belief in consent.

6. The circumstances in which deception may or may not vitiate consent was explored in *Assange v Sweden*,[1352] *R (on the application of Monica) v DPP;*[1353] and, most recently, *Lawrance*.[1354] The guiding principle was articulated in *Monica* as being a distinction between (1) a "deception which is closely connected with 'the nature or purpose of the act', because it relates to sexual intercourse itself" which can vitiate apparent consent because it is capable of negating a complainant's free exercise of choice for the purposes of s.74 of the

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[1347] See s.75
[1348] See s.75
[1349] [2010] EWCA Crim 119
[1350] See *Robinson* [2011] EWCA Crim 916
[1351] [2021] EWCA Crim 923
[1352] [2011] EWHC 2849 (Admin)
[1353] [2018] EWHC 3508 (Admin)
[1354] [2020] EWCA Crim 971

2003 Act and (2) a deception as to "the broad circumstances surrounding" the sexual act which does not have the effect of vitiating consent.

7. In some cases, particularly where there is evidence of exploitation of a young and immature person who may not understand the full significance of what he/she is doing, that is a factor the jury can take into account in deciding whether or not there was genuine consent.[1355]

8. There is no requirement that W must communicate his/her lack of consent to D.[1356]

9. Where the suggestion is that W lacks mental capacity to consent the jury should be directed that a person lacks capacity if he/she lacks the capacity to choose, whether because W lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason.[1357]

10. It is not necessary for the judge to direct on all aspects of the law of consent when they do not arise on the facts.[1358]

Sections 75 and 76

11. When evidential (s.75) or conclusive (s.76) presumptions about consent arise (a) the jury must be carefully directed and (b) any such directions must be discussed with the advocates: see example below.

D's reasonable belief in consent

12. Under ss.1-4 Sexual Offences Act 2003, the mental element comprises two questions:

    (1) May D have genuinely believed that W was consenting?

    (2) Was D's belief reasonable in the circumstances?

13. D's intoxication is irrelevant.[1359] The reasonableness of D's belief must be evaluated as if D had been sober. Delusional thinking, psychotic or otherwise, can never be considered to be reasonable.[1360] There may be cases where the personality and abilities of the accused (short of delusional or psychotic states) are relevant to whether D's positive belief in consent was reasonable.[1361]

14. It is for the jury to determine whether the belief D held is a reasonable one. It is not a question of whether D thought it was reasonable. There is no obligation on D to have taken any specific steps to ascertain consent, but where steps have been taken they must be taken into account by the jury in deciding whether D's belief was reasonable. Depending on the facts of the case, D's age, general sexual experience, sexual experience with this complainant[1362] learning disability and any other factor that could have affected D's ability to understand the nature

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1355 *Ali* [2015] EWCA Crim 1279
1356 *Malone* [1998] 2 Cr App R 447
1357 *A(G)* [2014] 2 Cr.App.R. 73(5)
1358 *H* [2006] EWCA Crim 853; *Taran* [2006] EWCA Crim 1498
1359 *Grewal* [2010] EWCA Crim 2448
1360 *Braham* [2013] EWCA Crim 3
1361 *Braham* [2013] EWCA Crim 3
1362 *McAllister* [1997] Crim LR 233

and consequences of D's actions (particularly the ability to appreciate the risk of non-consent) may be relevant.

15. The question of 'reasonable belief' (albeit in the context of age) was considered in *Ishaqzai*.[1363] The trial judge's directions in response to a jury question were found to be flawed. The court stated that:

> "Where there is an issue as to the [reasonable belief as to age] ingredient of the offence, the prosecution may prove it in either of two ways. We suggest that judges giving directions in cases where an issue of this nature arises may find it convenient and helpful to structure their directions by reference to these two different approaches, as indeed [counsel for the Crown] effectively submitted in the course of argument in the present case that the judge should do. First, the prosecution may make the jury sure that the defendant did not believe the child to be 16 or over. That involves the jury making a determination as to the defendant's subjective belief. Secondly, the prosecution may prove that even if the defendant did believe the child to be 16 or over, or may have done so, his belief was not reasonable. That involves the jury making an assessment as to whether, in all the relevant circumstances of the case, any such belief was not reasonable."

Directions

16. The prosecution must prove that W did not consent to the sexual activity alleged.
17. The prosecution must also prove that D did not reasonably believe that W consented.
18. The absence of consent may be proved by evidence of one or more of the following:
    (1) submission;
    (2) fear, without threat or use of force;
    (3) D continuing after W made it clear that W did not consent;
    (4) express or implied threats;
    (5) oppression (e.g. previous abuse);
    (6) force;
    (7) deceit as to the nature and/or purpose of the act;
    (8) deceit as to the identity of D.[1364]
19. Directions must be tailored to the factual issues in a particular case and the concept of consent explained by reference to those factual issues.
20. Where there has been an allegation of non-consensual sexual activity within or immediately after a long term relationship, further guidance will be required about the distinction between the 'give and take' that occurs within a relationship and the absence of consent.

[1363] [2020] EWCA Crim 222 at [20]
[1364] On the issue of what may vitiate consent see also *Melin* [2019] EWCA Crim 557

NOTE:

- Section 75 Sexual Offences Act 2003 provides for evidential presumptions to be made about lack of consent and lack of belief in consent, where it is proved that (i) D did the relevant act (ii) any of these circumstances existed and (iii) D knew that these circumstances existed, provided that there is insufficient evidence to raise an issue as to whether W consented. In reality these criteria seldom arise.
- Section76 Sexual Offences Act 2003 provides for a conclusive presumption to be made about lack of consent and lack of belief in consent, where D intentionally deceived W in one or more of these ways. In reality these criteria seldom arise.

Example 1: Consent

The prosecution must prove, so you are sure of it, that when D {specify act}, W did not consent to it. A person consents to something if he/she agrees to it and is capable of making a choice and is free to do so.

Example 2: Reasonable belief in consent

If you are sure that W did not consent, the prosecution must also prove to you that D did not reasonably believe W consented.

To decide this you need to answer two questions:

(1) Did D genuinely believe, or may D have genuinely believed, that W consented? and

(2) If D did or may have believed that W consented, was D's belief reasonable?

You must answer question 1 first.

If you are sure that D did not genuinely believe that W consented, then you do not need to answer question 2.

But if you decide that D did genuinely believe or may have believed that W had consented, you must then decide question (2): whether D's belief in W's consent was reasonable. To answer this you must decide whether an ordinary reasonable person, in the same circumstances as D, would have believed W was consenting. You must consider all the evidence presented to you. This includes looking at any steps D took to find out whether W was consenting or not. [If appropriate: The fact that D gave evidence that D thought that it was reasonable is something for you to take into account but the question is whether, in your view, it was reasonable, not whether D thought that it was.]

Sequence of questions for jury (to be provided in writing)

Question 1

Are you sure that when D {specify act}, W did not consent to it?

- If you decide that W did or may have consented your answer to Question 1 is **No** and your verdict will be 'Not Guilty'. If this happens then you have reached your verdict and you will not consider either Question 2 or 3.

- If you are sure that W did not consent, your answer to Question 1 is **Yes** and you must go on to answer Question 2 before you can reach a verdict.

Question 2

Are you sure that D did **not** genuinely believe that W consented?

- If you are sure that D did not genuinely believe W consented your answer to Question 2 is **Yes** and your verdict will be 'Guilty'. If this happens then you have reached your verdict and you do not consider Question 3.
- If you decide that D genuinely or may genuinely have believed that W consented, your answer to Question 2 is **No** and this means you must go on to answer Question 3 before you can reach a verdict.

Question 3

Are you sure that D's belief in W's consent was unreasonable?

- If you are sure that D's belief in W's consent was unreasonable, your answer to Question 3 is **Yes** and your verdict will be 'Guilty'.
- If you decide that D's belief in W's consent was or may have been reasonable, your answer to Question 2 is **No**, and your verdict will be 'Not Guilty'.

Example 3: Submission, without threats or force

W told you that even though D did not threaten W or use any force on W, W did not consent to {specify act}. W said he/she submitted to D, because {specify}. In law there is an important difference between consent and submission. Consent can be given enthusiastically or with reluctance, but it is still consent. But when a person gives in to something against his/her free will, that is not consent but submission. It is for you to decide where the line between consent and submission is to be drawn in this case. To do this you have to consider all of the evidence.

You must remember that the prosecution must prove that W did not consent to {specify act}. But to do this it is not necessary for the prosecution to prove that W was subjected to threats or violence, or that W was overpowered or put up a struggle or that W told D that he/she did not consent. What you have to decide is whether the prosecution have made you sure that W did not consent to {specify act} at the time [the act] took place.

Example 4: Fear, without threat or use of force

W told you that even though D did not threaten W or use any force on him/her, W did not consent to {specify act}. W said this was because he/she was so frightened by what D was doing that W froze and was unable to speak or to move. In law there is an important distinction between consent and submission. A person consents to something if he/she agrees to it and is capable of making this choice, and is free to do so. In some situations, consent may be given enthusiastically, but in other circumstances it is given with reluctance, but nevertheless it is still consent. However, when a person is so overcome by fear that he/she lacks any capacity either to give consent or to resist, that person does not consent but is submitting to what takes place.

Example 5: Express indication that W did not consent; belief in consent

W told you that when D started to touch W's thigh W made it clear to D that W did not want D to continue, by repeatedly saying "No. Stop" but D ignored W and carried on. D told you that W never said this.

Your conclusions about this difference of account as between W and D will be important when you are answering two questions:

(1) whether you are sure that W did not consent; and

(2) if you are sure that W did not consent, whether you are sure that D did not reasonably believe that W consented.

Your final decision must be based on all the evidence.

Example 6: Non-consensual sexual activity within or immediately after a long term relationship

It is agreed that D and W have had a long term sexual relationship. This is relevant to the question of whether or not W consented to D {specify act} on this occasion. That is because the situation between two people who have/have had a long term sexual relationship is different from a situation in which two people are strangers or have met one another only a few times.

When two people have/have had such a relationship, there may be some give and take between them in relation to any number of things, including their sexual relationship. And sometimes a partner who is not feeling enthusiastic may nevertheless reluctantly give consent to sex.

However, when two people are/have been in a long term sexual relationship it is not the case that both of them will consent to any sexual activity which takes place. One person is fully entitled not to consent regardless of their relationship. What you must decide in this case is whether W consented freely and by choice, even if reluctantly, to what took place or whether W did not consent but submitted to it. You must also decide whether D may have reasonably believed that W was consenting, taking into account all the evidence including the nature of the [previous] relationship between W and D.

20-5 Sexual offences – capacity and voluntary intoxication

ARCHBOLD 17-116 and 20-25; BLACKSTONE'S: B3.34

Legal summary

1. When the charges involved are those under ss.1-4 Sexual Offences Act 2003, W's voluntary intoxication may be relevant to (a) W's ability to consent or (b) whether W consented to sexual activity. D's voluntary intoxication may be relevant to D's belief in consent, but is not relevant to the reasonableness of such belief: see Chapter 20-4.
2. If in proceedings for such an offence it is alleged that D did the relevant act, at a time when W was unconscious and D knew that, under s.75 of the Act W is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether W consented, and D is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether D reasonably believed it.[1365]
3. Otherwise than in such cases, the jury is to determine whether W was consenting, applying the definition of consent provided in s.74:

   > "For the purposes of this part, a person consents if he or she agrees by choice and has the freedom and capacity to make that choice".

   W's voluntary intoxication is a factor which may bear upon consent and the issues of capacity and freedom to agree.[1366]
4. Applying s.74, if W has voluntarily consumed alcohol and/or drugs but remains capable of choosing whether or not to have sexual activity and agrees to do so, W has consented to it. Consumption of alcohol or drugs may cause someone to become disinhibited and behave differently, but consent given in such a state is still a valid consent if a person has the capacity to agree by choice. Where W through intoxication no longer has the capacity to agree, there will be no consent. W will not have capacity if W's understanding and knowledge are so limited that W was not in a position to decide whether or not to agree to the act.
5. The Court of Appeal has addressed the question of how a judge should direct the jury when W was intoxicated and may have lacked capacity. The leading case is that of *Bree*[1367] where Lord Judge stated:

   > "We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion."[1368]

[1365] Section 75
[1366] In the case of spiked drinks etc s.75(2)(f) applies.
[1367] [2008] QB 131
[1368] See also *Coates* [2008] 1 Cr App R 52 at para 44 per Sir Igor Judge P

6. The question of capacity is not dependent on whether W might afterwards have regretted what happened or had a poor recollection of what happened, or behaved irresponsibly.[1369]
7. In some cases, it will be necessary to direct the jury as to the distinction between an allegation that W was unconscious, and an allegation that although W was capable of consenting, despite W's state, W was not in fact consenting and was giving clear indications that W was rejecting D.
8. Where a question of capacity arises it should be left to the common sense of the jury, with an appropriate direction.[1370]
9. When directing a jury as to capacity, the words 'a drunken consent is still a consent' can cause distress and are best avoided.
10. When lack of capacity has not been a live issue, it should not be left to the jury.
11. The Court of Appeal in *Kamki*[1371] provided the following guidance:

> "a. A person consents if he or she agrees by choice and has the freedom and capacity to make that choice,
>
> b. When a person is unconscious, there is no such freedom or capacity to choose,
>
> c. Where a person has not reached a state of unconsciousness and experiences some degree of consciousness, further considerations must be applied,
>
> d. A person can still have the capacity to make a choice and have sex even when they have had a lot to drink (thereby consenting to the act),
>
> e. Alcohol can make people less inhibited than when they are sober and everybody has the choice whether or not to have sex,
>
> f. If through drink a woman has temporarily lost the capacity to choose to have sexual intercourse, she would not be consenting,
>
> g. Before a complete loss of consciousness arises, a state of incapacity to consent can nevertheless be reached. Consideration has to be given to the degree of consciousness or otherwise in order to determine the issue of capacity,
>
> h. …the jury would have to consider the evidence of [W] to determine what her state of consciousness or unconsciousness was and to determine what effect this would have on her capacity to consent,
>
> i. If it is determined that the complainant did have the capacity to make a choice, it would then have to be considered whether she did or may have consented to sexual intercourse".

[1369] See Archbold para 20-10
[1370] *Hysa* [2007] EWCA Crim 2056
[1371] [2013] EWCA Crim 2335

Directions

12. Depending on the evidence, the prosecution may put its case in the alternative: (a) that W lacked the capacity to give consent and (b) that W did not consent, in which event the jury should be given directions about each. The jury should not be directed about lack of capacity if this has not been a live issue in the case.
13. If the jury are sure that W was unconscious, W could not have consented because W would not have had the freedom or capacity to do so.
14. If the jury are sure that, although W was not unconscious, W was so intoxicated by reason of drink or drugs that W was unable to make a free choice, W was not consenting.
15. If the jury consider that W had, or may have had, the capacity to make a choice they must go on to consider whether W did in fact consent bearing in mind:
    (1) that alcohol (and some drugs) can make a person less inhibited than he/she might be when sober;
    (2) consent given when a person is under the influence of drink and/or drugs is still consent even if it would not have been given when sober.
16. If the jury are sure that W did not consent, when considering whether D reasonably believed that W was consenting:
    (1) whether or not D held that belief is to be decided having regard to D's state, which includes whether D was sober or drunk;
    (2) the reasonableness of D's belief is to be decided on the basis of whether it would have been reasonable had D been sober.

Example: W and D intoxicated by alcohol: W's capacity to consent and lack of consent in issue

It is not disputed that on the night in question D had sexual intercourse with W. What is disputed is whether W consented to sexual intercourse with D and, if W did not consent, whether D reasonably believed that W did consent.

It is not disputed that both W and D had a great deal to drink during the evening {briefly summarise evidence}. W says he/she cannot remember anything from the time that {specify} until {specify}. W cannot say what, if any, sexual activity took place. But W says that, if any sexual activity did take place, he/she would not have consented to it. D gave evidence that D and W had sexual intercourse, that W did not say anything at all, that W did not resist in any way and that D believed W was consenting.

You will have to consider W's state of mind. The prosecution have to make you sure that W did not consent to sexual intercourse. W will have consented if W agreed to have sexual intercourse with D, and W was capable of making that choice and was free to do so, whether or not W expressed consent directly in words.

You will have to decide whether the amount W drank affected W's ability to make a free choice about having sexual intercourse. If you decide W was able to make such a choice, then you will have to decide whether the amount W drank affected W's decision about whether or not to have sexual intercourse with D.

If you decide W was so drunk that W was in fact unconscious, then W would not have been able to make a free choice and W could not have consented. Also, if you find that W was not unconscious but was so drunk that W was not capable of making any choice, then in this situation W also could not have consented.

On the other hand W will have consented if you decide that, despite what W had to drink, W was, or may have been, able to make a choice and W chose, or may have chosen, to have sexual intercourse with D. In law, consent given when disinhibited by drink, even if consent would not have been given when sober, is nevertheless consent. Once you have considered these issues, if you find that W consented, or may have consented, you will find D not guilty.

If you are sure W did not consent then you will also have to consider D's state of mind:.

If you are sure D did not believe that W consented then you will find D guilty.

But if you decide that D believed, or may have believed, W consented you must go on to decide whether that belief was reasonable.

