CROWN COURT BENCH BOOK COMPANION

Judge Simon Tonking
Judge John Wait

FOREWORD BY THE LORD CHIEF JUSTICE

The "Specimen Directions to the Jury" provided by the Judicial Studies Board (now the Judicial College) were of considerable practical assistance to members of the judiciary trying criminal cases. However, in his Foreword to the 2003 re-issue my predecessor, the Rt. Hon. Lord Woolf of Barnes CJ, emphasised that the Directions "have to be selected and tailored to meet the facts of a particular case and not used indiscriminately".

This guidance was not always followed in practice. It was the experience of the Court of Appeal (Criminal Division) that the Directions were often used as a short cut, and incorporated into summings up, sometimes verbatim, insufficiently adapted to the issues in the case concerned. A new approach was called for.

In March 2010 the JSB published the "Crown Court Bench Book – Directing the Jury", a new work by Lord Justice Pitchford. This provides helpful and erudite guidance, and includes a number of examples which are deliberately based on particular facts and are not therefore amenable to being used as templates. However, the need has been identified for a companion to the Bench Book, providing concise and readily accessible checklists of matters which arise and, depending on the issues in the particular case, may need to be dealt with when directing the jury.

Such a companion has now been prepared by Judges Simon Tonking and John Wait, who are both highly experienced in conducting Crown Court trials, and are jointly the directors of the induction and continuation courses run by the Judicial College for newly-appointed Recorders.

This Companion is intended to be used in conjunction with the Bench Book, to which it repeatedly cross-refers, and to replace the Specimen Directions. The Companion does not deal with some particularly complex areas such as partial defences to murder, for which the Bench Book remains the sole point of reference.

The preparation of this Companion has involved a great deal of careful thought and hard work. It has been well received by the judges who have been consulted for their views on it, prior to publication. I am sure that it will be of great value to all who preside over Crown Court trials, and who now owe to Simon and John a considerable debt of gratitude.

The Rt. Hon. Lord Judge C.J.
October 2011

INTRODUCTION

This Companion to the Crown Court Bench Book "Directing the Jury" is just that: it is not a substitute for that work, which is the authoritative and contemporary work on this crucial function of the Crown Court judge, but complementary to it.

The purpose of the Companion is to provide recorders and judges of the Crown Court with a convenient point of reference when preparing to give directions to the jury particularly in a relatively short or straightforward case. It is arranged in the same order as the Bench Book, with page references to the Bench Book at the start of each section except in a couple of instances where notes are provided about topics not covered in the Bench Book.

The scope of the Companion is limited to describing in concise form the necessary, or in some cases desirable, elements of directions on particular topics. It must be stressed that these are not intended to be used as specimens or as a replacement for the original, now withdrawn, JSB Specimen Directions. To this end no "form of words" is provided: there can be no substitute for directions crafted to instruct and assist the jury in each individual case, however simple that case may appear to be.

Directions to be given in summing up, other than those which are of necessity the same in every case, should be discussed with the advocates at the end of the evidence and before speeches so that:

1. any necessary corrections, additions or deletions can be made; and
2. all parties know, before speeches are made, the basis on which the case, and individual aspects of it, are to be left to the jury.

Both the Crown Court Bench Book and this Companion have been designed to cover a number of issues which may have to be addressed when directing the jury in a particular case. In many cases however the number of points actually in issue are few and directions should be commensurately simple and succinct. It is essential to avoid giving directions which do nothing other than add unnecessary complication for the jury to what otherwise would be a relatively straightforward case.

To avoid unnecessarily cumbersome text all references to defendants and witnesses are in the masculine but of course are to be read as including the feminine. We are conscious of the debate as to whether the jury are to be referred to in the singular or plural. Having addressed so many we prefer the plural and so write of the jury throughout as "they".

We should like to thank Lord Justice Pitchford, Mr. Justice Maddison, Professor David Ormerod, Judge John Phillips and the tutor judges of the Criminal Induction Course for their advice and encouragement. Special thanks go to Judge Sybil Thomas for proof reading the draft of this work.

Simon Tonking and John Wait
October 2011

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2 Introductory words at commencement of trial incorporating 18(1) Empanelling a jury

{Bench Book pp. 9 – 10 and 377 – 381}

Before swearing in the jury (*Bench Book pp. 377 – 379*)

There should be a consultation with the advocates as to the questions, if any, it may be appropriate to ask potential jurors. The topics which may need to be addressed include:

- in cases that may run beyond the length of the jurors' summons, the availability of the jurors to sit for the anticipated length of the trial.
- whether potential jurors know the defendant, potential witnesses or others involved in the case.
- 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 (e.g. by working in or being a regular at a public house at which the incident occurred).
- in cases where there has been any significant local or national publicity, whether any questions should be asked of potential jurors.

Swearing in the jury (*Bench Book pp. 379 -381*)

Problems rarely arise but if they do they are so case specific that it is impractical to address them in this Companion. Reference should be made to Chapter 18 of the Bench Book.

Introductory words (*Bench Book pp. 9 – 10*)

After the jury has been sworn and the defendant has been put in charge the judge will want to give directions to the jury on a number of matters including those set out below. It is for the judge to decide the order and style in which this is done. Such remarks should be tailored to the particular case which the jury is to try.

- The time estimate of the trial and normal sitting hours should be explained. If the defendant or any witness is a child or has difficulties or needs of which the jury will learn, such that the sitting hours have to be adjusted, an explanation should be given at this stage.
- The jury should be reminded that they have taken an oath or affirmation to try the case upon the **evidence**, which is what they will all hear together in court, and told that it is the essence of the jury system that their verdicts will be based upon their common experience of the evidence and the discussions that they will have about that evidence in their deliberations at the conclusion of the case.

For this reason, the following points cannot be stressed too strongly and should be accompanied with a warning that ignoring them may well (as they have already been informed in their jury instructions) amount to a contempt of court which is an offence punishable with imprisonment:

- Until the case has been completed, jurors must not discuss any aspect of it with **anyone at all** outside their own number or allow anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way. And, even after they have returned their verdicts, whilst they may then talk about the case with others, they must be careful only to speak about what happened in the court room; they must never in any circumstances disclose anything of their discussions or deliberations.
- They may discuss aspects of the case among themselves but should only do so when they are all together, not in ones or twos, and they must be sure that no one else is present. They should not reach any concluded views about the case until they have heard all the evidence, the advocates' submissions and the summing up.
- They must not carry out any enquiries or research into any aspect of the case themselves, for example by visiting places mentioned or looking up any information on the internet. They should only work on the case when they are at court.
- They must take no account of any media reports about the case.