To decide this question you should look at all of the circumstances, including whether D took any steps to find out whether or not W was consenting. You must take no account of the fact that D was drunk. You must decide this question by considering what D would have believed if D had been sober.

If you are sure that D should have realised W was incapable of making any choice about whether or not to have sexual intercourse because of the state W was in, you will find D guilty. If you are sure that D, if sober, should have realised W was not agreeing to sexual intercourse by choice, then D's belief will not have been reasonable, and you will find D guilty. On the other hand if you decide D's belief that W was consenting was, or may have been, reasonable, you will find D not guilty.

21. VERDICTS AND DELIBERATIONS

21-1 Counts in respect of which alternative verdicts may be available

ARCHBOLD 4-531; BLACKSTONE'S D19.71 and 70

1. Care should be taken where the trial indictment has an alternative count to which D entered a guilty plea but which is not acceptable to the prosecution, e.g. s.18/20 or burglary/handling. If the alternative count was on the indictment ahead of trial and D pleaded guilty, the trial will be in relation to what might be termed the primary offence only. If the trial commences with the jury being put in charge of both counts, then there is nothing to prevent D asking to be rearraigned on the alternative count during the trial. The jury would then be invited to return a guilty verdict on the basis of his/her confession (see below) and the trial would continue on the primary count, but this will need to be explained to the jury. In the event of conviction in respect of the primary count, the position of the alternative count will need to be addressed. In *Read (Martine)*[1372] the court said that the correct course was to direct that the alternative count 'lie on the file on the usual terms'. Adopting that procedure caters for the potential of there being a successful appeal against conviction in respect of the primary count. It is not appropriate to sentence for both counts even where the lesser alternative is contained within the more serious charge e.g. possession with intent and possession; see *Bebbington*.[1373] There is no bar to an indictment containing mutually exclusive counts arising from the same set of facts, see *Bellman*,[1374] and no bar to D being tried on one mutually exclusive count having pleaded guilty to the other where the prosecution does not accept that plea, see *Read* ante. The cases do underline the benefit to be gained, when there are obvious alternatives available (such as on a charge under s.18), by requiring the prosecution to add the alternative count to the indictment ahead of trial whether D is going to plead to that count or not and whether such a plea would be acceptable or not. In *Ismail*[1375] the court stated that it was not appropriate to deal with the lesser alternative by way of 'no separate penalty' – such an order still represents the court's sentence for that offence and gives rise to an additional conviction.

[1372] [2014] EWCA Crim 687 and see also *Bath* [2020] EWCA Crim 1341 where the same conclusion was expressed
[1373] [1978] 67 Cr App R 285
[1374] [1989] AC 836
[1375] [2019] EWCA Crim 290 and see *Cole* [1965] 2 QB 388

21-2 Plea of guilty whilst the jury are in the charge of the defendant

ARCHBOLD 4-252; BLACKSTONE'S D12.93

1. If the defendant decides to plead guilty to a charge on the indictment in respect of which the jury have been put in charge, the procedure to be followed is usually for the plea to be entered in the presence of the jury and the jury to be invited to return a unanimous verdict on the basis of the defendant's confession (i.e. plea) to the count on the indictment. This is set out in CrimPR 25.9(7)(c). In principle a jury can be discharged without returning a guilty verdict upon the defendant's plea (see *Poole*[1376]) or before the guilty plea has been entered, however the latter could cause problems if the defendant attempts to manipulate the fact of the jury being discharged. Accordingly, the former course is to be preferred.

Example

[After the defendant has been re-arraigned and pleaded guilty in the presence of the jury.]

You have heard the defendant change his/her plea to guilty to the indictment. That means D has admitted the charge against him/her. When this trial began, and after you had taken your oaths and affirmation, the clerk of the court read out the charges to you. At that point, you were told that it was your responsibility as the jury to decide whether D was guilty or not. This means that legally you must return the verdict in this case even though D has now admitted he/she is guilty of the charge. Therefore, I have to ask you formally to return a verdict of guilty against the defendant. In a few seconds the clerk of the court will ask you to confirm that that is your verdict. To do this I will ask one of you to return this verdict and traditionally I choose the juror sitting closest to me.

[The clerk then reads out the particular form of words.]

[1376] [2002] 1 WLR 1528

21-3 Withdrawing a count from the jury

ARCHBOLD 4-373a; BLACKSTONE'S D16.69

1. Upon a successful submission of no case to answer being made, the court may direct the jury to acquit on the ground that the prosecution evidence is insufficient for any reasonable jury properly to convict (CrimPR 25.9(e)(i)). Alternatively, the jury could be discharged and a not guilty verdict under s.17 Criminal Justice Act 1967 could be returned. If the former course is adopted it is often desirable to explain to the jury why. This is especially in the case of a multi-count indictment where the direction is no reflection on the quality of a witnesses' evidence but simply a failure to establish an essential element of one of the offences on the indictment. Of course, there may be cases where the quality of the evidence is so tenuous or poor that the count/case cannot be left to the jury.

Example

[Where there is insufficient evidence to prove a constituent element.]

As the jury you are in charge of deciding the facts of this case. But sometimes there are circumstances where a judge may decide that there is not sufficient evidence for a jury to convict the defendant. I have decided that in this case there is not sufficient evidence to convict the defendant on Count 1 of the indictment. This is because the prosecution have to prove the element of [explain briefly a constituent element of the offence]. When the witness gave evidence, he/she did not say that [explain the evidence missing]. This means that the prosecution cannot prove that offence, and as a result I have made the decision that on Count X the defendant must be found not guilty.

To do this, you, the jury, must now formally say that the defendant is not guilty on Count X. In a few seconds the clerk of the court will ask the jury to confirm that is your verdict. To do this I will ask one of you to return this verdict, and traditionally I do this by choosing the juror sitting closest to me.

[If the trial is continuing on other counts in respect of which a witness who is mentioned in this explanation provides evidence that the jury could still take into consideration it may be sensible to explain that to them. A formula such as: "The fact that the witness did not say X in evidence has no bearing on how you assess the credibility of this witnesses" may be appropriate but what, if anything is to be said will need careful thought and should be discussed with the advocates in advance.]

21-4 Unanimous verdicts and deliberations

ARCHBOLD 4-491; BLACKSTONE'S D19.34 and 70; CrimPD 8.6

1. The jury must be directed that:
   (1) their verdict must be unanimous {in respect of each count and each defendant}; and
   (2) they may have heard of majority verdicts but they should put this out of their minds and concentrate on reaching a unanimous verdict/s. If a time were to come when the court could accept a majority verdict the jury would be invited to come back into the courtroom and given further directions. This would only happen if the judge were to decide that it is an appropriate course to take.
2. The jury should also be advised that it may help their deliberations if they select one of their number to chair their discussions and that, in any event, one of them will have to speak on their behalf when they return to the courtroom to deliver their verdict.
3. It is also helpful to reassure the jury that there will inevitably be some debate in the jury room and, at least initially, different views will be expressed. If they all discuss the case by expressing their own views but also taking account of the views of others they are likely to find that they will reach a verdict/s on which they all agree.
4. If any jurors are smokers, the jury may be told about the arrangements for smoking breaks. (Local practices to apply.)
5. In courts without catering facilities, the jury should be told about the arrangements for lunch breaks.
6. At Appendix VIII there is a 'Guide to Jury Deliberations' that is available to be provided to jurors by judges who think it helpful to do so. The Appendix explains the content of the document and why it might be used but as yet the decision as to whether to provide it in writing to the jury is a matter for individual judges. It is suggested that if a copy is given to the jury the contents does not need to be 'read into the record' but that the fact that the jury have been given the document should be recorded and a copy of that which they have received uploaded to the DCS.
7. It is no longer a rule of law or practice that a jury should not be sent out to commence their deliberations late in the afternoon or on a Friday afternoon. In *Senna*[1377] the Court of Appeal noted that previous authorities on the topic were decided prior to the amendment to s.13 Juries Act 1974, after which juries were allowed to separate whilst in retirement. It is suggested that a reminder to the jury that they are under no pressure to reach a verdict (as the trial judge did in *Senna*), would be good practice, a position confirmed in *Abraham*.[1378]

[1377] [2018] EWCA Crim 789
[1378] [2021] EWCA Crim 1000 at para 29

8. In *Dunster*[1379] the court had to consider in what circumstances evidence/information that had not featured in the trial could be provided to a jury in retirement. The court reviewed the authorities in this area as well as CrimPR 25.9(6). Although the court concluded that the provision of additional information to a jury in retirement was not necessarily fatal to a conviction it is suggested that any court should be highly circumspect about such an approach.

9. If a juror has to be discharged during retirement and any issue arises as to what if any direction it is appropriate to give to the jury either as to views expressed before discharge or votes cast: see *Carter*.[1380] Whilst the votes of the departed juror become irrelevant the jury are not required to disregard contributions from that juror expressed when he or she was still a member of the jury. Before giving any direction to the jury, however, the matter should be raised with advocates and the guidance in *Carter* considered.

Example

It is important that you try to reach a verdict/s which are unanimous: that means verdict/s on which all of you agree.

{The following is a form of words suggested by the CrimPD 8.6}

> "As you may know, the law permits me, in certain circumstances, to accept a verdict which is not the verdict of you all. Those circumstances have not as yet arisen, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a majority verdict, I will give you a further direction."

{The following is an alternative form, elaborating on CrimPD wording}

You may have heard of majority verdicts but please put this completely out of your mind. Should the time come when I could accept a verdict which is less than one on which you all agree I would invite you back in to court and give you further directions. But, first this would not be for quite some time and, second, the initiative for this must come from me: so please do not send me a note asking if you can return a majority verdict or stating, for example, "Our voting strengths are X and Y".

So please concentrate on reaching a unanimous verdict. You may take as long as you need: you are not under any pressure of time at all.

[In an appropriate case, e.g. in a long case or one in which the jury must reach several verdicts]: … and please do not worry about having to remain here long after our usual court hours. If you do not finish your discussions today, I will ask you to come back into court shortly before 4.30 p.m. At that point, unless you want to have some more time, I will ask you to continue your deliberations in the morning and give you a few directions about this.

Further in all cases {but see also Appendix VIII}

[1379] [2021] EWCA Crim 1555
[1380] [2010] 1 Cr App R 33

It is entirely up to you how you organise your discussions in the deliberating room. But you may find it helpful to choose a juror to chair your discussions. This person should ensure that every juror is able to express their views, that no one feels pressured into reaching a specific decision and that the jury stays focussed on the legal questions I have outlined for you. When you begin your discussions, a number of different views may be expressed on particular topics. But if you each listen to the views of others in almost all cases juries are able to reach a verdict/s they all agree on.

When you have reached your verdict/s you will all come back into court to deliver your verdict/s. At this point the clerk will ask one of you to stand up, and that person will then speak on behalf of you all. This person is usually referred to as 'the foreman', though of course this may be a woman or a man.

21-5 Adjournments during deliberation

ARCHBOLD 4-502; BLACKSTONE'S D19.8

1. If it is necessary for the jury to separate before they have reached their verdict/s, usually either to get refreshments at lunchtime or to leave the court at the end of the court day, the jury should be invited to return to court and may, where it is appropriate in the context of the time they have been in retirement, be asked by the clerk, whether they have reached verdicts on **all** counts upon which they are all (or if a majority direction has been given, upon which the required majority) are agreed. It is not suggested that such an enquiry is necessary on every occasion the jury are going to separate and if the jury are to be asked this question it is best practice to discuss that possibility with the advocates in advance of the jury returning to court. If they have not reached verdicts (or there is no indication via the jury bailiff that they have done so) then they must be given the following directions as per *Oliver*[1381] in full on the first separation and given a brief reminder at each subsequent separation.
2. It is not necessary to use any precise form of words provided that the jury are directed that:
   (1) when they leave the courtroom and until they return to the courtroom {specify e.g. this afternoon/tomorrow morning} they must not talk about the case to anyone;
   (2) this includes talking to one another because, if any of them were to do so, they would not be deliberating as a jury but having separate discussions in which not all the jury would be involved;
   (3) they must decide the case on the evidence and the arguments that they have seen and heard in court and not on anything that they may see or hear outside the courtroom. For this reason, no juror must look for or receive any further information about the case, whether by talking to someone or by making their own investigations e.g. on the internet.
3. These directions should be adapted and explained to a jury who are to separate during the day for smoking breaks or if deliberations have to be suspended for any other reason. It may also be opportune on occasion to remind the jury about the Juror Notice a copy of which they will still all have to hand.
4. If there is to be an extended period during which the jury are to be separated e.g. in a long case where the proceedings are to be adjourned in order to accommodate pre-booked holidays, the court will need to consider what further additional directions should be given including, if the gap during deliberations is to be for an extended period, the potential for some further reminder as to the evidence and issues. Any such step should be discussed in advance with the advocates and the consideration of so doing should be informed by a review of that which is set out in *Woodward and Ors*[1382] where the court had occasion to review the law and practice in this area.

[1381] [1996] 2 Cr App R 514
[1382] [2019] EWCA Crim 1002

Example

I will not ask you to continue your deliberations any further today. So we will now adjourn until tomorrow morning at {time}.

In the meantime, it is very important that you follow a few simple rules. First it is essential that you do not speak to anyone outside your jury about the case. And you must not even talk to each other about the case now until you have come back into the courtroom tomorrow morning. At that point the ushers will be re-sworn, and I will ask you to go to your jury room and continue with your deliberations.

The reason for this is that if you were to talk to one another about the case now, or in the morning before you have returned to your jury room, you would not be deliberating together as a jury. You would be simply chatting on the stairs or in the jury waiting area in ones and twos, so not all members of the jury would be involved.

I also have to remind you that you must decide the case only on the evidence and the arguments that you have seen and heard in court. The evidence and arguments are now closed, and that means you must not do any work on the case at all between now and tomorrow morning when you all go back to deliberating together. This means that you must not do any research of any kind about this case. For example, you must not do any searching on the internet, no private study or no making of any notes and no communication of any kind about the case. This is because you must work together on this case as a team only when you are at court. You must not do any work as individuals when you are away from court.

21-6 Taking partial verdicts

ARCHBOLD 4-516 and 522; BLACKSTONE'S D19.69, CrimPD 8.6.5

1. Where there are several counts (or alternative verdicts) left to the jury, the judge has a discretion in deciding when to take or ask the jury if it has reached any unanimous verdicts. The circumstances of the case may give rise to the view that it is more desirable to give the majority direction before taking any unanimous verdicts. If that is considered appropriate then, instead of being asked about each count in turn, the clerk should ask the jury: "Have you reached verdicts upon which you are all agreed in respect of **all** defendants and/or **all** counts?" If, on the other hand, it is considered to be appropriate to take the verdicts on some counts even if the jury may not have reached verdicts on all of them then the clerk can adjust the enquiry to allow for that: "Have you reached a verdict upon which you are all agreed on **any** count and/or in respect of **any** defendant?" If the jury answer in the affirmative then the clerk would proceed to ask the jury about each count/defendant in turn and any guilty verdicts can be recorded at that stage.
2. If there are a large number of counts and/or defendants, consideration could be given to inviting the jury to indicate the particular counts and/or defendants in respect of which they have reached a unanimous verdict. If that course is to be adopted, it is important that the jury are told in advance so that they understand what they are being asked to do. It would also be sensible to discuss such a course with the parties. In a case in which there are numerous counts the jury should be told that they may find it helpful to make a written record of the verdicts on each count so that the foreman does not get confused when returning verdicts.
3. Views may vary as to whether verdicts should be taken piecemeal or all at the same time. It is suggested that there is no 'right' answer. Taking partial verdicts may have the advantage of resolving some counts leaving the jury free to concentrate on the others. Some judges, however, consider that taking some verdicts in advance of the jury resolving all of them may potentially lead to difficulties. The jury's assessment of the correct verdict on one count may be influenced by their decision on another and accordingly it may be better to leave the jury in a position to revisit their decision on one count in the light of their resolving another count at a later stage of their deliberations. It is suggested that this is quintessentially an area of judicial 'feel' in the context of the circumstances that may pertain in a particular case.
4. If verdicts are taken on some, but not all, counts consideration should be given to the need for orders under s.4(2) Contempt of Court Act 1981 to postpone the reporting of the verdicts initially returned, until the jury have completed their deliberations and returned all verdicts.

5. The case of *RN*[1383] provides assistance on how a potential jury irregularity may need to be addressed and underlines the care that needs to be taken so as to ensure the jury are returning the verdict(s) they mean to give. The case also deals with the potential for reconvening a jury should it be thought that an error has been made in delivering the verdict(s) as well as identifying the limits of that power.
6. If there are counts upon which a jury cannot ultimately agree, publicity of the verdicts which they have returned may prejudice a further trial and a further postponement of reporting of these verdicts must be considered.

[1383] [2020] EWCA Crim 937 and see also *Adebayo* [2020] EWCA Crim 1178 on the same topic

21-7 Majority verdicts

ARCHBOLD 4-509; BLACKSTONE'S D19.35; CrimPD 8.6

1. No majority verdict can be accepted, and thus no majority direction should ever be given, unless the jury has been **deliberating** for at least two hours.[1384] In practice, to allow time for the jury to go from the courtroom to their retiring room and vice versa, a period of at least two hours and ten minutes is conventionally allowed.
2. It is for the judge to decide when a majority direction is to be given, although it is good practice to inform the advocates of this intention. Sometimes advocates may ask the judge when he/she is likely to give such a direction. The judge is under no obligation to give any indication, although in practice this may be done.
3. If the judge has decided to give a majority direction the jury will be sent for and, when they have returned to court the clerk will then ask the jury if they have reached a verdict or verdicts on which they are all agreed. Assuming that the answer to this question is 'No' the jury should be directed that:
   (1) They should still, if at all possible, reach a unanimous verdict.
   (2) If however they are unable to reach a unanimous verdict the time has now come when the court could accept a verdict which is not unanimous but one on which a majority of at least 10 of them agree; that is to say a majority of 10/2 or 11/1.
4. The above assumes that the jury has 12 members: if there are fewer than 12 members the majority permitted is:
   (1) if there are 11 jurors: at least 10;
   (2) if there are 10 jurors: at least 9;
   (3) if there are 9 jurors no majority verdict is permitted.[1385]

Example

In a moment I will ask you to go back to your room to continue your deliberations. It is important that you continue to try to reach a verdict on which all of you agree.

But if you find that you really cannot all agree on your verdict, I may now accept a verdict on which 11 or 10 of you agree. That means I can only accept a Guilty or Not Guilty verdict where there is a majority of either 10 to 2 or 11 to 1.

Please will you now return to your room and continue with your deliberations.

[1384] Juries Act 1974 s.17(4)
[1385] See *Patten* [2018] EWCA Crim 2492 where an error in this regard was made.

21-8 The Watson direction

ARCHBOLD 4-492; BLACKSTONE'S D19.88

1. Although some decisions in the Court of Appeal have discouraged the giving of a Watson direction, describing it as an exceptional course,[1386] in the more recent case of *Logo*[1387] the court, pointing out that *Watson*[1388] was still the leading case, stated these principles, per Saunders J, sitting with Hallett VP and McGowan J, at paragraph 20:

   > "…First, such a direction should only be given after the majority direction has been given and after some time has elapsed or a further direction is sought from the judge by the jury. That is a gloss on Watson which has become generally accepted in other cases. Secondly, there will usually be no need for a direction. Thirdly, the judge should follow the wording set out in the headnote to Watson … Those principles are to be culled from the cases and, we would add, while the decision is one for the judge's discretion, he or she should normally invite submissions from counsel as to the way in which the discretion is exercised."

   He went on, at paragraph 25:

   > "Given the difficulties that this direction can cause, trial judges may wish to think long and hard before exercising their discretion to do so and, as we have said, they will also be well advised to seek the submissions of counsel to assist them reach a considered decision."

2. Circumstances in which this direction is given will therefore be rare. They will not arise unless and until the jury have been deliberating for a significant time in the context of the particular case and after they have been given a majority direction and have had further time in retirement.
3. If the judge receives a note from the jury asking for help, or stating that they are having difficulty in reaching a verdict, after discussion with the advocates, the judge may give a further direction if he/she decides that it is appropriate to do so.
4. If the judge does decide to give any further direction the words of the direction formulated by Lord Lane CJ in *Watson* should be followed without deviation (subject, it is submitted, to reference to affirmation in a case in which one or more jurors have affirmed).
5. The judge must avoid putting the jury under any pressure or creating any perception that he/she is doing so.

[1386] *Arthur* [2013] EWCA Crim 1852; *Malcolm* [2014] EWCA Crim 2508
[1387] [2015] 2 Cr.App.R. 17
[1388] [1988] QB 690, 87 Cr.App.R. 1 CA

The Watson direction

"Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily, [10 of] you cannot reach agreement you must say so."

21-9 If the jury ultimately cannot reach verdicts

1. There may come a time when it is clear that, however much time they are given, the jury will not be able to reach even a majority verdict.
2. If that time comes, what is to happen must be discussed with the advocates in the absence of the jury.
3. Thereafter, the jury should be invited to return to the courtroom and asked if they have reached any verdicts on the counts or remaining counts upon which at least the required majority has agreed.
4. If there are counts on which they are unable to agree, the jury should be asked whether, if given further time, there is any reasonable prospect of them reaching a verdict/s. The jury should then be asked to retire (probably briefly to an ante-room) to consider this question.
5. In the event that the jury are unable to agree on all/some of the counts they should be discharged from giving verdicts on those counts and thanked for their work.

21-10 Final remarks to the jury after verdicts

Thanking the jury

1. The judge should always thank the jury for the work that they have done on the case.
2. The judge must not give any indication of his/her own view of the jury's verdict, particularly if it is adverse to the view of the judge as to what the verdict should have been.

Reminding the jurors about post-trial disclosure rules

3. The jury should be reminded of the disclosure rule that applies to them now that the trial is over. It is known from research with jurors who have just returned verdicts that at the end of the trial some jurors are confused about what they can and cannot discuss and with whom once the trial is over.[1389]
4. The jury should be told that now the trial is over and they are no longer serving on the jury they can discuss the case with anyone, save that they must never reveal what was said or done while the jury was in the deliberating room trying to reach a verdict. This is forbidden by an Act of Parliament and, if done, would amount to a criminal offence.[1390] See also Chapter 3-1 paragraph 15.
5. There are also some cases where a judge may be required to direct a jury that they must keep some parts of the trial confidential e.g. where an order has been made under s.11 Contempt of Court Act 1981 or in the case of a prosecution under the Official Secrets Act.
6. The jury should be reminded that the Juror Notice sets out the rules that apply to them now that the trial is over.
7. If the case has involved a sexual allegation then the jury should also be reminded that the complainant is entitled to lifelong anonymity.

Post-trial assistance

8. It is known from research with jurors who have just returned verdicts that some jurors may have the need for some post-trial assistance.[1391] The Juror Notice provides guidance for jurors who, after the trial is over, may feel upset about anything to do with the case and wish to speak with someone about this.
9. This guidance is set out in the last section of the Juror Notice. Consideration should be given to emphasising this section to the jury in your closing remarks, especially where the jury may have heard disturbing evidence.

[1389] See C. Thomas, 'The 21st Century Jury' [2020] Criminal Law Review (November)
[1390] Juries Act 1974, s.20(D)
[1391] See C. Thomas, 'The 21st Century Jury' [2020] Criminal Law Review (November)

22. APPENDIX I

PREVIOUS FOREWORDS

1-1 Foreword (to the June 2022 edition) by Lord Justice Fulford, outgoing Vice-President of the Court of Appeal (Criminal Division)

Very shortly after I was appointed as a High Court judge in 2002, I tried a somewhat complicated murder case in Liverpool. Towards the end of the trial, I mentioned in a rather self-satisfied way to one of the older judges' clerks that I was proposing to give the jury the entirety of the legal directions in writing, which I had typed out myself (20 years ago this was still something of a rarity). He looked at me very severely and indicated that the best judge he had ever known used to jot down his sparse observations on the law, for the summing up he was about to deliver, on the back of a cigarette packet whilst sitting in full fig in the ancient Daimler, en route from the lodgings to court. I did not try to justify the considerably more labour-intensive approach I was taking, not least because the lost world the clerk evoked has so much to commend it. Judgments, summings up and trials were significantly shorter than now; the legal directions were few and could be briefly described; and – with notable exceptions – Parliament only infrequently concerned itself with legislation concerning the criminal law. Which of us, particularly whilst wrestling with some of the labyrinthine directions that must now be given, does not envy that far simpler environment in which the criminal law used to be applied? There were undoubted downsides but, as the brilliant and terse judgments from the likes of Lord Lane and Lord Justice Lawton from the 1970s demonstrate, the criminal law was far less complicated and, for jurors, it must have been easier to apply than it is today.

Which inevitably brings me to the Compendium. Without it, we would be, well, if not lost, at the least at a very substantial disadvantage. The notion of having to construct a summing up without the ready guidance it provides as to the multifarious directions judges are obliged to give is difficult to contemplate. I have watched the present Compendium, along with its predecessors, mature and I have applied the guidance as it has progressed through a number of different incarnations. The evolving approach has demonstrated very different emphases. The text was originally viewed as providing a series of proscriptive formulae from which a judge deviated at his or her peril, an approach which was at one stage replaced by a far looser concept, which essentially amounted to reflections on the relevant law which many judges found somewhat difficult to use when wrestling with a looming summing up. The pendulum has now settled at an extremely satisfactory position, which does not operate as a straitjacket and leaves the judge to craft bespoke directions, adapting whichever of the helpful examples most readily fits the circumstances of the case. It provides the framework within which the judge can conjure the directions that truly reflect the needs of the trial.

It is an immense undertaking and the team of editors, led by Martin Picton, are the unsung heroes and heroines of the criminal law in action. Their knowledge of the jurisprudence, the legislation, the rules and the practice directions is necessarily

encyclopaedic but their approach is ruthlessly practical. Practitioners, judges in the Crown Court and the members of the Court of Appeal owe much to those who have put so much thought and care into providing this irreplaceable and utterly necessary Guide, which is – in its present form – so consistently useable. Alexander the Great slept with the Iliad (along with a dagger) under his pillow; if only it was still published in paper form, the 2022 Compendium would be under ours.

Adrian Fulford
22 April 2022

1-2 Foreword (to the August 2021 edition) by Lord Justice Edis

This Compendium passed its 5th birthday in May of this year. As far as I know there were no celebrations. If there were, my invitation must have been mislaid. I was, though, very pleased to be invited to contribute this Foreword to this latest and significantly revised edition.

The first thing to say is that the editorial team is to be congratulated on its tireless efforts to provide reliable and practical help to the Crown Court judges of England and Wales. The project has been a great success from its start, and the policy of continuous updating, revision and improvement is ensuring that this success continues to grow.

As all of its readership knows, the task of presiding over trials by juries in the Crown Court is challenging, endlessly fascinating and rewarding. These trials are all important events, in most of which the state brings its case for decision by a group of twelve people, chosen at random. The judge is there to see that the trial is fair to everyone, and that the jury decides the outcome by applying the law correctly to its findings of fact. The proper functioning of this process is essential to our system of criminal justice, and to much else besides. The Compendium is integral to that.

The life of this work has coincided with, and promoted, the use of written directions and routes to verdict in all Crown Court trials. There are now very few cases indeed where the jury receives nothing in writing from the judge, but even that small number is probably too great. As a criminal judge (initially as a Recorder) throughout the time when written directions moved from the unheard of to the almost invariable, I have seen the improvement in jury comprehension which they have brought about. I have also experienced the revelation that the exercise of analysing a case to identify the essential questions which the jury must answer on its way to a verdict, and deciding how to express them and the order in which they should appear, is an essential check on the whole summing up. It requires me, as the judge, to sort the case out in my own mind before directing the jury. The process of drafting, and discussing the draft with the advocates, helps the judge to ensure that everything necessary is dealt with, and dealt with properly. It also helps the advocates to make their submissions to the jury by reference to the questions which they know the jury will be required to consider.

There may perhaps be cases which are so straightforward that no route to verdict is required. Pending the proposed reconsideration of the Rules on this subject,[1392] CrimPR 25.14(4) does not make written directions or questions mandatory. But the process of drafting often teases out a previously hidden complication. The judge must analyse the case rigorously before reaching the conclusion it is one of these straightforward cases, so why not share the product of that work in writing with the jury? It should be a short document, quickly prepared. In a case where there really is only one critical question of fact, the resulting route to verdict will make that clear to the jury, and will also demonstrate that all parties agreed that this was the case, or that the judge decided that it was so after hearing submissions from the parties. The document will only require substantial extra work where the initial analysis turns out

[1392] See *Grant and Ors* [2021] EWCA Crim 1243 and in particular paragraph 50.

to have been faulty. In that case it will save the judge from error. It should also be remembered that what seems straightforward to everyone else, may not seem so to every member of the jury. Comprehension of the process by defendants, victims and the public is also an important factor. It is an aspect of transparency.

Probably the most common problem with routes to verdict is inconsistency with other written or oral directions or observations. This occurs because the written directions and the route to verdict may be prepared at different times, and then amended before their use. One of the documents is amended, but the judge forgets that a similar amendment is required to the other. Sometimes when reading the directions to the jury it appears that they might have been better expressed in some respect, and the judge makes what seems to be an improvement without remembering that this will affect the route to verdict. The process of creating written directions must be quite rapid in most cases, and it is easy to see how this happens. I have done it myself. The route to verdict should be a logical consequence of the fuller written directions, and judges need to explain how their documents relate to each other; or, if they are combined in one document, what the purpose of the different sections of the document is. The documents, or document, must be coherent.

In this edition of the Compendium, the editors have set out to provide greater practical assistance to judges undertaking this task. It contains expanded guidance and examples for the preparation of directions for the jury. All judges will have their own style and preferred methods, and all cases are different. The old debate about specimen directions contained a valuable warning which should not be forgotten: start with the case you are trying, and see what it requires; then look for assistance from the Compendium. Examples are very helpful, but following them without paying attention to the needs of the particular case can lead to error, or at least to directions which are less helpful to the jury than they could be. One of the daily discoveries of criminal work is how many different and unprecedented situations arise and develop in trials.

The Compendium provides a very useful analysis of the main legal issues which are likely to arise. It signposts the user rapidly to the authoritative textbooks and decisions which provide full coverage of the particular area for consideration when necessary. Its content is a useful checklist of the directions which cases may require so that the judge can ensure that everything necessary is covered.

The experienced editorial team is ideally placed to pull together the accumulated experience of the Crown Court judiciary and to express it in a clear and incisive way. We all owe them an enormous debt. Their work is indispensable to the working judge. It is also part of a process for developing and disseminating better ways of doing things in our constantly changing field of work.

Andrew Edis
18 August 2021

1-3 Foreword (to the December 2020 edition) by Lord Justice Holroyde, Chairman of the Sentencing Council

I am told by the editors that Part II of this Compendium has not previously had its own foreword. I am therefore particularly pleased to have been asked, as Chairman of the Sentencing Council, to provide a foreword for this latest revision. It gives me the opportunity, which I gladly take, to welcome the Sentencing Code. The outstanding work – and stamina - of the Criminal Law team at the Law Commission, under the leadership of David Ormerod, has led to legislation which will simplify and clarify sentencing procedure and will help make sentencing more transparent to the public. Sentencing is a matter of constant, and increasing, public concern, and the Code will benefit us all by making the procedural law more accessible and easier to follow. We have been living in extraordinary times since the last revision of this Part of the Compendium was published in December 2019. The Code comes as very good news at the end of a most difficult year.

Old habits sometimes die hard, and we will all need to be vigilant, in the early months of the Code, to avoid falling into the trap of referring to the old statutory provisions instead of the new. This revision of the Compendium will help us to avoid that trap, and it is therefore timely and welcome. We will also need to remember that the Code applies to everyone convicted on or after 1 December 2020 but not to those convicted before that date, even if they are sentenced later. It is very helpful to have that single commencement date, but there will for a time be cases in which judges and recorders are sentencing offenders to whom the old statutory provisions apply. There will also, no doubt, be multi-handed cases in which one defendant has pleaded guilty before 1 December but is not sentenced until others have been convicted after that date, and the judge in those circumstances will need to refer to both the old statutory provisions and the new. If an error is made, but only identified by the court or the parties after the sentencing has been concluded, the power to vary or rescind a sentence under section 385 of the Code (previously s155 of PCC(S)A 2000) should where possible be used, in order to avoid an unnecessary appeal.

The Code does not alter any of the sentencing guidelines. Nor does it alter the general duty of the court to follow any relevant guideline unless satisfied that it would be contrary to the interests of justice to do so: see sections 59 and 60 (previously s125 of C&JA 2009).

The Sentencing Council launches a new website[1393] on 1 December. However, the area housing the guidelines has not been changed, so any links which judges have set up to the guidelines should continue to work. The guidelines themselves continue to provide a link to this Compendium. The legislative references have been updated to provide links to the Code, and the text has where necessary been updated to be compatible with the Code. We hope that these changes, accomplished in time for the

[1393] https://www.sentencingcouncil.org.uk/

commencement of the Code, will be helpful to sentencers. The availability of those links is one of the reasons why I urge sentencers to use the online version of the guidelines, which is guaranteed to be up to date.

Amongst the material to be found on the website is our statement of 23 June 2020 on the application of sentencing principles during the Covid-19 emergency. This explains, for the benefit of those less familiar with sentencing principles or guidelines, what may be taken into account by sentencers during the pandemic. It is similar to the guidance given by the Lord Chief Justice in AG's Reference, *R v Manning* [2020] 4 WLR 77, which reminds sentencers to bear in mind the practical realities of the effects of the pandemic. More generally, we hope to be able to provide, early in 2021, some additional help for sentencers to avoid common errors.

I would like very briefly to mention three recent developments.

First, the Council's overarching principles guideline on Sentencing offenders with mental disorders, developmental disorders, or neurological impairments came into effect on 1 October 2020. It provides valuable guidance as to the general approach to sentencing in such cases and as to the assessment of culpability and the determination of the appropriate sentence. It also includes, amongst its annexes, a list of the main classes of mental disorders and presenting features. In common with other guidelines, it encourages sentencers to refer to the Equal Treatment Bench Book.