- The jurors should also be told that not only are they responsible, personally and together as a jury, for the verdict but also for all that they do whilst they are at court. For this reason:
  - should anyone try to approach them to talk about the case they should have nothing to do with it but report it immediately to an usher or the court clerk, preferably in the form of a note, so that the judge can deal with it there and then.
  - should they have any problems amongst themselves they should report it immediately in the same way so that the judge can help them. It should be explained that unless they report any such problems at the time that they arise, it may well not be possible to put things right.

These points can be made with an assurance that such things are uncommon but that it is better for the jury to know how to act if such things were to occur.

- If there is an interpreter for the defendant, identify the fact and in terms agreed with the advocates, explain the interpreter's role (e.g. translating everything into a foreign language or assisting a defendant who has some English with technical or difficult language).
- If there are to be witnesses using special measures or interpreters it is desirable to give an explanation of what is to happen and why at this stage.
- Smoking arrangements (at those courts where provision is made) should be explained.

A full list of matters such as those outlined above appears at pp. 9 - 10 of the Bench Book.

3 Fitness to plead and stand trial

{Bench Book p. 11}

By s.4(5) Criminal Procedure (Insanity) Act 1964 as substituted by the Domestic Violence Crime and Victims Act 2004 it is for a judge alone to determine the issue of whether or not a defendant is fit to plead and stand trial.

Whenever a finding of unfitness has been made a jury must try the issue as to whether it is satisfied that the accused did the act or made the omission charged against him as the offence.

- Jury selection proceeds in the usual way save that the accused has no right of challenge.
- The jurors take an oath or affirm to determine whether the accused did the act or made the omission or is not guilty.
- The judge should explain to the jury the nature of the proceedings and the reason for the public trial of the issue: namely that although the accused is not fit to be tried for the offence there is an important public interest in ascertaining whether or not he did the act.
- The summing up will be in conventional form save that the jury is concerned only with whether the defendant did the act or made the omission.
- The verdict will be:
    - ◊ "He did the act charged"; or
    - ◊ "He made the omission charged"; or
    - ◊ "Not guilty".

4(1) Child defendants

{Bench Book p. 13}

The doctrine of *doli incapax* was abolished by the Crime and Disorder Act 1998. The age of very young defendants will remain relevant when considering a number of issues (e.g. recklessness and foresight, self defence and reasonableness).

Directions

- In such cases the jury must be directed:
    - ◊ To have regard to the age of the defendant at the time of the incident in question.
    - ◊ To consider the issue of foresight or reasonableness in the light of what they know of the defendant, his capacity and level of maturity.

4(2) Separation of rôles

{Bench Book pp. 14 - 15}

Directions

The jury

- The jury has heard all the evidence that is to be presented: there will not be any more. The jury's task is to consider all of this evidence and reach their verdict/s by assessing the truthfulness, reliability and accuracy of witnesses whose evidence is in issue, deciding what evidence is important and what is not and drawing conclusions from the evidence which they have found to be reliable.
- They do not have to resolve every issue of fact which has been raised but only those which are necessary to reach their verdict/s.
- They must decide the case on the evidence alone and must not speculate, for example about what other evidence there might have been, what a witness might have said if he had been called or asked a particular question.
- In an appropriate case the jury should be told that they must reach their decision dispassionately and objectively, ignoring any feelings of sympathy or emotion.

The judge

- The judge's task is different. It is to:
  (a) give directions about the relevant law, which the jury must apply; and
  (b) summarize the important features of the evidence, particularly those that are in issue.
- Because the jurors are the judges of issues of fact:
  - ◊ if the judge omits a piece/pieces of evidence that they think is important they should take it into account; and
  - ◊ if the judge includes or emphasizes a piece/pieces of evidence that they do not think is important they should ignore it/them.
- If the judge expresses any view about any piece/s of evidence, or if they think that he has done so, they are free to accept or reject it. This also applies to the submissions/speeches of the advocates who have raised points and arguments about the evidence: the jury may accept or reject any point or argument that has been raised.

4(3) Burden and standard of proof

{Bench Book p. 16}

Directions

Where the burden is on the prosecution

- The burden of proving the case is on the prosecution: the defendant does not have to prove anything. *Where the defendant has given evidence it should be explained to the jury at some point that the fact that he gave evidence does not mean that he has to prove anything.*
- The prosecution must make the jury sure.

Where a legal burden is on the defendant

- The defendant must establish that it is more likely than not that the matter subject to that burden is as he has asserted it to have been.

4(4) Separate consideration of counts and/or defendants

{Bench Book p. 17}

Directions

- The jury must consider the evidence both against and for the defendant in relation to each count and/or each defendant separately and are required to return a separate verdict on each count and/or in respect of each defendant. It follows that the verdicts in respect of different counts and/or different defendants may be the same or they may be different.
- In some cases the issue/s on two or more counts may be the same and depend on the same evidence (e.g. possession of two or more different types of drug in the same package with intent to supply them). The jury should be directed accordingly. The judge should discuss this direction with the advocates before speeches.

4(5) Specimen counts

{Bench Book pp. 18 - 22}

Directions

- Explain to the jury the difference between specific and specimen counts.
- Identify for the jury which counts relate to specific alleged events and which are specimens by reference to the allegations/evidence.
- Explain why specimen counts have been charged (e.g. where a witness alleges a course of conduct but cannot be specific about the number or dates; or to keep the indictment within manageable proportions).
- Explain that to convict the defendant on a single specimen charge the jury must be sure that the alleged conduct occurred at least once, to convict the defendant on a second specimen charge relating to the same conduct the jury must be sure that it occurred on at least two occasions and so on.

4(6) Trial in the absence of the defendant

{Bench Book pp. 23 - 26}

If a trial is held or continues in the absence of the defendant:

Directions - at the first time of absence

- Point out to the jury that the defendant is absent.
- If it is appropriate to tell the jury the reason (e.g. illness), do so and direct them that they must not hold the defendant's absence against him.
- If it is not appropriate (e.g. misbehaviour or voluntary absence), 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

- Repeat the earlier directions.
- If the defendant's absence occurred after he gave evidence, no more is to be said.
- If the defendant's absence occurred before the time when he 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 he has not given evidence. They should be told that as a matter of fact he has given no evidence which is capable of explaining or contradicting the evidence given by witnesses called by the prosecution although if this is not his fault (e.g. illness) this should also be explained.
- If the defendant's absence occurred after he 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 15(8).