Secondly, there has not hitherto been any guideline for sentencing firearms offences in the Crown Court. I am glad to say that we will very shortly be publishing such a guideline, which will come into effect in January 2021. This too will encourage sentencers to refer to the ETBB. It will refer to evidence, in relation to some of the offences covered by the guideline, of disparity of sentence outcomes as between White, Black, Asian and Other ethnicity offenders. There may of course be many reasons for such differences, but all sentencers should be aware of them. This is an area to which the Council is likely to return. We all want to ensure that the guidelines are applied fairly.

Thirdly, I draw attention to the decision in *Hodgin* [2020] EWCA Crim 1388, in which the court emphasised that the maximum reduction of one-third for a guilty plea to an indictable-only offence will only be available to an offender who has given at the first stage of the proceedings an unequivocal indication of his intention to plead guilty. An indication that he is likely to plead guilty is not enough.

Finally, I wish to thank the editors for their work in updating this Compendium, which is an invaluable source of assistance to judges and practitioners.

Tim Holroyde
25 November 2020

1-4 Foreword (to the December 2019 edition) by the Lord Chief Justice of England and Wales

The Compendium provides an invaluable resource for any judge looking to craft jury directions that are both legally correct but are also expressed in a way that a jury will understand. Whilst the law may be thought to have become ever more complex in recent years there has at the same time been a marked improvement in the quality of directions that juries receive. Judges now routinely share draft legal directions with the parties and that is an important aid to producing legally correct directions that are unlikely to give rise to a point that can then be taken on appeal. A case having to be retried may represent a failure of the system and it is something to be avoided.

Just as important as the careful crafting of legal directions, however, is the work that goes into the second stage of a summing up – the review of the evidence. Whilst there has been some discussion over the years as to the utility of this part of the trial process it remains important and calls for every bit as much effort as directing the jury on the law.

I expect that many can still remember the "notebook" summing up of old. Such a style of evidence review should now have been consigned to history. It is important when preparing the review of the evidence to have at the forefront of one's mind the question of what is actually going to help the jury carry out the task of deciding the case? I would suggest that hearing the judge slavishly replaying back to them the evidence to which they have been playing close attention is unlikely to do much by way of helping.

In his 'Review of Efficiency in Criminal Proceedings'[1394] Sir Brian Leveson gave some consideration to the evidence review when summing up [section 8.4]. The Review explores practices in other jurisdictions and the principles applicable to a fair trial process commenting:

> 297. I see no great difficulty in complying with these principles by ensuring that the route to verdict posed for the jury identifies the analysis that the jury is required to undertake in order to reach that verdict. When taken with the evidential analysis of the issues (which is not the same as an exhaustive analysis of the evidence), it should be beyond argument that the accused and the public can understand the verdict and so satisfy the requirements of Article 6.

The Review recommended that judges give relevant directions as and when needed as opposed to doing so simply after all the evidence has been given and the use of a 'split summing up'. The Review highlighted the importance of providing the jury with a route to verdict which should be clear enough to enable an understanding of the

[1394] Review of Efficiency in Criminal Proceedings Final Report

basis of the verdict. The concluding recommendation in this section of the Review was:

> 310. The Judge should remind the jury of the salient issues in the case and (save in the simplest of cases) the nature of the evidence relevant to each issue. This need be only in summary form to bring the detail back to the minds of the jury, including a balanced account of the issues raised by the defence. It is not necessary to recount all relevant evidence. Appropriate training on the constituents of an effective summing up should be a standard part of the Crime seminars provided by the Judicial College.

It is now commonplace for judges to give legal directions at stages of the trial process that previously they would not have done. The provision of at least some of the legal directions in written form, even if only a route to verdict, is also increasingly the norm and the Court of Appeal has endorsed the practice on many occasions – see for example *Atta-Dankwa*[1395] and *PP*[1396].

Writing a short and focussed summing up is no easy task. Articulating best practice is one thing but putting it into effect can be another. There has in the past been a fear that a summing up that failed to cover all the minutiae of the evidence upon which the defence focussed might be vulnerable to attack in the Court of Appeal. That is no longer the case as this court has sought to make clear but the fear still seems to remain. It is also the case that producing a short review of the evidence that provides a jury with the help they really need is harder, and takes more preparatory work, than something more reminiscent of the "notebook" style.

In the recent case of *Reynolds*[1397] Lord Justice Simon provided, between paragraphs 50 to 69, valuable guidance on what a summing up should contain. In summary:

(i) The summing up should remind the jury of the salient facts and competing cases that provides assurance about the basis of their decision;

(ii) Counsels' closing speeches are no substitute for a judge's impartial review of the facts[1398];

(iii) The summing up should not rehearse all the evidence and arguments[1399];

(iv) A recitation of all the evidence and all the points made on each side is unlikely to be helpful; brevity and a close focus on the issues is a virtue and not a vice[1400];

(v) A summing up must, of necessity, be selective but providing the salient points are covered and a proper balance is kept between the case for the prosecution and the defence, the Court of Appeal will not be lightly drawn into criticisms on points of detail;

[1395] [2018] EWCA Crim 320
[1396] [2018] EWCA Crim 1300
[1397] [2019] EWCA Crim 2145
[1398] *Amado-Taylor* [2000] 2 Cr App R 189 at 191D
[1399] *McGreevy v. DPP* (1973) HL (NI) 2 Cr App R 424 at 431
[1400] See Rose LJ in *Farr* (The Times, December 10, 1998) cited in *Amado-Taylor* at 192A

(vi) A succinct and concise summing-up is particularly important in a long and complex trial to assist the jury in its consideration of the evidence. The longer the case the more important is a short and careful analysis of the issues[1401];

(vii) In a trial that has made use of schedules, timelines, digital material and the like whilst there may be a need to cross reference evidence from different sources, for example where a defendant has a particular point to make, it is a pointless exercise for a judge to recount the contents of a factual timeline or (in a different context) a schedule relating to the use of mobile phones, which the jury have in front of them, which has been the basis on which the evidence has been deployed and which they will have with them in retirement;

(viii) There is nothing novel in the concept that a long trial can and should be summed up succinctly[1402]. The dangers of boring a jury rather than assisting them must have occurred at some point to any judge who has sat in the Crown Court; but it is a danger that it is particularly important to avoid in a case which is based largely on documents with which the jury are familiar, on which they have already heard closing submissions and which they will consider further after the summing-up;

(ix) It is not usually necessary to remind the jury of all the points made in the advocate's speech;[1403]

(x) If no complaint or suggestion is made at the time of a summing-up it may be regarded on an appeal as relevant to the validity of any later complaint. A trial in the Crown Court is not to be regarded as a dress rehearsal for a challenge to a conviction in the Court of Appeal. If a point is material, it should be taken at a time and place when it can be dealt with most conveniently and so that the jury can consider it if necessary. The defence advocate has a duty to correct any misstatement of fact[1404]:

(xi) In general, and as a matter of fairness, if a judge is considering introducing an issue that has not been canvassed in the course of a trial, he or she should at least warn a defence advocate before final speeches, so that the correctness of the proposed course can be discussed and an opportunity afforded to the defence to deal with it[1405];

(xii) As to the propriety of judicial comment there is a potential tension between the importance of a judge not usurping the jury's function and a judge's legitimate expression of a view, even a strong view in a proper case, of the evidence. There can be no all-embracing rule, other than that a judge's personal views must be considered carefully before being expressed; and, if they constitute the

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1401 *D, Heppenstall and Potter* [2007] EWCA Crim 2485

1402 *Charles* (1979) 68 Cr App R 334 at 338-9, this Court (Lawton LJ) addressed the issues that may arise from a lengthy summing-up following the order in which the evidence was given ('a notebook summing-up'): "The method of summing up in this kind of case, particularly the reading out of the judge's note of all the evidence is, in our judgment, unsatisfactory. It is unsatisfactory for a number of reasons. In plain language it must bore the jury to sleep; and that is what happened in this case."

1403 *Lunkulu* [2015] EWCA Crim 1350 at [43]

1404 *Charles* (above) at p.338

1405 *Evans (DJ)* (1990) 91 Cr App R 173

> appearance of advocacy on behalf of the prosecution, they will not necessarily be regarded as appropriate simply because the jury had been told that they are not bound to accept the judge's views or by the use of the timeless refrain, 'it is entirely a matter for you.'

Experience suggests that the modern approach to judicial comment is to err on the side of caution. If facts are for the jury on the basis of their assessment of the evidence sharp comment is rarely helpful.

In terms of the balance as between volume and quality in a summing up, less really can be more. Maintaining the focus on helping the jury by reminding them only about that which really matters pays dividends. In a short case there should be little that needs to be said about the details of the evidence if the directions on the elements of the offence incorporate the essential facts that are in issue. That may be all that is needed by way of a reminder whether supplemented with a route to verdict or not. In a longer case it should always be borne in mind that the summing up is intended to trigger the memory of jurors about the evidence that they have heard, rather than providing it all to them for a second time. The gratitude that a jury may feel toward a judge who provides them with a short and focussed summing up will be matched by judges in the Court of Appeal should the case end up being considered there.

1-5 Foreword by The Rt Hon Sir Brian Leveson (to the 2018 edition)

As a concluding judicial act, I am delighted to have been given the opportunity of contributing to the latest edition of the Compendium. A fair but efficient criminal justice system is the cornerstone of a civilised society but ever-increasing complexity means that it is essential that we all do what we can to make it more comprehensible for those who undertake the vital civic duty of sitting on a jury. Of course, the right to a fair trial must never be degraded in the pursuit of efficiency but that does not preclude making meaningful changes that promote that worthwhile aim whilst at the same time protecting the rights of the accused, complainants, witnesses, jurors and the community as a whole. In the course of the *Review of Criminal Efficiency (*2015), I made a number of recommendations which I hoped would make the trial process more effective and, importantly, easier for the jury to understand without ever losing sight of the need to maintain the high standards of which we have always been proud of in this country; I am pleased that so many have been adopted.

In addition to the Juror Notice which makes clear the role and responsibilities that jurors undertake (trying cases on the evidence and not on the basis of what they might come across on social media), recent improvements which I consider to have been important in terms of promoting a fair and efficient trial process include early identification of trial issues, the provision of timely jury directions, the adoption by judges of written directions including “Routes to Verdict” and the greater utilisation of a ‘split’ summing up. They are each significant trial management tools which have allowed a vital sea change within the trial management process to flourish. Thus, the defence are required to engage earlier in proceedings and assist the jury with what the defence will be. The judge can also focus the minds of jurors on the salient factual and legal issues before they hear the relevant evidence, providing directions at the most appropriate time to assist in its evaluation. Evidence is much better assessed by a jury if the purpose for which it is being given is clear.

Research has shown the vital importance of providing jurors with assistance in understanding the often complex legal directions which they are required to apply. The provision of written directions and written routes to verdict can give the jury invaluable support in the process of their deliberations. This issue of the Compendium promulgates and encourages the adoption of these practices, amongst others. The use of written directions by judges has rapidly come to be accepted by those that have to craft them but the Compendium provides an invaluable resource when undertaking that task. The examples in the Compendium provide judges with a starting point from which they can develop and craft case specific assistance for jurors that is fair and legally correct. Advocates now engage cooperatively with judges so as to ensure that the jury get the assistance they need to reach a just verdict. Proceeding in that way is compliant with the overriding objective enshrined in the Criminal Procedure Rules.

The fundamental principles that guided the Review and, in particular, direct engagement (as enshrined in the Criminal Procedure Rules), robust and consistent case-management and maximising the valuable time of the Crown Court, are all

vitally important to ensure that the system continues to operate in the most efficient way it can. It is heartening that this edition of the Compendium endorses and promotes those principles.

I conclude by expressing my very real gratitude to the editorial team for all their hard work in ensuring that this publication reflects the important developments in criminal law and procedure as they affect jury directions that have taken place in the last few years.

Sir Brian Leveson

1-6 Sir David Maddison

The honorary fellowship bestowed on Sir David Maddison by the Judicial College in 2014 stands as a well-deserved testament to his work for the College and before that the Judicial Studies Board. From an early version of the original Specimen Directions, which he drafted with Judge Gerald Clifton, to the Crown Court Compendium in 2016, David worked tirelessly for the Board and in a variety of roles: author, lecturer, tutor and for 3 years as Director of Criminal Training. Throughout our long collaboration in writing the Compendium it was both a treat and an honour to work with David. It is a mark of the man that although the task was agreed during his time as Director of Criminal Training all of the writing was done during his retirement; and whilst the necessity to tease them from his laptop on a remote golf course in Portugal was not unknown, his drafts were always worth waiting for and consistently hit the spot. With his feet firmly on the ground and a guileless sense of humour David was a wise colleague and a true friend. We will miss him sorely.

DCO, ST, JW

1-7 Foreword (April 2016)

Since 1987 the Judicial Studies Board and its successor, the Judicial College, have provided guidance for Judges and Recorders when summing up cases in the Crown Court. The first was in the form of the *Specimen Directions to the Jur*y; they were 43 pages long and accompanied by a 5 page guide for structuring a summing-up. They replaced the informal notes provided by senior judges, such as one written by Cusack J. The primary purpose of the *Specimen Directions* was to alleviate what Lord Lane CJ described in his foreword as “mistakes on straightforward points which one would not expect to cause any difficulty”. Lord Lane CJ added a further pithy observation: “The directions will often require adaptation to the circumstances of a particular case. They should not be regarded as a magic formula to be used as an incantation.”

Although the *Specimen Directions* succeeded in their primary purpose, Lord Lane’s observation was not always followed. Lord Woolf CJ in his Foreword to the 2003 re-issue, had to emphasise that the Specimen Directions "have to be selected and tailored to meet the facts of a particular case and not used indiscriminately". Regrettably this guidance was again not always followed. The Directions were on occasions used as short-cuts and incorporated into summings-up, often verbatim, without the necessary thought and work to adapt them to the issues in the case concerned.

To address this situation, in 2010 the J.S.B. published the *Crown Court Bench Book – Directing the Jury*, a new work by Pitchford LJ intended to replace the *Specimen Directions.* It provided helpful and comprehensive guidance and included many example directions deliberately based on hypothetical facts and therefore less amenable to being used as templates. This work was seen by users as being particularly useful when summing up in long and complex cases, but for shorter cases some judges continued to use the *Specimen Directions*.

This led to the Judicial College's publication in December 2011 of a *Companion to the Bench Book* written by Judge Simon Tonking and Judge John Wait, two of the authors of this *Compendium*, who were then and until 2014 the joint directors of the College's criminal induction seminars for newly appointed Recorders. This *Companion* took the form of check- lists of matters which would and (depending on the issues in the case) might need to be dealt with when directing the jury on particular legal and evidential subjects. This work was well received and a second part, dealing with sentencing in the Crown Court, followed in January 2013.

The unintended end result, evident from discussions at Judicial College Seminars and from a survey of Crown Court Judges, was that different Judges and Recorders were now using the *Specimen Directions*, the *Bench Book* and the *Companion* either singly or in various different combinations. The Judicial College rightly decided that what was needed was a new work, but one which did not replace but sought to combine the strengths of the previous work.

The result is this *Compendium*. It differs from its predecessors in various respects. First, it combines guidance on jury and trial management, summing up and sentencing. Secondly, it was preceded and informed by 600 replies to the survey asking for the views of Crown Court Judges on the strengths and weaknesses of the previous publications, and which legal and evidential topics they found the most difficult to sum up. Thirdly, it has been subject to rigorous review – the Directions and

Examples in Part II of the *Compendium* by a number of experienced Crown Court judges and most of the Examples by the Plain English Campaign. Fourthly, Professor Cheryl Thomas, Professor of Judicial Studies, Judicial Institute, University College London, whose excellent research into juries' understanding of criminal proceedings is unsurpassed, has given valuable advice to the authors with a view to making the Examples more accessible and easier to understand. Fifthly, hyper-links are provided to all the authorities and statutory provisions referred to in the text.

I am very grateful to the authors who have undertaken this massive task. I am sure that they have addressed through the *Compendium* the issues that I have outlined. They have done so with clarity and erudition. All judges who try criminal cases will therefore find it invaluable. The task that remains is to steer both substantive and procedural law back to a state where the *Compendium* can be shorter, though we will never reach a state where it can all be summarised in a length that was possible in 1987.

The Right Honourable the Lord Thomas of Cwmgiedd,

Lord Chief Justice of England and Wales

April 2016

1-8 Acknowledgements (April 2016)

We wish to acknowledge with real gratitude the advice, help and support which we have received from so many people.

We thank, for their support and suggestions, Sir Brian Leveson PQBD, Lady Justice Hallett VPCACD, Lords Justices Bean, Fulford, Pitchford and Treacy, Mr. Justice William Davis, Mrs. Justice McGowan, Mr. Justice Openshaw and their Honours Judges Ambrose, Aubrey QC, Bayliss QC, Edmunds QC, Everett, Farrer QC, John Phillips CBE, Picton, Rook QC, Deborah Taylor and Zeidman QC.

We thank, for their care, industry and good humour in reviewing this work:

Part I – Jury and Trial Management and Summing Up: the course directors and tutor judges of the Judicial College Criminal Continuation Course: respectively their Honours Judges Sally Cahill QC and Pegden QC and their Honours Judges Catterson, Davey QC, Denyer QC, Hilliard QC, Kinch QC, Leonard QC, Lynch QC, Juliet May QC (now Mrs. Justice May), Mr. Recorder Richard Atkins QC and Mr. Recorder Bruce Houlder QC; and

Part II – Sentencing: Lyndon Harris, LL.B. (Hons), Barrister, editor of Thomas' Sentencing Referencer.

In respect of the Examples in Part I we thank Professor Cheryl Thomas, Professor of Judicial Studies at the Judicial Institute, University College London, for her most valuable advice about tailoring our draft directions to make them more accessible to jurors; and members of the Plain English Campaign for their work in helping us to simplify the wording used in the directions.

In respect of Part II we are very grateful to Joanna Shaw, B.A. (Hons.), LLM, Barrister of 1, Essex Court, Temple, and researcher of the Judicial Institute, UCL, who painstakingly researched and corrected the footnotes and formatted and hyperlinked the text.

Finally and above all we acknowledge the forbearance and support of our respective wives during the time-consuming preparation of this work, whose patience has at times been sorely tried.

The original authors

Sir David Maddison is a recently-retired High Court judge, has been involved in judicial training for many years and was a contributor to the original Specimen Directions published by the then Judicial Studies Board.

Professor David Ormerod QC (Hon) is on secondment from UCL and is currently the Criminal Law Commissioner and has been involved in judicial training for over a decade. He assisted Lord Justice Pitchford in preparation of the Crown Court Bench Book*.

His Honour Simon Tonking is a recently retired Circuit Judge. He was formerly Resident Judge of Stafford and, with His Honour Judge John Wait, Co-director of the Judicial College Criminal Induction Course and co-author of the Bench Book Companion.

His Honour Judge John Wait, was formerly Resident Judge of Derby and, with His Honour Judge Simon Tonking, Co-director of the Judicial College Criminal Induction Course and co-author of the Bench Book Companion.

Further acknowledgements

We are most grateful for the advice and assistance we have been given in the course of making these revisions by his Honour Judge Burbidge QC, his Honour Judge Edmunds QC, his Honour Judge Goldstone QC his Honour Judge Hopmeier QC, his Honour Judge Picton and his Honour Judge Zeidman QC.

David Maddison David Ormerod Simon Tonking John Wait
February 2017

* The Compendium owes a huge debt of gratitude to the late Lord Justice Pitchford whose brilliant work on the Crown Court Bench Book did much to inform its successor. His tragically early loss is sorely felt by all who knew and admired him.

23. APPENDIX II

EXAMPLE OF OFFENCE DIRECTIONS, ROUTE TO VERDICT AND FLOW CHART[1406]

Scenario

Prosecution case:

On Friday 10th July an argument developed between D and W in the White Horse public house in the course of which D picked up a pint glass from the bar and struck W on the side of the head with the glass and with such force that it broke causing a serious wound to W's face.

Defence case:

D agrees there was an argument. D says it was started by W who was threatening to strike D. D denies picking up a glass and says he/she had been drinking and had it in his/her hand throughout. D says W raised his/her arm as though W was going to punch D. D lifted his/her arm in self-defence not realising that he/she was holding a glass. D says W's wound was caused as the glass broke on impact.

Charges

Count 1: S18 wounding with intent

Count 2: S20 unlawful wounding.

Directions

Written directions may take a number of forms and it may be appropriate to provide more than one e.g. a narrative direction and route to verdict.

Narrative direction

1. It is agreed that on Friday 10th July D and W were drinking in the White Horse and an argument broke out between them. In the course of the argument W sustained a serious wound to his/her face.
2. It is agreed that the wound was caused as a pint glass held by D broke against the side of W's face.
3. D faces two alternative counts alleging:

   Count 1

   Wounding with intent, contrary to section 18 Offences against the Person Act 1861.

   Count 2 (the alternative and less serious count)

   Unlawful wounding, contrary to section 20 Offences against the Person Act 1861.

[1406] As to the benefit of written directions see *Grant and Ors* [2021] EWCA Crim 1243

4. In order to prove guilt on Count 1 the prosecution must make you sure that:
   (a) D struck a deliberate blow to W's face.
   (b) The blow caused the W's wound.
   (c) D was acting unlawfully i.e. D was not acting in lawful self-defence.
   (d) D intended to cause W a really serious injury.
5. In order to prove guilt on Count 2 (the alternative) the prosecution must make you sure that:
   (a) D struck a deliberate blow to W's face.
   (b) The blow caused W's wound.
   (c) D was acting unlawfully i.e. D was not acting in lawful self-defence.
   (d) D realised he/she might cause W some injury.
6. Explaining the offences:
   (a) **A Deliberate Blow**

   The prosecution must make you sure that the wound was caused by a deliberate blow. The defence say there was no deliberate blow; they say D raised his/her arm to fend off a blow from W.

   If you are not sure there was a deliberate blow you would find D not guilty of both Count 1 and Count 2.

   If you are sure there was a deliberate blow you will have to go on to consider self-defence and the issue of intention.

   (b) **Self Defence**

   (i) If a person is attacked or believes he/she is about to be attacked he/she is entitled to use reasonable force to defend him/herself and if he/she does so he/she is acting in lawful self-defence.

   (ii) Because it is for the prosecution to prove the case against D it is for the prosecution to prove that D was not acting in lawful self-defence.

   (iii) If you are sure that D was the aggressor and did not believe he/she was about to be attacked by W then self-defence does not arise; D was acting unlawfully.

   (iv) If you are sure the blow struck by D was deliberate but that this was or may have been because D believed that W was about to strike him/her and that D needed to defend him/herself then you must go on to consider whether D's response was reasonable.

   (v) When you are considering this, if you think that what D did was no more than D thought was necessary in the light of the circumstances as D believed them to be, that would provide strong support for the view that what D did was reasonable.

   (vi) Your decision whether D knew he/she had a glass in his/her hand when D struck W may help you to decide whether D was or may have been acting in lawful self-defence.

(vii) If you decide that D was or may have been acting in lawful self-defence you will find D not guilty of both Count 1 and Count 2.

(viii) If you are sure that D was not acting in lawful self-defence you must go on to consider D's intent at the time that D struck W with the glass.

(c) **An intention to cause a really serious injury (Count 1)**

The words on the indictment "intending to cause grievous bodily harm" mean that the prosecution must make you sure that at the time D delivered the blow D meant to cause a really serious injury. A really serious injury does not have a legal definition. It does not have to be life threatening it but must be an injury which you regard as really serious.

This is not a case where it is suggested there was a plan to cause serious injury: any intention must have arisen very shortly before or as the blow or blows were being struck.

Factors that will be relevant to your decision may include; where the blow was aimed and whether D realised he/she had a glass in his/her hand.

(d) **Realising he/she might cause some injury (Count 2)**

The prosecution do not have to prove an intention to cause an injury but they do have to prove that D realised that striking W with the glass might cause some injury. This does not have to be serious; any injury, e.g. a bruise, would be sufficient.

(i) If you are sure that D struck a deliberate blow, that it was not in lawful self-defence and that D intended to cause a really serious injury your verdict will be guilty of Count 1 and you will not consider Count 2.

(ii) If you are not sure that D is guilty on Count 1 you will return a verdict of not guilty on that count and go on to consider the alternative of Count 2.

(iii) If you sure that D struck W deliberately and that when D did so he/she was not acting in lawful self-defence and that when D struck W he/she realised that he/she might cause some injury your verdict will be guilty of Count 2; if you are not sure about any of these things your verdict will be not guilty.

Route to verdict – see over:

Route to verdict

It is agreed that W sustained a wound and that this was caused when a pint glass held by D broke against the side of W's face.

Questions for Verdicts

Question 1

Are you sure that D struck W deliberately?

- If your answer is **No** your verdict will be one of Not Guilty on Count 1 and Count 2.
- If your answer is **Yes**, go on to consider Question 2.

Question 2

Are you sure that when D struck W, D was **not** acting in lawful self-defence?

- If your answer is **No** your verdict will be one of Not Guilty on Count 1 and Count 2.
- If your answer is **Yes**, go on to consider Question 3.

Question 3

Are you sure that when D struck W, D intended to cause a really serious injury?

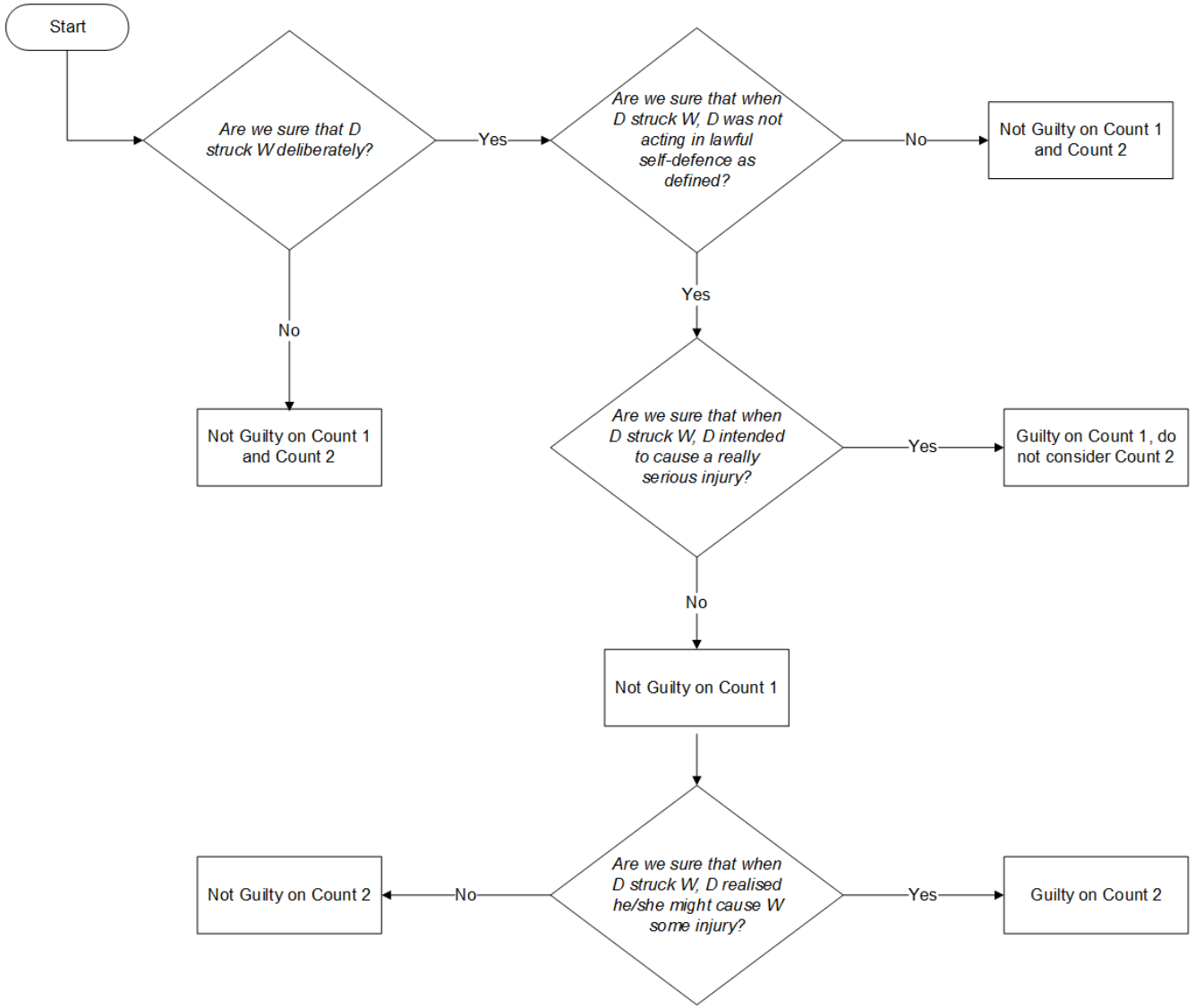
- If your answer is **No** your verdict will be Not Guilty on Count 1 and you must go on to consider Question 4.
- If your answer is **Yes** your verdict will be Guilty on Count 1 and you will not consider Count 2.

Question 4

Are you sure that when D struck W, D realised he/she might cause W some injury?

- If your answer is **No** your verdict will be one of Not Guilty on Count 2.
- If your answer is **Yes** your verdict will be one of Guilty to Count 2.

Flow Chart


Start
Are we sure that D struck W deliberately?
Yes
Are we sure that when D struck W, D was not acting in lawful self-defence as defined?
No
Not Guilty on Count 1 and Count 2
Yes
No
Not Guilty on Count 1 and Count 2
Are we sure that when D struck W, D intended to cause a really serious injury?
Yes
Guilty on Count 1, do not consider Count 2
No
Not Guilty on Count 1
Are we sure that when D struck W, D realised he/she might cause W some injury?
No
Not Guilty on Count 2
Yes
Guilty on Count 2

24. APPENDIX III

SAMPLE JUROR QUESTIONNAIRE

The following questionnaire incorporates examples which have been produced from a number of court centres. It is provided as an example only. The questionnaire created for any particular case will need to be tailored to its location, subject matter and length. It is a matter for the judge, with the assistance of the advocates, to craft a questionnaire suitable for the case which is about to start.

In *Bermingham*[1407] the Court of Appeal gave guidance on the way in which jury questionnaires should be used and copies retained – see Section 2-1.

[1407] [2020] EWCA Crim 1662 and in particular paras 61 and 62.

JUROR QUESTIONNAIRE

You will be required to sit on this case up to the week ending Friday *[insert date]*. You will be required between *[insert time]* and *[insert time]* each weekday. Please take account of the time you will need to get to and from court when deciding whether you will have difficulty in sitting on this trial.

1. **Please read and consider each question carefully.**
2. **Please answer every question. If you need to check information with family, friends, employers, etc., please do so before answering.**
3. **If the answer to any question is "Yes", please <u>give details in the box provided.</u>**
4. **Please hand your completed questionnaire to the usher.**
5. **WHEN ANSWERING PLEASE USE BLOCK CAPITALS.**

<table>
<tr><td>JUROR NAME:</td><td colspan="2"></td></tr>
<tr><td>QUESTION</td><td colspan="2">ANSWER
Please circle your answer</td></tr>
<tr><td>1. Do you know or recognise [insert name] who is the defendant in this case? Do you know any members of his/her family?</td><td>YES</td><td>NO</td></tr>
<tr><td colspan="3">If you answered YES, please provide details.</td></tr>
<tr><td>2. Do you or any members of your family or close friends know any of the following people associated with the case? [insert list of names here]</td><td>YES</td><td>NO</td></tr>
<tr><td colspan="3">If you answered YES, please provide details.</td></tr>
</table>

3. Have you or any members of your family or close friends ever worked for, had any business with or any other personal connection to *[insert organisation]* located at *[insert address]?*	YES	NO
If you answered YES, please provide details.		
4. Have you booked and paid for a holiday to be taken at any time between now and the estimated end of the trial?	YES	NO
If you answered YES, please provide dates and details. Please be ready to provide document(s) to support this. If you do not have documents with you, you will be asked to provide them when you next come to court.		
5. Do you have any medical condition which requires inpatient treatment or regular outpatient appointments or visits to your doctor?	YES	NO
If you answered YES, please provide details and dates (if known):		
6. Are you caring for a young child or a sick or elderly relative **and** cannot arrange this to be covered by others during the time you are needed at court?	YES	NO
If you answered YES, please provide details:		

7. Is there anything exceptional about your work, whether employed or self-employed, or in regard to any educational course being undertaken, such as examinations, which would make it impossible for you to sit on this jury?	YES	NO
If you answered YES, please provide details and dates (if known):		
8. This case will involve reading a number of documents. They will be explained to you by the advocates and the judge. Do you have difficulty reading because English is not your first language, or for any other reason?	YES	NO
If you answered YES, please provide details:		
9. Do you use English as a second language, and are you concerned for this or any other reason that you will be unable to keep up with the evidence?	YES	NO
If you answered YES, please provide details:		
10. Do you have problems with reading or watching TV screens for any length of time? *[Also, where the evidence is presented in colour coded documents or diagrams.]* Are you colour blind?	YES	NO
If you answered YES, please provide details:		

11. Are you aware of any other factor that could prevent you from serving as a juror on this case, or is there any other information which you think the court would find helpful in deciding whether you could serve as a juror on this case?	YES	NO
If you answered YES, please provide full details:		

25. APPENDIX IV

PROCEDURE FOR USING THE JUROR NOTICE[1408]

Distributing the Notice to Each Sworn Juror

- Each sworn juror **must** be given a copy of the Notice "Your Legal Responsibilities as a Juror" **in the course of the judge's opening remarks** to the jury and **before the Prosecution opens the case**. If not distributed in advance (as is currently required by reason of the Covid crisis) the Notice will be **handed out to the jury by the usher**.
- **Every juror must be given his or her own copy** of the Notice (ie, jurors **must not** be asked to share copies of the Notice between them).

The Juror Notice Does NOT replace or change the Judge's opening remarks to the jury in any way

- The Notice does not replace the judge's oral directions to the jury on their legal responsibilities. It only reinforces not replaces existing oral directions.
- Judges should continue to give the same homily as before but should only use the Juror Notice (not any other form of written direction) to reinforce their opening remarks to the jury about their legal responsibilities.