4(7) Trial of one defendant in the absence of another

{Bench Book p. 27}

Directions

- 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, this should be put before the jury as an agreed fact.
- 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 that defendant, they must not speculate about his position and that it has no bearing on the position of the defendant whom they are trying.
- Where, other than where a co-defendant's plea of guilty has been admitted under section 74 Police and Criminal Evidence Act 1984, the jury know that a co-defendant has pleaded guilty, they 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.
- Where evidence of a co-defendant's plea of guilty has been admitted under s.74 PACE 1984, 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).

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 counsel before speeches and appropriate directions given to the jury.

4(8) Alternative verdicts

{Bench Book p. 29}

The primary test for whether an alternative verdict should be left to the jury is whether it would suggest itself to the mind of an ordinarily knowledgeable and alert criminal judge: such a verdict should ordinarily be left if it is obviously raised on the evidence. In all cases in which the jury is asked to consider an alternative verdict it is highly desirable that this is reflected by a count on the indictment unless it is not possible to do so (e.g. careless driving as an alternative to dangerous driving).

Directions - where there is an alternative count on the indictment

- Identify for the jury which counts are laid in the alternative.
- Explain that the prosecution does not seek a verdict of guilty on both counts but only on one (the more serious offence) or alternatively the other (the less serious offence).
- The jury should consider the more serious offence first. If they are sure that the defendant is guilty of that offence, they will return a verdict of "Guilty" on that count - and in this event they will ignore the alternative count and will not be asked to return a verdict on it.
- If they are not sure that the defendant is guilty of the more serious offence, their verdict on this count will be "Not guilty" and they must then go on to consider the less serious offence and reach a verdict on it.
- Explain what the prosecution must prove on each of these offences, pointing out the difference/s between them.

Directions - where the alternative is not on the indictment

- Explain that on the count of [*specify*] if their verdict is not guilty, the jury should go on to consider the lesser alternative of [*specify*]. The lesser alternative should only be considered if they have found the defendant not guilty of the more serious count of [*specify*]. If their verdict on the more serious count is guilty the jury should ignore the alternative.
- Describe all of the potential verdicts open to the jury (e.g. "Guilty of dangerous driving"; "Not guilty of dangerous driving but guilty of careless driving"; "Not guilty" (which means that the jury has found that they find the defendant is not guilty of either dangerous driving or careless driving). It is highly desirable that these potential alternative verdicts are provided in writing.
- Explain what the prosecution must prove on each of these offences, pointing out the difference/s between them.

4(9) Delay

{Bench Book pp. 30 - 34}

Where there has been a long delay between the matters the subject of the indictment and the trial itself it is likely to be necessary to give directions on the following matters:

Directions

- The jury must consider the reasons asserted by the prosecution and the defence for any delay in making complaint and consider whether such delay affects the credibility of the witness.
- The passage of time is bound to affect memories:
    - ◊ an inability to recall matters of detail is to be expected in witnesses, whether called by the prosecution or the defence, but it is the prosecution which bears the burden of proof;
    - ◊ the passage of time may also cause a witness to become sure of some matter which did not in fact occur: memories can play tricks.
- Allowance must be made for the difficulties which a defendant may face in answering an allegation (e.g. the possibility of raising an alibi is closed because either the allegation is not specific as to date or the defendant could not be expected to remember or obtain evidence of where he may have been).
- A defendant of good character will be able to assert that the absence of any other similar allegations in the years that have followed is of significance.

5(1) Circumstantial evidence

{Bench Book pp. 35 - 37}

Most cases rely to a greater or lesser extent upon circumstantial evidence and reference may be made by the judge to the evidence being circumstantial and the drawing of conclusions as part of the jury's task when describing the sources of evidence in initial directions.

Where the case depends entirely, or almost entirely, upon circumstantial evidence specific directions will be required.

Directions

- To explain the nature of circumstantial evidence i.e. that it relies upon proof by the prosecution of a series of facts or matters which it says can be rationally explained only by the guilt of the defendant.
- To explain to the jury the evidence relied upon in support of the case and any evidence relied upon in rebuttal.
- To direct the jury to distinguish between drawing conclusions from the evidence and speculating about matters which are not in evidence.
- To direct the jury that they must decide whether the evidence which they accept leads them to the sure conclusion that the defendant is guilty or whether there is another possible conclusion to be drawn.

5(2) Conspiracy

{Bench Book pp. 38 - 43}

A conspiracy is an agreement between two or more people to commit a criminal offence with the intention that the agreement should be carried out.

Directions

- The prosecution must prove that:
    1. there was an agreement to commit an offence. The prosecution does not have to prove that the offence was actually committed, though in many cases such evidence will have been called. What it must prove is the existence of an agreement to commit that offence; **and**
    2. the defendant (whose case they are considering) joined that agreement; **and**
    3. when the defendant joined that agreement he intended that the agreement should be carried out.
- The judge must identify the evidence on which the prosecution relies to allege that each of these three elements existed (elements 2 and 3 separately in relation to each defendant). If the evidence against each defendant 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 defendant.
- In an appropriate case the jury should also be told that:
    - ◊ different people may join an agreement at different times. If a defendant joined in an agreement to commit an offence of [*specify*] at any stage intending that the agreement should be carried out he is guilty of conspiracy.
    - ◊ different people may be involved in an agreement on different levels and play different rôles in putting it into effect. They need not know one another or know all of the details. If a person joins an agreement, at whatever level and whatever rôle he plays, or agrees to play, intending that the agreement should be carried out he is guilty of conspiracy.

NOTE: For the direction regarding statements made in furtherance of a conspiracy see 14(4).

5(3) Intention

{Bench Book pp. 44 - 46}

Directions

- A specific direction as to intention will normally only be required where a specific intent is a requirement of the offence (e.g. s.18 wounding with intent).
- Intent/intention is used in its ordinary sense and does not require further definition.
- It must be made clear that the jury must consider the defendant's intention at the time of committing the act and that intention does not require advance planning.
- The jury must be directed as to the sources of evidence from which they may determine the defendant's intention i.e. anything that was said or done before, at the time of, or after the act in question.