What Judges say to the Jury about the Notice

- Once the jurors have been given the Notice, the **judge needs to tell the jurors** the following:
  - **You have each been given a document that summarises what I am about to tell/have just told you about your legal responsibilities as a juror.**
  - **During your next break please take some time to read this document carefully and make sure you understand the rules it contains.**
  - **This document also tells you what to do if you have any questions at all about your responsibilities as a juror at any time during the trial.**
  - **This document is for you to keep, and you should keep it with your summons at all times when you are on jury service.**

If there is any concern that jurors may sit and read the Notice instead of paying attention to the Prosecution opening, the judge can finish by saying:

- **Please remember to read this document at the break – but please do not do this now because we are about to start the case and you need to give your full attention now to [prosecution].**

[**NOTE:** some courts have laminated these instructions and put them on each judge's bench.]

[1408] Notice to the jurors

Making a Record of the distribution of the Notice

- The trial **Judge** needs to make a **notation into the trial record** that the Juror Notice was handed to each member of the jury.
- The **Court Clerk** needs to make sure that a **copy** of the Juror Notice goes in the **case file**. For most cases this will mean that the Clerk must upload a **PDF of the Notice** onto the digital case file (**DCS**) in **section "O"** and make a note on **Xhibit** that this has been done. For those case files that are still hard copy, the Clerk will need to place a hardcopy of the Notice in the case file.

Notifying Parties:

While the **parties to the case** should be aware of the Notice from the Practice Direction, courts may wish to post a copy of the Notice in the Robing Room with the following explanation:

- The Notice is a summary of jurors' legal responsibilities that has been approved by the Criminal Procedure Rule Committee, and Practice Direction (Chapter 8: Juries: Preliminary instructions to juries) requires this Notice to be distributed to all sworn jurors.

26. APPENDIX V

DISCLOSURE

Legal summary

BLACKSTONE'S D9; ARCHBOLD 12-48; and CrimPR 15

The statutory scheme

1. The core statutory provisions of the *Criminal Procedure and Investigations Act 1996* (CPIA) are as follows:

   - **Section 3 Initial duty of the prosecutor to disclose**

     The prosecutor must disclose any prosecution material which might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the defendant.

   - **Section 5 Compulsory disclosure by accused**

     Within 28 days of the prosecutor complying with *s.3* the defendant must give a defence statement to the court and the prosecution (required contents of the statement are set out in ss.6A and 6C).

   - **Section 7A Continuing duty of the prosecutor to disclose**

     The prosecutor has a duty to keep disclosure under review and to disclose any material that may undermine or assist, in particular after service of a defence statement.

   - **Section 8 Application by the accused for disclosure**

     A defendant can apply to the court for an order requiring the prosecution to make further disclosure where the defendant has reasonable cause to believe there is material that should be disclosed to him.

Application of the statutory scheme

Disclosure Management Documents

2. A Disclosure Management Document (a DMD) is a document prepared by the prosecution, in conjunction with the investigators, which includes an explanation about how the disclosure responsibilities have been managed and an outline of the prosecution's general approach to disclosure in a particular case.
3. The Crown Prosecution Service have made a DMD mandatory in all Crown Court cases.
4. The DMD is a 'living document' and should be kept up to date as a case progresses. The DMD should be served by the prosecution on the defence and the court at least seven days prior to the PTPH by being uploaded to the Digital Case System, The Better Case Management Revival Handbook ('the Handbook' 1st edn, Jan 2023) para 11.3. The DMD should invite the defence to identify any additional lines of enquiry that the defence consider reasonable and which have not yet been undertaken, the Handbook para 11.4.

The stage dates and disclosure

5. The stage dates include requirements relating to disclosure:
   - By the Stage 2 date, the defence should serve a defence statement and make any requests for disclosure, specifying the material and setting out how the material relates to the issues in the case.
   - By the Stage 3 date, the prosecution should respond to any disclosure requests.
   - By the Stage 4 date, if there are unresolved issues of disclosure, the defence should make a s.8 CPIA 1996 application. **To make a s.8 application the defence must have served a defence statement (see also CrimPR 15.5).**

Potential issues at PTPH

CrimPR 3.2 and 3.3(2)(c)(iii)

6. The judge conducting the PTPH may wish to raise with the advocates the following matters relating to disclosure (recognising that the court is not necessarily provided with a copy of any schedule of unused material or copies of any disclosed material):
   - The detail of a Disclosure Management Document.
   - The identification by the defence of additional reasonable lines of enquiry.
   - The particular need for the stage dates to be met in respect of disclosure.
   - The obligation on a party to notify the court if orders in respect of disclosure are not complied with (see CrimPR 3.3).
7. A defendant in person will need to be assisted at the PTPH in identifying additional reasonable lines of enquiry and in obtaining disclosure from the prosecution.

Sources of guidance

- The CPIA Code (March 2015).
- The Attorney-General's Guidelines on Disclosure July 2022).[1409]
- The CPS Disclosure Manual (July 2022).
- The CPS Guide to Reasonable Lines of Enquiry and Communications Evidence (24 July 2018).

The CPIA Code

8. The Code sets out the ways in which police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation and which may be relevant.

[1409] Attorney General's Guidelines on Disclosure 2022

The Attorney-General's Guidelines on Disclosure

9. The Guidelines are issued for use by investigators, prosecutors and defence practitioners. The Guidelines outline the principles that should be followed when the CPIA disclosure regime is applied.

The CPS Disclosure Manual

10. The Manual has been drafted to offer practical guidance and assistance to investigators and prosecutors in discharging their disclosure obligations.

The CPS Guide to Reasonable Lines of Enquiry

11. This Guide deals with issues in cases where the accused and the complainant are known to each other and where a smart phone or similar may contain communication that may be relevant to the case and would fall to be disclosed.

Particular issues in document/ digital heavy cases

12. In the context of cases that may involve, for example, phone downloads and/or social media records, the prosecution's duty to disclose is limited to material which is capable of strengthening the defendant's case or weakening its own.

13. In *R*,[1410] the court considered the duties of the parties in cases that were document and/or digital evidence heavy. The following was stated (see [34]-[36], [41], [49-50], [58], [60]):

    a) The prosecution had to lead disclosure from the outset and adopt a considered and appropriately resourced approach which should extend to and include an overall disclosure strategy, selection of software tools, identifying and isolating material subject to legal professional privilege and proposing search terms to be applied.

    b) The prosecution had to explain what it would and would not be doing, ideally in a disclosure management document.

    c) The prosecution had to encourage dialogue and the defence had a duty to engage, and to assist the court in furthering the overriding objective.

    d) In cases with vast quantities of electronic material the prosecution was entitled to use appropriate sampling and search terms and its record-keeping and scheduling obligations were modified accordingly.

    e) The judicial tasks of active and robust case management applied to the initial stage of disclosure. Flexibility was crucial; in a document-heavy case there could be no objection in principle to the judge devising a tailored or bespoke approach to disclosure.

    f) The scheme of the Criminal Procedure and Investigations Act 1996 should not be subverted. The constant aim had to be to make progress, if need be in parallel, from initial disclosure to defence statement, addressing requests for further disclosure in accordance with *s.8*.

[1410] [2015] EWCA Crim 1941

14. In *CB*[1411] the court emphasised that there was no presumption that a witness's mobile phone or device should be obtained, inspected, retained or downloaded. There had to be an identifiable basis that justified such an approach. The extraction of information from electronic devices is now subject to s.37-44 Police, Crime, Sentencing and Courts Act 2022 and the associated Code of Practice.

Potential issues at Pre-Trial Review and Trial

15. Complaints about inadequate disclosure by the prosecution and/or the determination of any s.8 applications may be resolved at a Pre-Trial Review. Skeleton arguments could be ordered in advance of any such hearing to identify the material in question, why the material does or does not satisfy the *s.3* test, and any authorities relied upon.
16. A typical issue encountered may be the alleged failure to provide all of the relevant information relating to particular mobile phones or a complete set of third-party records. The core test remains the prosecutor must disclose any prosecution material which might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the defendant.
17. Any disclosure issue that is to be determined by the court will be made after hearing submissions from the parties.

Prosecution failure to comply with disclosure obligations / best practice

18. If a finding is made that the prosecution has failed to comply with its disclosure obligations that does not mean that the case will be stayed.
19. In *E* [2018] EWCA Crim 2426, the court indicated that:
    (1) A failure to comply with best practice, although relevant, should not necessarily lead to a stay application. Ordering a stay should be a last resort.
    (2) An effective jury direction could be given concerning the absence of the material and any potential disadvantage. Such a direction could point out in the conventional way the disadvantage the defence may have been under caused by the absence of this material and direct the jury to take that into account when applying the burden and standard of proof (at [39]).

Public interest immunity

See in particular BLACKSTONE's D9.50-9.68; ARCHBOLD 12-24 to 12-41; and CrimPR 15.3.

CPS Disclosure Manual Chapter 13.

[1411] [2020] EWCA Crim 790 at [68]-[78]

The questions to answer

20. In determining a PII application the court should address the following 7 questions in order, *H and C* [2004] 2 AC 134 [2004] UKHL 3:

    1. What is the material which the prosecution seeks to withhold? This must be considered by the court in detail.
    2. Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure (subject to 3, 4 and 5 below) be ordered.
    3. Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.
    4. If the answer to 2 and 3 is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence? This question requires the court to consider, with specific references to the material which the prosecution seek to withhold, the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected. In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions 2 and 3 as well as 4.
    5. Do the measures proposed in answer to 4 represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.
    6. If limited disclosure is ordered pursuant to 4 or 5, may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.
    7. If the answer to 6 when first given is 'No', does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

       It is important that the answer to 6 should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.

Types of hearing

21. There are three types of PII hearing:

- Type 1: Notification by the prosecution to the defendant that they are applying for a ruling by the court with an indication of at least the category of material involved. The defence must have the opportunity to make representations to the court.
- Type 2: Notification by the prosecution to the defendant that they are applying for a ruling by the court but without an indication of at least the category of material involved. The defence have the opportunity to make representations on the procedure to be adopted.
- Type 3: No notification by the prosecution to the defendant that they are applying for a ruling on the basis that revealing the fact of an application would have the effect of disclosing that which the prosecution asserts should not be disclosed in the public interest.

A suggested approach to conducting PII hearings

22. In all but the simplest cases the prosecution should be invited to take the following steps in advance of the hearing:

- Provide a copy of the material to the court that is subject to the PII application. The prosecution should, if they have not already, have assessed the material and provide the court with only material that is relevant to the issue(s) to be determined.
- Prepare a written disclosure note for the court identifying the precise basis and why the material should be withheld.

Type 1

23. This is the most frequently encountered type of PII hearing. A suggested approach to conducting the hearing is as follows:

- Ask to see the material in question before hearing representations from the defence so that you are familiar with the matters in issue.
- Hear submissions from the defence in open court. Be careful to avoid revealing anything contained within the material in the course of any discussion.
- Hear submissions from the prosecution in private.
- Deliver a ruling in private. The ruling should address the questions in *H and C*. In a case of any complexity, a written ruling is suggested. The written ruling would always remain private.
- Announce in open court, in short, neutral terms, whether further disclosure is, or is not, to be made. It should also be said in clear terms that the issue of disclosure will be kept under review.

Type 2

24. This type of hearing should be relatively rare. It may be an unusual case where the prosecution can reveal that a PII application is being made but not the category of material involved.

25. The court should challenge the prosecution, in private, as to whether the category of material can be revealed to the defence. In the absence of knowing the category of material, the ability of the defence to make focussed submissions is reduced.

26. Otherwise, the suggested approach to the hearing is the same as with a Type 1 application.

Type 3

27. This type of hearing is conducted entirely in private without submissions from the defence. The court should challenge the prosecution, in private, as to whether, as a minimum, the fact of a PII application can be revealed to the defence. In the absence of submissions from the defence, there is an increased emphasis on the need for the court to ensure that the prosecution's submissions are tested and for the court to provide detailed reasons, ideally in writing and which will need to be stored confidentially and securely The ruling must in no circumstances be uploaded to the DCS unless the court is satisfied that it can be placed in a section inaccessible save to the judge and the Court of Appeal. The court staff may need specific guidance on this issue.

Other practical matters

28. In the context of all PII applications and rulings the following matters should be considered:

- The need for real care in the choice of language. This is particularly relevant when hearing submissions from the defence and avoiding 'jigsaw' disclosure by an unguarded remark.
- It is important that the court does keep the issue of non-disclosure under review as the case continues.
- Nothing in relation to the PII application, hearing or ruling should be uploaded to DCS.

Withholding information in section 41 applications

29. Particular issues about withholding information can arise in respect of applications to cross-examine a witness about any sexual behaviour of a complainant pursuant to s.41 Youth Justice and Criminal Evidence Act 1999. The CrimPR 22.5(4) sets out the procedure to be followed if a party applies for permission to introduce evidence or cross-examine but includes information that the applicant thinks ought not to be revealed to another party.

Notification hearings

ARCHBOLD 12-47a-12-47c and CrimPR 3.11

30. A notification hearing is an ex parte hearing held when the prosecutor has, or is aware of, material:
    (1) the revelation of which would give rise to a real risk of serious prejudice to an important public interest;
    (2) that does not meet the disclosure test;
    (3) but the prosecutor thinks it necessary to inform the court as the material creates potential unfairness to the defendant in the conduct of the trial, potential prejudice to the fair management of the trial or potential prejudice to an important public interest.
31. In *Ali*,[1412] the court considered that such hearings would be 'necessarily rare'. The need for a notification hearing must be exceptional. There must be no practicable inter partes alternative, including an in camera hearing. At any hearing the material shown to the judge and the discussion must be kept to a minimum and confined to what it necessary to achieve the purpose of the notification hearing.
32. The procedure to be adopted for a notification hearing is:
    - The prosecution asks the court for a hearing.
    - The defendant must be notified of the request for a hearing only to such extent as the court directs.
    - The hearing is normally to be held in private and in the defendant's absence.
    - The prosecution must explain both why the hearing is necessary and why there is no practicable alternative to the hearing taking place in the defendant's absence.
    - The prosecution must provide or describe the material to the court in such manner as the court directs.
    - The hearing should be recorded and a ruling provided by the Judge.
    - Nothing in relation to the notification hearing or ruling should be uploaded to DCS.

[1412] [2019] EWCA Crim 1527

27. APPENDIX VI

HOMILY

The opening words to the jury are critical, but also personal to the judge giving them. It is the moment when the judge can establish a working relationship with the jury that may be crucial to the successful completion of the trial process. All judges will, over time, develop their own style and discover what works best for them.

Do not forget the Juror Notice – it is hugely valuable and its use compulsory. The Juror Notice must always feature as an aspect of the homily. Exactly how the homily is structured around the Juror Notice is going to be a matter of personal style.

What follows is a checklist of matters that may be considered for inclusion in the homily and two examples of how such issues may be addressed. There is no particular magic in the order in which the directions are set out in the checklist. Judges should assess the order which is most appropriate for the specific case. There may well be issues that merit being referred to that are not included in the checklist.

The two fleshed out examples of what might be said in a homily are deliberately different in style. Neither is 'correct' – what is correct is that which is called for in any particular case and as may be best suited to the style of the judge conducting that trial.

The examples given may be more helpful for those judges who are commencing their judicial career in the Crown Court. Each judge will inevitably develop their own style along with a form of case introduction that suits how they work. The examples also represent what might be termed a 'long form' of opening remarks. For short cases, it is perhaps inevitable that the introduction will also be shorter and will omit some of the explanations and warnings given in the homily.

How much of the homily it is appropriate to provide to the jury in writing is again going to be a matter of individual choice and will also depend upon the nature of the issues in the case. Some judges provide, for example, legal directions that are given at this stage in hard copy form. Research has clearly demonstrated the benefit that juries gain from being provided with material in hard copy form to which they can then refer. There is, however, the potential for the directions necessary to be given at the end of the trial to differ from those it was anticipated as being called for at the beginning. In such circumstances the jury will need a very clear explanation as to the ones by which they must abide. Simply asking them to make some handwritten amendments themselves may be open to criticism.

Homily checklist

- Thanks for patience
- Length of trial
- Timing and sitting hours
- Scheduled regular breaks (if any)
- Non-sitting days (if any known at start)
- Reassurance if long trial
- [Jury size will be reduced to 12 at end of pros opening if starting with more than 12]
- Role of judge and jury – facts/law
- Jury out for legal discussions – emphasises difference in responsibilities
- Jury fulfilling important role/public service but comes with important responsibilities
- Juror Notice
- What case is about
- Try case on evidence alone
- Only discuss when jury all together and cannot be overheard
- Postpone final judgment until evidence is complete, have had submissions from the parties and the case has been summed up – discussions are not decisions; decisions are made at the end of the trial
- Particular security arrangements if any – no adverse impact on D
- No research
- No internet
- Potential for press reporting
- No talking about the case outside of the jury – family/friends
- Importance of no research/Internet/talking directions – prohibited conduct [cf Juror Notice]
- Collective responsibility
- Taking notes – freedom but no obligation to do so/no one will look at them/they will be destroyed at the end of the trial
- Concerns – send note if any [at any stage of the trial]
- Say if cannot hear any part of proceedings
- Report if approached or spoken to by anyone
- Burden and standard of proof
- Procedure after homily – prosecution opening/defence outline of case/start evidence

Where considered appropriate in any particular case:

- Nature of evidence – live / ABE / screens / child witnesses and age or other vulnerability adjustments / intermediaries / interpreters / adjustments for other vulnerabilities / read statements / agreed facts / schedules / expert witnesses / hearsay / complex jury bundles / photographs (if capable of being upsetting) / guard against disapproval or sympathy etc.
- Particular issues in case – ID / myths and stereotypes / self-defence / delay / alibi / lack of intent / diminished / distressing issues or evidence / absence of D (if has absconded) etc.