5(4) Intention formed in drink or under the influence of drugs

{Bench Book pp. 47 - 49}

Crimes of specific intent

Where there is evidence from which the defence invites the jury to conclude that the defendant was, or may have been, so intoxicated that he was incapable of forming, and did not form, the necessary intent, the jury should be directed as follows:

Directions

- If the jury find that the defendant was, or may have been, so intoxicated that he was incapable of forming any intention he is not guilty of the offence of specific intent.
- If the jury are sure that the defendant had the capacity to form an intention, they must decide whether he did form an intention.
- An intention formed in drink or under the influence of drugs remains an intention.
- The fact that the defendant would not have behaved in the way he did, or formed such an intention, when sober is not a defence.

Crimes of basic intent

Directions

Where the prosecution does not have to prove a specific intent and the crime is one of basic intent the jury should be told that intoxication is no defence.

As to voluntary intoxication and self-defence: see 16(2).

When involuntary intoxication is raised great care must be taken: see footnote 53 on p.47 of the Bench Book.

5(5) Dishonesty

{Bench Book pp. 50 - 52}

Many offences require proof of dishonesty. In most cases the jury will require no assistance because the act, if proved, is plainly dishonest.

Where a specific direction is required because it is the honesty of the defendant which is in issue, it must be in the form prescribed in *Ghosh*.

Directions

- Has the prosecution proved that the defendant was acting dishonestly by the ordinary standards of reasonable and honest people?
- If the prosecution has proved that the act was dishonest by those standards, did the defendant realise he was acting dishonestly by the ordinary standards of reasonable and honest people?
- If the prosecution proves that the defendant realised he was acting dishonestly by the ordinary standards of reasonable and honest people it is no defence for a defendant to say he was acting honestly by his own standards.

5(6) Recklessness and "maliciously"

{Bench Book pp. 53 - 56}

Recklessness

In most cases the issue of recklessness does not arise: the jury should be left simply with the issue of whether (e.g. the wound/injury/damage was caused by a deliberate act). If the need for a recklessness direction appears to arise it should be discussed with counsel at the earliest opportunity.

Directions

Where a recklessness direction is necessary, or where the word reckless is intrinsic to the offence (e.g. arson being reckless as to whether life would be endangered) the prosecution must prove:

1. that the defendant did the act; **and**
2. that the defendant:
   (a) **either** realised there was a risk that the consequence alleged might occur;
   (b) **or** if he was, or claimed to be, intoxicated by drink or drugs he would, if he had been sober, have realised there was a risk that the consequence alleged might occur; **and**
3. despite having realised the risk the defendant went on to take it.

Maliciously

The word maliciously most commonly calls for definition within the meaning of s.20 unlawful and malicious wounding or causing GBH. It means either intending to cause injury or being reckless whether injury, however slight, would be caused.

Directions

- The prosecution must prove:
  1. that the wound/injury was the result of a deliberate act by the defendant; **and**
  2. at the time of causing the wound/injury the defendant realised that his act might cause some injury, however slight, but went on to take that risk.

5(7) Criminal attempts

{Bench Book p. 56}

Before a defendant may be found guilty of an attempt to commit an offence the prosecution must prove that he committed act(s) that were more than merely preparatory to the commission of an offence and that those acts were accompanied by an intention to commit it.

In many cases there will be no issue that if the defendant acted as alleged he was attempting to commit the offence but where the issue arises as to whether acts were more than merely preparatory the judge should direct the jury as follows:

Directions

- By following the words of the statute namely "he has committed act(s) that were more than merely preparatory to the commission of an offence and that those acts are accompanied by an intention to commit the offence".
- Explain, by reference to the evidence in the case, matters which may be regarded as merely preparatory and those which would amount to attempting to commit the offence.
- It is for the jury to decide whether on the evidence the prosecution has proved that the act was more than preparatory.
- Where the issue of attempting the impossible arises the jury must be told that the fact that the full offence could not have been committed (e.g. because the pocket the defendant was trying to pick was empty) is not a defence to attempted theft.

5(8/i) Participation (simple joint enterprise)

{Bench Book: Introduction pp. 57 – 64; this direction pp. 64 - 67}

Directions

- If two or more people act together to commit a criminal offence each is responsible for the offence and each is guilty.
- In relation to the/each defendant the Prosecution must prove that:
  1. he intended, or shared an intention, to commit the offence; **and**
  2. he did something to bring about the commission of that offence.
- People may play different parts but anyone who takes part is responsible for the offence which is committed.
- Two or more people may act together without any formal agreement to do so: in some cases there may be discussion and planning whilst in others there may just be a tacit understanding which arises on the spur of the moment.
- The test commonly applied for joint participation is "Were they in it together?".
- In cases which require proof of specific intent (e.g. wounding with intent) the prosecution must prove that the defendant:
  1. personally did the act with the specific intention required; **or**
  2. took part realising that there was a real risk that the other/another defendant may act in the way in which he did with the intention required; **or**
  3. continued to take part realising that the other/another defendant was doing the act and might be doing so with the required intention.
- These are all matters about which the jury must draw conclusions from the circumstances as they find them to have been.
- The jury's verdicts need not necessarily be the same in relation to each defendant but if the evidence against each defendant 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 defendant.

5(8/ii) Defendant not present assisting another to commit the offence

{Bench Book Introduction pp. 57 – 64, this direction pp. 67 – 68}

The need for this direction arises when a defendant is said to have facilitated the commission of an offence (e.g. by providing an item or information) but who is not said to have played any other part.

Directions

- The Prosecution must prove that:
    1. the offence was committed; **and**
    2. the defendant was aware in advance that the offence* was to be committed; **and**
    3. the defendant intended to assist the commission of the offence; **and**
    4. the defendant did assist in its commission.

* The Prosecution does not have to prove that the defendant knew of the date on which, or the precise circumstances in which, the offence would be committed nor of its precise nature. The Prosecution must however prove that he knew of the kind of offence which was being contemplated.

5(8/iii) Presence at and encouragement of another to commit the offence

{Bench Book Introduction pp. 57 – 64, this direction pp. 68 – 69}

The need for this direction most commonly arises when a defendant admits that he was present at the scene of a crime but denies that he played any part in it: he claims to be "the innocent bystander".

Directions

- A person who is present at the scene of a crime but who plays no part in committing it is not guilty of it. This is so even when a person stands and watches a crime being committed and does nothing to prevent it.
- If a person who is present at the scene of a crime intends to encourage others to commit the offence and does in fact by his presence encourage others to commit the offence, he is guilty of the offence.
- The Prosecution must prove that the defendant:
    1. was present at the scene; **and**
    2. intended to encourage another/others to commit the offence; **and**
    3. did, by his presence, encourage another/others to commit the offence.
- If the Prosecution alleges that the defendant gave encouragement by more than presence (e.g. by shouting words of encouragement) this should form part of the direction.

5(8/iv) Counselling or procuring (directing or enabling)

{Bench Book Introduction pp. 57 – 64, this direction pp. 69 - 73}

Directions

- If the defendant has directed or encouraged another party to commit an offence and the other party does so the defendant is also guilty of that offence.
- It makes no difference whether the other party freely agreed or was put under pressure.
- The means by which the other party put the direction or encouragement into effect is not material: if a defendant directed or encouraged the other party to use one means to commit the offence and the other party used another to commit it the defendant is nevertheless guilty.
- If it is asserted that the other party committed acts which went beyond that which the defendant directed or encouraged, the jury must consider whether the other party's actions were within the scope of what was directed or encouraged. The actions will have been within the scope of the direction or encouragement if the defendant realised that there was a real possibility that the other party would act as he did. The more different the other party's acts from those directed or encouraged, the less likely it will be that the prosecution can prove that the defendant foresaw a real possibility that the party would act as he did.
- In offences which require proof of specific intent the prosecution does not have to prove that the defendant had the specific intent but that he foresaw the real possibility that the other party would act with that specific intent.

In less straightforward cases of secondary liability the Bench Book should be consulted: in particular for "Counselling" and "Procuring" see the Introduction to Chapter 5 pp. 57 – 64 and paragraphs 6 and 7 on p. 70.

5(8/v) Further offence committed in the course of a joint enterprise

{Bench Book Introduction pp. 57 – 64, this direction pp. 73 – 76}

The need for this direction arises when in the course of a joint enterprise one person acts in a manner which is said to have gone beyond the shared intention and so commits another, usually more serious, offence. Many such cases, particularly those of murder, give rise to significant legal complications which are more fully described in the Bench Book.

Directions

- If it is asserted that the act of another person (who may/may not be a defendant) went beyond the shared intention, the prosecution must prove in relation to the defendant whose case the jury are considering that the defendant was taking part in carrying out the shared intention **and either**
    1. the other person's act was within the scope of the shared intention and so the defendant agreed to it; **or**
    2. at the time he set out to put the shared intention into effect the defendant foresaw that there was a real possibility that another person would act as he did, whether or not the defendant wanted him to do so. The more different the other person's acts from those necessary to carry out the shared intention, the less likely it will be that the prosecution can prove that the defendant foresaw a real possibility that another person would act as he did.
- In cases which require proof of specific intent (e.g. wounding with intent) the prosecution must prove in relation to the defendant whose case the jury are considering that when he took part or continued to take part he realised that there was a real possibility that another person would act as he did, with the specific intention of (e.g. causing really serious injury).
- If in a case requiring proof of specific intent the jury is sure that the act committed by the other person was within the scope of the shared intention but is not sure that the defendant whose case they are considering realised that there was a real possibility that that person would have the specific intent the jury must find the defendant not guilty of the offence requiring specific intent but may find him guilty of a lesser alternative offence.
- If the defendant withdrew from the shared intention before the commission of the offence, having realised that through the actions of the other person there was a risk of an outcome unintended by him, he is to be found not guilty, but the defendant's withdrawal must be effective and unequivocal.

5(9) Causation

{Bench Book pp. 78 – 89}

That the act of the defendant caused that which is the subject of the charge is frequently not in issue (e.g. causing death by dangerous driving): in such a case no specific direction will be required. Where causation is in issue some or all of the following directions will be required.

Directions

- Where there is a chain of events the jury must be satisfied that the outcome is one which was either intended by the defendant or could have been anticipated by an ordinary sensible person as being possible.
- If the jury are not sure that the outcome was intended or that an ordinary sensible person could have anticipated the possibility, the chain of causation is broken and the defendant's act is not to be treated as a cause.
- If the jury are satisfied that the outcome was intended or could have been anticipated by an ordinary sensible person, they must go on to consider whether the defendant's act was a real or significant cause.
- "Real or significant cause" may be explained as being something more than minimal or trivial.

NOTE: Directions in cases where the result arises from the response of a third party to the unlawful act of the defendant or from medical intervention are rarer but are considered in detail in the Bench Book.

5(10) Agreement on the factual basis for the verdict

{Bench Book: pp. 90 - 96}

- The following applies when it is necessary for the jury to be agreed (whether unanimously or, after a majority direction, by a majority) on the specific basis for their verdict, for example:
    - ◊ when more than one statement is alleged against the defendant in the same count (e.g. misleading statements in fraud cases);
    - ◊ when more than one act is alleged against the defendant in the same count (e.g. items stolen in theft or received in handling cases, separate events of violence in public order or assault cases);
    - ◊ when, in a case of harassment, several acts are alleged and the jury must be sure that at least two of those acts occurred (course of conduct).

Such a direction is only necessary when it is possible that the jury might return a verdict of guilty on the basis that some of them found one or more allergations and others found another allegation or other allegations proved and so would not be unanimous (or have a sufficient majority) as to an essential element of the offence.

Directions – cases where at least one statement or act must be proved

- The jury must all be agreed so that they are sure that the **same** one, or more, of the specific matters have been proved to establish the element of the offence (e.g. false representation made; item stolen; act of violence or threat of violence).

Directions – cases where at least two acts must be proved (course of conduct)

- The jury must all be agreed so that they are sure that the **same** two, or more, of the specific matters have been proved to establish that the defendant pursued a course of conduct.

Murder

Judges will be alert to the matters set out on pp. 95 - 96 of the Bench Book regarding possible bases for a manslaughter verdict in cases of murder.

6(1) Special measures

{Bench Book pp. 97 – 98}

In respect of the common special measures for witnesses (e.g. screens or television link) 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.

Directions

- The use of screens/television link/other [*specify*] is now commonplace: the purpose is 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 and to put the witness, so far as is possible, at ease.
- Where there is a pre-recorded ABE interview explain that when it is believed that a child or young person has information that will assist in a criminal investigation it is better to get their account in a form that may be viewed by a jury at the earliest possible stage because children/young people do not have the same ability as adults to measure time or set matters into time frames.
- Where there is a pre-recorded ABE interview of an adult explain the reason (e.g. it was taken at a time when it was expected the witness would have the best memory of events).