Example 1

1. Members of the jury, before we hear the prosecution advocate's opening speech, I need to say a few things about this trial, your jury service and your responsibilities when trying this case.

The role of the judge and jury

2. The first thing I want to talk about is our different roles in trying this case. My role as the trial judge is to act as an independent umpire between the parties. I ensure that this trial is fair and I am responsible for the running of the case generally. I also have to decide issues of law when a point of law arises. When I do that, I will do it in your absence. However, I do not decide the evidence and nor do I decide whether the defendant(s) is/are not guilty or guilty. That is the job of you 12. All 12 of you are judges. All of you judge the evidence. That is why all of you just took oaths or affirmations in the presence of each other and everyone here to try the defendant(s) according to the evidence. You have the responsibility of listening to the evidence and assessing it. You have the responsibility of making factual decisions on the evidence that you hear. Those factual decisions will shape the verdict(s) that you return in this case. There are very strict rules that control how you go about judging the case.

No research

3. The first rule is that you must not do any research either individually or collectively about the case. It is a criminal offence for any of you to do this. In the information age that we live in, it is very easy for us to find out information over the internet. You absolutely must not go on the internet to find out anything about the case, which includes any aspect of the law or the charges, or anyone who features in the trial. That includes therefore not just the defendant(s), but also the advocates and even me. You cannot go any of the places that will feature in this trial.

4. There is a good reason for this rule. It comes down to open justice and the oaths or affirmations you took. You decide the case on the evidence and argument you hear in this courtroom. If your decision included things that have not been ventilated or challenged in this trial, then you would not be making a decision on the evidence or argument presented by either side Indeed, we would not know about something that has potentially affected your decision. It would not be a fair trial.

5. It is crucial to observe these rules. **[insert an example if necessary: Only a few months ago, two jurors researched the difference between murder and manslaughter. This came to light with the other jurors and the two jurors were prosecuted even though you can see that they had no bad intentions in doing research].** Other consequences beyond prosecution include the possibility of the whole trial having to restart. That causes expense and distress to those involved. If at any time you want further guidance from me as to a piece of the evidence, or the law, you are welcome to send me your request and I will do my best to answer it. That is how queries in this case have to be dealt with.

No discussion about the case except when all together[1413]

6. My second warning to you is that you must not talk to anyone about this trial until it is over and you have returned your verdicts. When I use the word 'talk', it includes communications over social media such as Facebook, Snapchat, Instagram, Twitter and so on. It is almost inevitable that your friends and family will know or find out that you are doing jury service. There is no problem in them knowing. However, beyond knowing that, they may be interested in what you are doing and might want to talk about it. The first thing you should do if anyone does ask a question about the case is tell them that I have instructed you not to discuss the case.

7. There are two reasons for this strict rule. First, all the discussions that you have between the 12 of you are confidential to the 12 of you. Not even I find out about those discussions. If you spoke to someone outside the 12 of you, you risk breaching that confidentiality. Second, is that there is a risk of you being influenced. Just imagine a situation if you speak to a friend or relative about the case. Within a few moments, I could guarantee that the other person you were talking to would offer you their view about the case, maybe the justice system and they might even offer you their thoughts about the verdict. That could influence you and the rest of the jury. It would come from someone who does not have the responsibility of returning the verdict and someone who has not even heard the evidence. Therefore, no discussion about the case at all with others during the trial. I emphasise that it is a criminal offence for any juror to communicate with others outside the jury panel during the trial. Jurors in the past who have breached it or who have even posted Facebook comments about a case have ended up being prosecuted.

8. Please forgive me if these warnings sound threatening. They are not intended to. I have to remind of you of them forcefully because they are so important, and I would be failing in my duty to you if I did not emphasise just how seriously the courts take these things.

9. During the case you can have discussions with the other jurors. However, those discussions must be in private. Certainly not in the general jury assembly area where you can be overheard. There must be no discussions between jurors unless you are all there together in private. [**This paragraph should be modified if the jury's composition is 14 to begin with**]. Remember also to keep an open mind when listening to the evidence and before discussing it.

10. When the case has finished, you can discuss the case with other people should you wish to. However, you must never reveal to anybody what was discussed confidentially between the 12 of you.

What to do if you are concerned about anything

11. The third matter I need to talk about is that sometimes events can occur during a trial which cause a juror or jurors to become concerned. For example, if anyone tries to contact you, either electronically or in person about this case, then report it to the usher or court clerk as soon as you can. If it happens outside business hours, then the police can also be contacted. Sometimes a concern can arise

[1413] See *Lajevarti* [2023] EWCA Crim 615

from something a fellow juror does. Imagine if you found out that a fellow juror was researching or speaking to someone from the public about the case. All of you have a collective responsibility for each other's conduct. In such a situation, as uncomfortable as it might be, in that situation you have to report any concern or problem to me. You have to do that as soon as you can. Do not wait until after the case has finished because by then I would not be able to investigate the situation or put things right. Can I reassure you by saying these kinds of problems are exceedingly rare. I have no reason at all to think that anything will occur in this case.

The Press

12. There may be some press interest in this case. There is nothing wrong or unusual with the press reporting on cases. You must not, however, take any account of the press reporting of this case in deciding the issues. You try this case only on the evidence you see and hear in court.

The running of the trial

13. I now wish to deal with a few administrative things.

14. It is impossible to guess the exact length of the case. At the moment the length of the trial is estimated to be … days. I hope you understand that there can be unforeseen delays and the trial length is fluid, but I will keep you informed of where we are and how we are doing as we move through it. In order to make sure that the trial runs efficiently it is crucial that all of you attend on time. Unless I say otherwise, we cannot start without you. Please treat this case as a professional commitment.

15. We will usually sit between 10.00 to 1pm and then from 2pm until 4 or 4.30 each day. These hours may vary and are not rigid. Sometimes, we may want a witness to finish his/her evidence and we might finish outside of these times by a few minutes. We will sometimes have comfort breaks during the morning or afternoon session. During the times that we are sitting, it is important that you are able to concentrate on the evidence and the proceedings. I appreciate that listening to others talk can sometimes be difficult and tiring, and therefore please do not hesitate to ask for a break if you are struggling. Within reason, there is no problem in you having a break for a drink or if you simply want to stretch your legs. Similarly, if you are feeling unwell, do not suffer in silence, please let me know.

16. All of you have stationery in front of you. If you want to write your own notes about the case or the evidence, then feel free to do so. However, you do not have to. One of my roles is, as you probably know, to sum up the case for you at the conclusion of the evidence. I will be taking a fairly full note of the evidence. So do not feel that you have to write your own notes, but please do if you prefer to work that way.

Further Directions

The following examples are a non-exhaustive list of additional directions that a judge may want to consider giving at the outset in his/her introductory words.

17. **In paper heavy cases or cases with voluminous jury bundles or schedules, it might be helpful to reassure the jury with something like:**

Some of you may look at the material and the jury bundles coming your way and be intimidated or concerned by just how much there is. Please do not worry. It is the experience of the courts that jurors very quickly adapt and understand the issues and the evidence. Navigating those documents and understanding their content will quite quickly become second nature. These documents are your documents and although you are not permitted to take them home with you, please feel free to write or annotate them in any way that you wish.

18. **In a longer than usual trial (exceeding two weeks), it might be appropriate to reassure jurors in the following way:**

    It is very much appreciated by me that in doing your public service as jurors, you will be involved in this case for a longer period than you might have expected. Can I reassure you by saying that nearly all jurors become far more invested and interested in longer cases than they would a case lasting only a few days.

19. **In some cases, it may be appropriate to draw the jury's attention to the essential issue in the case. For example, in a case where the issue is identification, a jury can be directed and assisted in a short paragraph in the following way (and also in writing at the outset):**

    It is not disputed that the criminal act alleged in this case occurred. What is disputed is whether the victim of the crime has correctly identified the defendant. In making the decision about the quality of the identification, you will be directed to consider a number of factors. It may be helpful to consider those factors whilst you listen to the evidence of identification. Those factors are as follows….

20. **In a sexual allegation where consent is the sole issue or where consent is irrelevant, a jury can be directed to consider the legal meaning of consent or respectively ignore any consideration of it.**

21. **In sexual allegations or cases that may attract strong feelings it may be appropriate to say the following at the outset of the case:**

    You may well be shocked by some of the allegations, or the things and language you will hear. Whatever your reaction is, it is important that you remain objective and dispassionate during this trial. Cases are not decided upon by emotion but by way of a calm and measured assessment of the evidence. Remember to keep a cool head and to ensure that you keep an open mind when you are listening to the evidence from both/all parties.

22. **In cases involving ABE interviews and/or transcripts, it will be necessary to direct the jurors in the following terms:**

    A witness in this case was video interviewed about his/her allegation. That video interview is sometimes referred to as an 'ABE' interview which means 'Achieving Best Evidence'. The video recording will be played to you as the first part of their evidence before cross-examination. However, normally you only get to see it once in the same way that you would only see a witness give evidence once. Therefore, it is important to pay attention to it and make any notes that you might want to as the recording is being played. [**transcripts**] The transcripts are provided to you because some of the audio is difficult to hear. Use the transcript to follow the evidence but please do not concentrate just on the written word.

Look at the video as well so that you can see how the witness is describing events. The transcripts will be removed from you after the video has finished. I can of course remind you of particular passages and words used when I am summarising the evidence for you in my summing up.

23. **In cases featuring special measures:**

    This witness is giving evidence from behind a screen/in a separate room in this building. It is common practice for this to happen. The reason why it often happens is to make sure that the witness is at ease when giving evidence. It is not to be taken against the defendant in any way at all and it will not affect your assessment of the evidence.

24. **In cases featuring Intermediaries/ground rules/limited cross-examination:**

    Research into the concept of questioning young children and vulnerable people has for some time concluded that they should not be treated like adults when it comes to questioning. Children might not be able to understand some questions that adults do. So called 'closed questions' which are commonly asked of adults or questions where the answer is suggested in the question can be linguistically difficult for children to understand. Therefore, the questions that that will be put to the witness in this case will be of a very different nature and type than you might have expected. It also means that you cannot expect the defence barrister to forcefully cross examine that witness as they might an adult.

    [**intermediary**] The witness/defendant has what is called an intermediary assisting him/her. The intermediary's job is to help communication between the court and the witness/defendant.

Jury Notice

25. Finally, you will now be given a document which summarises the rules that I have explained. Whilst you will be tempted to look at it now, please wait until the next break to do that. When you have time, read the document carefully. Keep the document with your jury summonses at all times during the trial.

Example 2

Good morning/afternoon members of the jury. Let me begin by thanking you for the patience you have already shown waiting for this trial to begin. I am afraid that during your jury service you will have to get used to some delays and there may be times when you may not know precisely what is going on. Jury trials have a lot of moving parts and it is far from uncommon I'm afraid for there to be delays or interruptions during the course of the evidence and other stages of the process. Everyone involved in this case will do their level best to try and keep such interruptions to a minimum but I'm afraid it is simply a fact of life that sometimes things happen that force us to have a pause in the proceedings, a delayed start and sometimes an early finish.

This trial is expected to last for X days/weeks. In general terms the sitting hours are between 10.00 and 1pm with a break for lunch and then carrying on in the afternoon between 2 and 4.30. That may not seem a very long working day, perhaps compared to that which you may have undertaken in other circumstances, but experience shows that this is about right in terms of you all being able to maintain the appropriate level of concentration on the evidence and listening to the advocate's speeches. You should also bear in mind that quite a lot of work goes on when you are not in court hearing evidence – work done by the parties, the court staff and myself.

As I have already mentioned there may be some days when we can't start at 10.00, not least because I may have other cases with which I have to deal, and there may be other days when for a whole variety of reasons it is necessary to finish a little earlier than normal. Whenever I can, I will give you advance warning as to variations in the normal sitting times so that you can make arrangements with that in mind. We already know that this trial will not be sitting on certain days and I'm going to provide to you a list of all the days when that is the case. You will thus be able to plan to do other things on those days confident that your attendance here will not be required.

Let me now explain our respective roles in this trial. You are the judges of the facts and you are the only judges of the facts in this courtroom. I have no role to play in helping you to decide the facts of this case – the assessment of the facts is a matter entirely for you. My role in this case is to deal with legal issues and to ensure that the trial runs smoothly and fairly. It is also my job to provide you with legal directions that you apply to the fact-finding exercise you are undertaking as the jury. That will involve me giving you some legal directions even in the course of these opening remarks, at other stages during the trial when it's helpful to do so and, in particular, at the end of the trial when I come to sum the case up to you. I will provide to you a legal framework that you must apply in reaching the verdict(s) in respect of the charge(s) you have just heard read out.

Because I deal with legal issues there will be times when I need to consider some matter of law that arises during the evidence and it may be necessary to ask you to leave court whilst that is done. This serves to emphasise the difference in our respective roles – facts for you, law for me. It also leaves you free to concentrate on the facts whilst I sort out matters of law.

In addition to providing you with legal directions I will also, in the course of my summing up, remind you of some of the evidence that you hear during the trial. Bear in mind, however, that when it comes to the evidence it is your view in relation to that

which matters and not mine. If at any stage it appears to you that I may have a view of the evidence of my own take no notice of that whatsoever – my thoughts about the evidence are of no relevance and cannot assist you in deciding this case.

At the end of the case it will be your task to reach the verdict or verdicts in relation to the charges. The prosecutor will provide you with a written copy of the charge(s) about which you heard just now. They are set out in a document that we call the indictment.

There is going to be a variety of evidence presented to you in the course of this trial. Some witnesses will come into the courtroom and give their evidence from the witness box and they will be cross examined by the defence. The purpose of that may be to challenge the evidence, put it in context or to draw out from the witness other evidence that is considered potentially of use to you. You will also be given plans/schedules/photographs etc. You can write on any of the documents with which you are provided, and also on the blank sheets of paper that you have.

Some jurors choose to make lots of notes, some none at all. What you can be sure of is that no one will look at anything you may choose to write down. Anything you write is private to you and will be destroyed at the end of the trial.

In terms of making notes of the evidence you must do what you find helpful. There is no right or wrong way about how you choose to follow the evidence. Bear in mind that at the end of the trial you will announce your verdict(s) – either guilty or not guilty. You will not, however, have to take an exam on the case or write an essay setting out what you have learnt about the circumstances surrounding it.

{In a case where the police undertook an ABE process}

Some of the evidence in this case will be in the form of a pre-recorded account provided by the witness to an interviewing police officer, which process was undertaken much closer to the time when the investigation began. That evidence will be played to you and you will watch it on the television screens in this courtroom. The witness will then be cross examined over a video link. The witness will be sitting in a room some distance from here when that happens.

{This may be a convenient point to refer to an intermediary if there is one, or a witness supporter, interpreter etc}

The fact that the evidence was recorded in advance and is played to you as part of the prosecution case, and the fact that the witness is giving evidence over a video link (or behind a screen etc as appropriate), is not something that counts in any way against the D. It is commonplace in criminal trials for evidence to be received in this way for a whole variety of reasons and the fact it is done so doesn't mean the D is starting a few points down or that this somehow makes it more likely that he/she committed the offence(s) alleged. You must not allow the way in which that evidence is presented to you to operate in any way adverse to the D.

What you must remember is that evidence given in this way is assessed by you in exactly the same way as if the witness was physically in the courtroom and standing in the witness box being cross examined. You must also bear in mind that this will be the one and only time you see the recording of the evidence – it is very unlikely the

recording of that which the witness had to say to the police will be played to you again so you must pay as close attention to it as you would to any other evidence.

{If a transcript is to be provided to the jury for the duration of the witness's evidence explain at this point why and also that it will be taken from them as soon as the witness completes giving evidence and that they will not get it back.}

Other evidence may be read to you. That is done when the content of the witness statement is agreed. Some evidence may be provided to you in the form of what are called 'Agreed Facts', which can be a convenient way of providing a jury with facts that are agreed to be correct and can be taken by you as being so. By proceeding this way we avoid witnesses having to come to court to give evidence in respect of which there is no challenge.

{If there are, for example, timelines or sequence of events/schedules not all of which is necessarily agreed this may be a sensible time to explain that. If hearsay evidence is to feature in the case, then likewise this may be a good time to direct the jury as to how they should approach such evidence, emphasising that this is evidence that is read but the accuracy and/or reliability is **not** agreed.}

{Example of identifying issue in advance and providing legal direction in respect of that.}

It is right that even at this early stage I provide you with an indication of some of the issues it is anticipated will arise in the course of the trial and also to provide some pointers as to how you approach these matters. For example, in this case the prosecution relies upon evidence of identification – there is a witness who will tell you that they saw someone who they identify as being the defendant. The defendant disputes the correctness of that identification – he/she says the person the witness is talking about was not them. Experience shows that identification evidence must be approached with care and that mistakes about identification can and sometimes are made. It is also the case that a witness who believes they are correct in making an identification may, because they believe themselves to be correct, present as a convincing witness and yet may be wrong. You will need to look with care at the circumstances in which this disputed identification took place and focus on matters such as lighting, the length of time the witness had the suspect within their sight, the degree to which the witness who says they can identify the suspect as being the defendant had prior knowledge of the person that they tell you they can identify and matters such as that. You will assess the evidence of identification in the context of all the evidence that you receive in the course of the trial and I will give you further directions about the issue of identification when I come to sum the case up later. At that point I will provide you with some further remarks as to the potential strengths or weaknesses of the identification evidence as assessed in the context of all the other evidence that by that stage you will have received.