Where a transcript of an ABE interview is to be/has been provided to the jury to enable them better to follow the evidence of the witness the judge will need to direct the jury that:

- the only reason that they will have/have had the transcript is so that they can more easily follow the interview, but that it is what they see and hear on the recording which is the evidence not what they read on the transcript;
- the transcript will be/has been withdrawn to avoid the danger of the jury concentrating on the evidence of which they have a transcript, rather than the evidence given in cross examination or by other witnesses, of which they do not have a transcript.

If in an exceptional case it is suggested that the jury should retain a transcript after the recording has been played, either during cross examination or thereafter, the judge must hear submissions of the advocates and decide on the appropriate course.

In all special measures cases:

- As with all witnesses it is for the jury to listen to what the witness has to say and judge as best they can the way in which the evidence is given so as to assess the honesty and reliability of the witness.
- The fact that the witness has had special provision made is to assist the witness to give evidence away from the public gaze and it is no reflection upon the defendant or his case.

6(2) Anonymous witness

{Bench Book pp. 99 – 100}

Anonymous witnesses are a comparative rarity in the Crown Court. They are most likely to be encountered in cases where undercover police officers have been making "test purchases" of controlled drugs.

Directions

The only directions that are required are to the effect that:

- The reason the true identities of the police officers have not been disclosed is because the nature of their work in this and possibly other cases makes it important that their names are not known.
- Their anonymity is simply because of the nature of their work: it has nothing to do with this defendant or the details of his case.

NOTE: In cases in which civilian witnesses have been granted anonymity because of fears for their safety, see the directions and illustration at pp. 99 - 100 of the Bench Book.

6(3) Intermediaries

{Bench Book pp. 103 – 106}

Before giving directions to a jury about an intermediary the judge should review the order appointing the intermediary, the report prepared by the intermediary and the history of any meetings there may have been between the intermediary and the advocates: this should be done before the commencement of the trial.

Directions

It may be helpful if the following explanations are given to the jury at the time that the intermediary is sworn or affirms:

- Why an intermediary is necessary (e.g. by identifying problems arising from the age or other difficulties of the witness).
- The purpose of an intermediary is to assist in communication by helping advocates to ask questions in a way the witness can understand and/or assisting the witness to communicate their answers to questions to the jury. It may be helpful to tell the jury, if it be the case, that the advocates have had an opportunity to consult with the intermediary in advance of the trial.
- The intermediary is independent of the parties, is present only to assist communication and is not permitted to give evidence.

Similar explanations should be given when an intermediary is present to assist a defendant.

7(1) Visual identification

{Bench Book pp. 107 – 112}

Where the prosecution case depends on visual identification evidence (which may include a situation in which the defendant admits presence but denies that he was the person who acted as is alleged by the identification witness) a Turnbull direction must be given.

Directions

- The following warnings must be given:
  - ◊ of the need for caution to avoid the risk of injustice;
  - ◊ that a witness who is convinced in his own mind may be wrong;
  - ◊ that a convincing witness may be wrong;
  - ◊ that more than one witness may be wrong (**see over*);
  - ◊ that a witness/witnesses who purport/s to recognise the defendant, even when they know the defendant well, may be wrong.
- The jury should be directed to put caution into practice by carefully examining the surrounding circumstances of the evidence of identification, in particular:
  - ◊ the duration of the period during which the witness had the person he says was the defendant under observation; in particular for how long was the witness able to see the person's face;
  - ◊ the distance between the witness and the person observed;
  - ◊ the light/lighting;
  - ◊ whether there was any interference with the observation (such as either a physical obstruction or other things going on at the same time);
  - ◊ whether the witness had ever seen the person whom he says he was observing before and if so in what circumstances (i.e. whether the witness had any reason to be able to recognise the defendant);
  - ◊ the length of time between the original observation (usually at the time of the incident) and the identification by the witness of the defendant to the police (often at an identification procedure);
  - ◊ whether there is any significant difference between the description the witness gave to the police and the appearance of the defendant.
- Any weaknesses in the identification evidence must be identified, for example those arising from:
  - ◊ one or more of the circumstances set out above;
  - ◊ 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;
  - ◊ anything said or done at the identification procedure including any breach of Code D.

- Evidence which is capable and, if applicable, evidence which is not capable of supporting the identification must be identified.
    - ◊ * 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.
    - ◊ 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.

- Particular care is needed if the defendant's case involves an alibi: see 16(1).

7(2) Identification from CCTV and other visual images

(1) Comparison made by the jury

{Bench Book pp. 113 – 116}

In this situation each member of the jury is a witness of the event (as shown on CCTV or still images).

Directions

- The jury must 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 to avoid injustice. In particular they should be directed that:
  - ◊ even if the person shown on an image appears similar to the defendant it may not be him;
  - ◊ anyone, and any one of them, can make a genuine and honest mistake in identification and several people, even all of them, can make a genuine and honest mistake: the fact that a number of people make the same identification does not of itself prove that the identification is correct;
  - ◊ none of them knew the defendant before they saw him in the dock and so this is the only knowledge on which any of them can base their recognition of him.
- The jury should be warned that although they have had the advantage of having been able to observe the defendant in the course of the trial over a significant period, in clear light, from a reasonably short distance and without obstruction or distraction:
  - ◊ his 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.
  - ◊ 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.
- Any obvious difference between the appearance of the defendant and the suspect shown on the image must be identified.
- 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.
- Evidence which is capable and, if applicable, evidence which is not capable of supporting the case that the person shown on the image is the defendant must be identified for the jury.

(2) "Recognition" by a witness

{Bench Book pp. 117 – 118}

In this situation a witness who knows the defendant purports to recognise him from an image/images: in this sense the witness is a witness of the event shown on the image/s.

Directions

- 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:
  - ◊ any witness can make a genuine and honest mistake in identification;
  - ◊ 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 look at the CCTV footage/images many times the image/s is/are only two dimensional and this is not the same as observing an actual person at the scene.
- 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 the defendant.
- Any obvious difference between the appearance of the defendant and the suspect shown on the image must be identified. If the defendant'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 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.
- Evidence which is capable and, if applicable, evidence which is not capable of supporting the identification must be identified for the jury. Evidence capable of supporting the identification may include the jury's own comparison of the defendant with the suspect shown in the CCTV footage/images and vice versa, in which case the direction must reflect the features of the direction at p. 33, "7(2)(1) Comparison made by the jury" above.

7(2) Identification from CCTV and other visual images

(3) Comparison by a witness with special knowledge of scene of crime images

{Bench Book pp. 119 – 121}

In this situation a witness (usually a police officer) who has studied photographs of a person proved/agreed to be the defendant purports to identify him by using knowledge thus acquired when viewing CCTV footage/images of the scene of the incident.

Directions

It should be noted that such evidence is given to assist the jury in making their own comparison of the defendant (and proved/agreed photographs of him) with the suspect shown on the CCTV footage/images. Reference should therefore be made to the direction at 7(2)(1) above, in particular the warning adapted from Turnbull in relation to the risk of mistaken identification and the special need for caution before relying on such evidence to avoid injustice.

The illustration at pp. 119 – 121 of the Bench Book demonstrates the manner in which a direction in relation to identification evidence of this particular kind might be framed.

7(2) Identification from CCTV and other visual images

(4) Identification by facial mapping

{Bench Book pp. 122 - 125}

In this situation an expert witness gives evidence of the comparison which he has made between a known image/images of the defendant with CCTV footage/images of the scene of the incident.

Directions

- 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:
  - ◊ the extent of expertise and experience of the witness;
  - ◊ the fact that the expert is giving evidence of opinion [see 8 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;
  - ◊ the strengths and weaknesses of the expert's evidence in the light of his method and the extent to which he looked for both similarities and differences between the known image/s and the footage/ images of the scene;
  - ◊ that, if it be the case, there is no unique identifying feature linking the appearance of the defendant with the appearance of the suspect;
  - ◊ that the expert'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 the expert's opinion, although informed by experience, is entirely subjective;
  - ◊ that such evidence does not amount to evidence of positive identification (although it could positively exclude a suspect);
- If the expert expresses his 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 his opinion of the significance of his findings and that because such opinion is entirely subjective different experts may not attach the same label to the same degree of comparability. *NB - 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.*
- The jury should be warned that such evidence does not amount to positive identification and that they should be cautious about finding the defendant guilty on the basis of such evidence if it is not supported by other independent evidence. Evidence which is capable and, if applicable, evidence which is not capable of supporting such evidence must be identified for the jury.
- Where there have been two such witnesses who have disagreed care must be taken to review the evidence in such a way that the areas of disagreement and reasons given for each conflicting opinion are identified and made clear for the jury.

7(3) Identification by finger and other prints

{Bench Book pp. 126 - 131}

Directions: fingerprints

- The jury should be directed that the expert is giving evidence of opinion (see Chapter 8 Expert evidence) which is only part of the evidence and, as with any other part of the evidence, the jury is entitled to accept or to reject it.
- The following matters should be reviewed:
    - ◊ the experience and expertise of the witness;
    - ◊ the number of ridge characteristics said to be similar;
    - ◊ whether there are any dissimilar characteristics;
    - ◊ 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;
    - ◊ 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);
    - ◊ if there is a realistic possibility that a dissimilar characteristic (as between the known print of the defendant and the print from the scene) exists, this will exonerate the defendant.
- If an expert expresses his 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 his opinion of the significance of his findings and that because such opinion is entirely subjective different experts may not attach the same label to the same degree of comparability. *NB - 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.*
- The jury should be warned, not least because such evidence does not amount to positive identification, that they should be cautious about finding the defendant guilty on the basis of such evidence if it is not supported by other independent evidence. Evidence which is capable and, if applicable, evidence which is not capable of supporting such evidence must be identified for the jury.
- Where there have been two such witnesses who have disagreed, care must be taken to review the evidence in such a way that the areas of disagreement and the reasons given for each conflicting opinion are identified and made clear for the jury.

Directions: other prints

Evidence of identification by other prints are, at least at the time of writing, rarely encountered. Guidance is to be found at pp. 130 - 131 of the Bench Book.

7(4) Identification by voice

{Bench Book pp. 132 – 136}

Directions

What follows is no more than a non-exhaustive list of possible considerations.

- Identification by voice recognition is more difficult than visual identification.
- 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.
- 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:
    - ◊ the quality of the recording of the disputed voice;
    - ◊ the length of time between the listener hearing the known voice and his attempt to recognise the disputed voice;
    - ◊ the extent of the listener's familiarity with the known voice;
    - ◊ the nature, duration and amount of speech which it is sought to identify;
    - ◊ 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.
- 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).

7(5) Identification by DNA

{Bench Book pp. 137 – 147}

Such evidence, if disputed, is always intricate both in terms of the scientific process and the factual detail and any judge who has to direct the jury in relation to such evidence should refer to the relevant pages in the Bench Book.

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). The summing up must focus on the real issues in relation to such evidence.

Directions

Depending on the issues in the case, the following matters should be considered when reviewing such evidence for the jury:

- 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.
- A summary of the DNA findings.
- Avoiding the "prosecutor's fallacy", the random occurrence 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 the defendant 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".
- A summary of any explanation given by the defendant in relation to the DNA findings: in most cases the defendant will accept that the DNA is his and give an explanation as to how it came to be where it was found.
- The jury should be reminded that the DNA findings are of themselves only evidence of a probability of contact between the defendant and the place from which the sample was taken and to the extent shown by the profile. It is not of itself proof that the defendant committed the offence. The jury must have regard to all the evidence in the case.
- The jury should be reminded of evidence which is capable and, if applicable, evidence which is not capable of supporting the DNA evidence.

8 Expert evidence

{Bench Book pp. 148 – 154}

The purpose of expert evidence is to provide the jury with evidence of findings, and the conclusions that may be drawn from those findings, in areas of science, medicine or other technical matters about which a jury could not be expected, without assistance, to form conclusions.

Directions relating to expert evidence must be case specific and should always be discussed with the advocates before speeches. Consideration should be given in a case of any complexity to providing a written summary of the issues and evidence.

Directions

- The issues addressed by the expert evidence must be identified and the purpose of expert evidence explained.
- Where there is a single unchallenged expert opinion it remains a matter for the jury to decide whether or not they accept it (though where the expert evidence is unchallenged they would be likely to do so).
- Where there have been two or more such witnesses who have disagreed, care must be taken to review the evidence in such a way that the areas of disagreement and the reasons given for each conflicting opinion are identified and made clear for the jury. The judge's task may include identifying:
    - ◊ evidence which casts light on the reliability of one or other opinion;
    - ◊ whether the opinion has been subjected to a recognised peer-review process;
    - ◊ the relative experience and qualifications of the expert witnesses;
    - ◊ whether any expert witness has appeared to assume the rôle of advocate or has gone outside his field of expertise.
- If an expert expresses his 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 his opinion of the significance of his findings and that because such opinion is entirely subjective different experts may not attach the same label to the same degree of comparability. *NB - 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.*
- While the jury may accept or reject expert opinion evidence they must not substitute their own opinions for those of the expert/s e.g. by undertaking their own examination of handwriting or a fingerprint.
- If there has been no expert opinion on an aspect of the evidence where such evidence might have been called, the jury must be directed not to undertake any examination or experiment of their own or to draw any conclusions based on their own inexpert theories or experiments.