{This may be the point at which other relevant issues e.g. myths and stereotypes in a case involving a sexual allegation; child witnesses; delay; fast moving event and fact that witnesses may have an incomplete view of the circumstances; vulnerabilities relevant to D and any adjustments made as a consequence; intermediaries where any of the witnesses or D is being assisted by one; expert evidence; publicity if case is a high profile one likely to get significant press coverage; any particular issues

concerning information relating to any of the relevant parties that calls for specific mention over and above the normal warning as contained in the Juror Notice; absence of D in case where the accused has absconded etc.}

I'm now going to provide you with/refer to a document you already have which sets out some really important rules that apply to your work as jurors – JUROR NOTICE. As the document itself tells you the rules that it refers to are very important. The document itself is yours to keep and you should refer to it both during your jury service as well as afterwards. The document informs you that the rules it sets out are so important that failing to abide by them can amount to a criminal offence that could result in up to two years in prison and/or a fine.

I am not going to read out the document to you word for word, but I am going to cover matters to which it makes reference. If you have any doubt about any part of what the document has to say then please let me know, ideally by way of a note, and I will try and answer any question that you ask. There are blank jury notes available for you to use when you wish to raise an issue with me.

The Juror Notice explains that you try this case only on the evidence that you see or hear in court. You must not try and find out anything about the case, or about anyone who features in it, from any other source. That means you must not look anything up about the case on the internet. A lot of us may be tempted to put names or places into Google and see what comes up, or perhaps look to see if someone we meet has a presence on social media e.g. do they have a Facebook page? Whatever you may do in other circumstances you must not do that in respect of anything, any place or anyone that features in this case. The Notice explains that very clearly to you and you must abide by that rule. As the Notice explains a little later you all have a collective responsibility to ensure that this and all the other rules referred to in the Notice are complied with. If you ever think they are not being complied with you must tell me, by way of a note, and I will sort that out.

There may/are going to be reports in the press about this case. As the Notice tells you it is important that you pay no attention to them. The reporters will no doubt do their best to accurately relay events in court but what gets reported will not be complete, may not be accurate, may consist of comments about the evidence that cannot help you and, critically, does not form part of the evidence with which you will be provided, and upon which you will decide the case. Nothing that you may have already seen in the press in advance of the trial, or which you may see reported during the trial itself, can be permitted to play any part in your work as jurors and you must put it out of your minds.

For the same reason, jurors are instructed not to speak about the case to anyone outside of their number during the trial.[1414] That means you must not talk to family or friends about the evidence that you receive or any thoughts you may have about it. Further, do not post anything on social media about this trial and which may attract comment if you were to do so.

No one else will have the unique perspective of you 12 jurors as to the facts of this case and no one else can be permitted to contribute to your assessment of the evidence or the verdict(s) you must reach. If anyone should try to speak to you about

[1414] See *Lajevarti* [2023] EWCA Crim 615

the case then you should tell a member of the court staff immediately as the Notice tells you.

You are free to talk about the case when all 12 are together and you cannot be overheard by anyone else. But please remember that these are only discussions and not decisions. The time for decisions is the end of the case when you have heard everything which anyone wants to say. Until that time, the end of the case, you must keep an open mind and approach any discussions you have on that basis.[1415]

As I have already mentioned but I emphasise again, and as the Notice sets out, you have a collective responsivity to ensure that the Rules relating to your work as a jury are complied with and you must let me know if you think at any stage that is not the case.

The Notice gives you instructions about the position once the trial is over. I will have more to say about that at the end of the trial but as the Notice makes clear there is a permanent ban on your talking about anything that may be discussed by you the jury when in your room deciding the verdict(s).

{If the case is one that carries with it a risk of emotional impact consideration should be given as to what should be said to the jury about that at the start of the trial and what measures may be put in place to assist jurors to cope with that fact then and also after the trial.}

The next stage is for the prosecution to introduce the case to you. We call that 'opening' the case. The prosecutor is going to explain the circumstances of the allegation from the prosecution perspective and will tell you that which they are setting out to prove. The burden of proving the case rests on the prosecution throughout. They will only prove the case if they make you sure of the D's guilt.

Once the prosecutor has finished explaining the case to you the defence advocate will tell you something of the defence position and why the D says he/she is not guilty.

None of what the advocates say at this point is evidence in the case; comments made by the advocates are just that and they do not become evidence however attractively they may be expressed. The evidence will follow once the advocates have finished setting out their positions and that will be by way of the first witness from whom you are going to hear but in advance of that I will now hand over to X for them to introduce the advocates to you and tell you more about the case.

[1415] On this topic see *Edwards* [2021] EWCA Crim 1870 where the issue of jurors discussing the evidence during the trial was specifically addressed.

28. APPENDIX VII

SUMMING UP – CHECKLIST

[The original Crown Court Bench Book published by the then Judicial Studies Board contained a summing up checklist. The 2010 Bench Book 'Directing the Jury' did not. This new annex has been added in response to requests that such a resource be made available.]

It is common now to summarise in short form the issues and competing cases by way of a balanced preamble to the formal legal directions. That is particularly to be recommended if giving a split summing up.

The checklist is no more than a memory aid. It does not include every possible topic which may require directions. Judges should be alert to issues which have not been included in this list.

There is no particular magic in the order in which the directions are set out in the checklist. Judges should assess the order which is most appropriate for the specific case.

Some of the directions will have been given, in full or in part, at earlier points in the trial. It will still be necessary to provide those directions as part of the overall summing up. It may sometimes be better to give (or repeat) a particular legal direction just before referring to the evidence itself in the course of the evidence summary.

It is strongly recommended that the jury be provided with legal directions in writing. Practices vary as to how much is given to them in written form – see for example, *Atta-Dankwa*[1416] and *PP*.[1417] It is suggested that at the very least the jury should be provided with a RTV in hard copy and ideally more than that. The failure to provide written directions has (so far unsuccessfully) been advanced as a stand-alone ground upon which it has been suggested a conviction should be assessed as being unsafe. The failure to provide written directions is likely to attract criticism should the case be reviewed in the Court of Appeal.

In the current Covid crisis thought will need to be given as to how the jury receive hard copy legal directions.

The legal directions should always be discussed with the parties before being finalised.

For more general guidance on the purpose, structure and form of a summing up see the foreword herein from the LCJ and *Reynolds*[1418] to which he makes reference.

[1416] [2018] EWCA Crim 320
[1417] [2018] EWCA Crim 1300
[1418] [2019] EWCA Crim 2145

General

- Function judge/jury – law for judge, facts for jury
- Decide only on evidence in case [evidence is closed and there will be no more]
- Inferences – explain
- Must not speculate
- Jury should not expect to be able to answer every question that they might think arises in a case
- Jury should not act as investigators – task is to try the case on the basis of the evidence and arguments advanced by the parties
- Emotion/sympathy/disapproval – guard against
- Judge expressed or apparent view of the evidence – ignore
- Process of reviewing of evidence in summing up – not going to remind about all of it. Jury decides what evidence is relevant not judge
- D sitting in dock – not relevant. All witnesses start equal
- Trial in absence of defendant
- Child defendant – criminal responsibility if that arises in an historic case *doli incapax*
- Non-relevance of Special measures
- Burden and standard of proof
- Ingredients of each offence including, as appropriate, intention/recklessness/dishonesty, intoxication etc.
- Nature of defence
- Defence not raised or relied upon but arising on the evidence and which falls be directed upon [rare]
- Alternative verdicts
- Specimen counts
- Multi-incident counts
- Separate treatment of counts
- Cross-admissibility where that arises
- Separate treatment of defendants
- Joint responsibility/enterprise
- Conspiracy
- Defences, as appropriate, alibi/self-defence/accident/no dishonest intention/duress/lack of intent/insanity etc.
- Route to verdict

Various aspects of evidence

- Circumstantial evidence
- Admissibility of evidence where more than one defendant – evidence of co-defendant and need for caution/what said in interview by co-defendant who does not give evidence etc.
- Accomplice evidence – treat with caution
- Plea of co-defendant/alleged co-conspirator
- Bad character
- Good character
- Hearsay evidence – absent witness etc.
- Things said or done in furtherance of conspiracy
- Implied assertions e.g. text messages and 'dealer's lists'
- Hostile witness
- Complainant in sexual case – myths and stereotypes/video evidence/distress
- Child witness
- Vulnerability of witness/D [relevance/role of intermediary]
- Delay
- Evidence of complaint – not independent support/distress at time of complaint
- Supporting evidence where it amounts to such
- *Makanjuola* warning where the need arises
- Identification
- Lies
- Police interviews
- Failures and adverse inferences potentially arising therefrom
- Expert evidence

Summarise the evidence

- Tell the story
- Relate evidence to charges
- Account in interview
- Identify defence case [and where appropriate even one not raised or relied upon but arising from the evidence]

Before retirement

- Process of deliberation
- No pressure of time
- Availability of exhibits/viewing CCTV etc.
- How to ask questions
- Breaks during retirement if any
- Selection of spokesperson to give verdicts
- How verdicts are given – who says what
- Unanimity of verdicts
- Majority verdict – not until later
- Watson direction [rare]

Breaks in retirement

- Deliberation must stop.
- Do not discuss between selves after leaving court or attempt so to do.
- Remind re not discuss family/friends.
- Avoid temptation to research e.g. don't go to scene.
- Do not begin to deliberate again until been back into court and jury bailiff re-sworn.

29. APPENDIX VIII

DIRECTING THE JURY ON THE TASK OF DELIBERATING

It is the practice in a number of jurisdictions for juries to be given general guidance on how they might go about the task of deliberating on their verdict(s). That has not previously been a significant part of the summing up in this jurisdiction. Traditionally judges do not say much about deliberations, apart from telling the jury that they will need to appoint someone to return the verdict(s), explaining about breaks and asking questions, and telling them that the time when a majority verdict might be considered is at some unidentified point in the future.

That has, however, begun to change, not least as judges and Recorders have had the benefit of learning about empirical research into the jury system conducted by Professor Cheryl Thomas QC (Hon) with juries at court in England and Wales. Through her Judicial College lectures and her published research insight has been gained into the benefit to jurors from judges' use of written directions, and we now also know about the expressed desire of jurors to have more guidance about the most important task they undertake – deciding on the verdict in the privacy of the jury retiring room. Her research has found that 82% of jurors who had just returned a verdict said they would have liked more guidance on how to conduct deliberations. There are a number of aspects of jury deliberations where jurors would like more guidance, including what to do if they are confused about a legal issue, how to ensure everyone has a chance to express their views, what to do if something goes wrong in deliberations, how to start deliberations and how long to deliberate, how to choose a foreman/woman, etc.[1419]

Based on this information, in the last couple of years judges have started saying ever more to jurors about the task that they have to carry out in deliberations. This change has become apparent from discussions at Judicial College seminars. However, until now, there has been little by way of guidance as to what might usefully be said at the stage the jury retire, and also how best to provide some helpful guidance to the jury.

What is set out below is a document prepared by Professor Thomas, in conjunction with other members of the editorial team of the Compendium, which provides some general pointers as to what might be said to the jury about conducting deliberations. The document reflects similar guidance widely used in a number of other common law jurisdictions for many years now.[1420] The guidance has been presented to the CPRC and received unanimous acclamation as having the potential to assist jurors. It is, however, only a suggestion as to what may be said. The Compendium, however, has no mandate to dictate best practice. Further, the contents of the document have not been the subject of consideration by the Court of Appeal.

It is suggested that sensible practice would be to provide the jury with the document in hard copy and to do so either just before they go out to deliberate (similar to the provision of the Juror Notice at the start of the trial) or perhaps even earlier than that (especially if the jury is asked to choose a foreman/woman before deliberations) so

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[1419] C. Thomas, "Avoiding the Perfect Storm of Juror Contempt" [2013] Criminal Law Review, Issue 6, 483: 496-7.

[1420] Many of these other jurisdictions' guidance draw on the 1999 publication *Behind Closed Doors: A Guide for Jury Deliberation* by the American Judicature Society.

that they have had time to absorb some of the detail ahead of beginning their deliberations. The provision of the guidance in writing involves a simple exercise of copying, pasting and printing. If not given before it would be a helpful supplement to anything else a judge might think it sensible to say just before the jury are sent out.

Your guide to jury deliberations

You are about to start your deliberations as a jury. Before you begin, please take the time to read through this document. It gives suggestions to help you conduct your deliberations in a smooth and productive way.

General guidelines for deliberating

Before you get started, it would be useful to think about the following guidelines for deliberating:

- Respect each other's opinions and value the different viewpoints you each bring to the case.
- Be fair and give everyone a chance to speak.
- It is okay to change your mind.
- Listen to one another.
- Do not let yourself be pressured into changing your opinion, and do not pressure anyone else.
- Do not rush into a verdict to save time. The people in this case deserve your complete attention and thoughtful consideration.
- Follow the judge's instructions on the law.
- Do not under any circumstances make your own inquiries about anything to do with the case. See the notice "Your Legal Responsibilities as a Juror" that you received on the first day of the trial for further information about this.

Getting started

Q. How do we start?

A. At first, you might want to:

- Talk about your feelings and what you think about the case
- Talk about how you want to go ahead with the deliberations and lay out some rules to guide you
- Talk about how to handle voting
- Select a foreman/woman

Selecting the foreman/woman

Q. What qualities should we consider when choosing the foreman/woman?

A. Suggestions include someone who is:

- Organised
- Fair
- A good discussion leader
- A good listener
- A good speaker

Q. What are the responsibilities of the foreman/woman?

A. The foreman/woman should:

- Encourage discussions that include all jurors
- Keep the deliberations focused on the evidence and the law
- Let the court know when there are any questions or problems
- Tell the court when a verdict has been reached
- Speak in court on behalf of the jury

Q. Is the foreman/woman's view more important than mine?

A. No, the view of each juror counts equally.

Q. Once chosen, do we have to keep the same foreman/woman?

A. No. The jury can agree to select a different foreman/woman at any time before the verdict is delivered.

Getting organised

Q. Are there any set rules to tell us how to deliberate?

A. No, but here are a few suggestions:

- Go around the table, one by one, to talk about the case.
- Have jurors speak up anytime, when they have something to say.
- Try to get everyone to talk by saying something like, "Does anyone else have anything to add?''
- Show respect to the other jurors by letting them express their points of view and carefully consider their views.
- Do not be afraid to speak up and express your views.
- Have someone take notes during your deliberations so important points are not forgotten.
- Write down key points so that everyone can see them.

Discussing the evidence and the law

Q. Is there a set way to examine the evidence and apply the law?

A. The judge's instructions will tell you if there are special rules or a set process you should follow.

- If the judge has given you written directions use this to guide your deliberations.
- If the judge has given you a written set of questions to answer (called a Route to verdict) go through each of these in the order set out by the judge.

Q. What if someone is not following the instructions, refuses to deliberate, or relies on other information outside of the evidence?

A. This is a violation of a juror's oath and the court must be told straight away by sending a note to the judge.

Voting

Q. During deliberations when should we take the first vote?

A. There is no best time. But, if you spend a reasonable amount of time considering the evidence and the law and listening to each other's views, you will probably feel more confident and satisfied with your eventual verdict than if you rush things.

Q. Is there any correct way to take the vote?

A. No, any way is okay. You might vote by raising your hands, by a written ballot, or by a voice ballot. Eventually, a final vote in the jury room will have to be taken with each of you expressing your verdict openly to the other jurors.

Q. What if we cannot reach a verdict after trying many times to do so?

A. Ask the judge for advice on how to proceed.

Getting assistance from the court

Q. How do we go about getting assistance when we are deliberating?

A. Write your question or request down on paper and ask the jury bailiff to give it to the judge. Do not talk to the bailiff about your question or the case.

Q. What if we don't understand or are confused by something in the judge's instructions, such as a legal principle or definition?

A. Ask the judge because each juror must understand the judge's directions in order to reach a fair verdict.

Finishing deliberations for the day

Q. What happens if we are still deliberating at the end of the day?

A. If you are still deliberating at the end of the court day, you will go back into court and the judge will explain about the rules you have to follow overnight when you go home. You will return the next day at the appointed time to continue deliberations.

The verdict

Q. After we have reached a verdict(s), how do we let the court know?

A. The following steps are usually followed:

- The foreman/woman tells the jury bailiff that a verdict has been reached.
- The judge calls everyone, including the jury, back into the courtroom.
- The clerk asks the foreman/woman to stand.
- The clerk will then ask for the verdict on each count.

Q. What happens after our verdict is given in court?

A. The judge will discharge the jury from the case. All of you will return to the jury lounge, and the jury officer will tell you if you are still needed to try more cases or if you are being released from your jury service.

Thank you

Making decisions as jurors about the lives, events and facts in a trial is always difficult. If you follow the judge's directions, you will have performed an invaluable service for the people in this case and for the system of justice in our community. Thank you for your thoughtful deliberations.

This guide is not intended to take the place of any instructions given to you by the judge.