9 Corroboration and the special need for caution

{Bench Book p.155 – 160}

A statutory requirement for corroboration only arises in completed or attempted cases of treason and perjury.

There are however other cases in which the judge may as a matter of discretion, and usually ought to, direct the jury to approach the evidence of a witness which is not supported by other independent evidence with caution. Such witnesses will include those in respect of whom there is an **evidential basis** for the suggestion that they:

- have a purpose of their own to serve;
- have an improper motive to give false evidence, such as a grudge against a defendant;
- have lied, in the instant case or on an earlier occasion;
- are otherwise unreliable.

The nature and terms of such a direction are a matter of judgment.

Directions

- In directing the jury to approach the evidence of such a witness with caution, the judge should explain to the jury the risks to which they should be alert and the suggested reasons.
- The judge should identify evidence which is capable of providing independent support and, if applicable, evidence which is not.
- Where the witness is a co-defendant the jury should be:
  - reminded to consider the case of each defendant separately;
  - reminded of the evidence of the defendant which is relevant to the case of the other;
  - directed to bear in mind that the co-defendant may have a purpose of his own to serve, identifying the suggested purpose; and
  - directed that the evidence of the co-defendant should otherwise be assessed in the same way as that of any other witness.

10 Good character of the defendant

{Bench Book pp. 161 – 165}

Directions

- Where a defendant has not been convicted of or cautioned for any criminal offence he is entitled to a good character direction.
- Good character cannot by itself provide a defence to a criminal charge.
- Good character is evidence which counts in the defendant's favour in two ways:
    1. his good character supports his credibility and so is something which the jury should take into account when deciding whether they believe his evidence; **and**
    2. it may mean that he is less likely than otherwise might be the case to have committed the offence/s with which he is charged. In cases where allegations are "historic" the jury should also be directed to take account of the fact that the defendant has not committed any offences in the intervening period.
- It is for the jury to decide what weight they give to the evidence of good character and they are entitled to take into account everything that they have heard about the defendant (e.g. age, occupation and any character evidence called by the defence).
- This direction should be modified or qualified in cases where:
    - ◊ the judge decides that the defendant is to be treated as a person of good character notwithstanding one or more (usually minor and/or spent) previous convictions or where, whilst the defendant is not entitled to a direction about credibility, he is entitled to a direction about lack of propensity;
    - ◊ there is undisputed evidence of the defendant's criminal conduct, not amounting to the offence/s charged and not adduced under the bad character provisions;
    - ◊ where evidence of reprehensible behaviour under the bad character provisions is admitted a direction must be given incorporating both good and bad character and explaining their significance.

Direction where the defendant has not given evidence

If the defendant has not given evidence but answered questions in interview upon which he relies, the direction about good character supporting credibility should be modified. The jury should be directed that although he did not give evidence the defendant did give an account to the police in interview and they should take his good character into account when deciding whether or not to believe it. That this was not said under oath or tested by cross-examination and, where applicable, that this was wholly exculpatory will be/have been covered by a direction about the defendant's silence at trial: see 15(8).

Co-defendant about whom there is no evidence of character

If there is a co-defendant about whom there is no evidence as to character the impact on that co-defendant of a good character direction in respect of another defendant must be considered with counsel. In some cases it may be appropriate to say nothing about the character of the co-defendant. In others it may be necessary to direct the jury that they must not speculate or make any assumptions about that defendant's character.

11 Bad character of the defendant

{Bench Book pp. 166 - 171}

Introduction

Whenever the bad character of the defendant has been admitted under the provisions of s.101 CJA 2003 there should be a discussion with the advocates, before speeches, about the purpose(s) to which each such piece of evidence may be put; this may or may not be confined to the gateway through which it was admitted. Such a discussion should include the extent to which it is appropriate to rely on the bad character evidence. In some cases (e.g. "signature" offences) it may be that the evidence of a very unusual *modus operandi* goes to the heart of the case.

Evidence of bad character must be distinguished from evidence admitted under the provisions of s.98 CJA 2003 as having to do with the facts of the offence(s).

Bad character evidence may arise from admitted convictions, convictions where the defendant continues to maintain his innocence or other criminal or reprehensible conduct which has not led to criminal proceedings or which led to an acquittal.

Directions

- In the case of disputed bad character evidence the jury must be reminded of the evidence from both sides (whether it be prosecution and defence or co-accused and defence) and warned to rely upon only that which has been proved.
- In respect of all bad character evidence the jury must be told of the limited purpose(s) to which the evidence may be used (explanatory of other evidence, relevant to an issue including propensity or signature, rebutting a defence, credibility, correcting a false impression etc).
- The jury must consider the extent to which, if at all, the evidence establishes that for which the party relying upon it contends and, if it does, the extent to which it assists in determining guilt.
- The jury must be warned against over reliance on the evidence of bad character: in particular the jury must not convict the defendant wholly or mainly on the basis of the evidence of bad character. This evidence can only be used as providing support for the prosecution case.
- In many cases evidence of bad character will have been admitted through or have become relevant to more than one issue in such cases directions will have to be given relating to all relevant matters.

11(1) s.101(1)(c) - Important explanatory evidence

{Bench Book pp. 172 - 174}

Where evidence of bad character is implicit from the facts of the case, for example when an offence is one which occurs in a prison or is one of intimidation of a witness who had given evidence against the defendant in another case, the direction to the jury must clearly confine the use to which the evidence may be put.

Directions

- That the evidence is put before the jury to explain a particular matter (e.g. how the defendant came to be in prison or had contact with the complainant).
- Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury, there may be a direction as to the effect upon his credibility: see "The credibility issue" in the Bench Book at pp. 176 - 178.
- That this evidence has no other relevance.
- It would be wrong and illogical to consider that the fact that a defendant had been convicted/behaved reprehensibly on previous occasions made it more likely that he would commit this offence.

11(2) s.101(1)(d) - Important matter in issue between the defendant and the prosecution

{Bench Book pp. 175 - 191}

The most common form of evidence admitted through this gateway is evidence of propensity to commit an offence of the type with which the defendant is charged, but there are many others: for example identification, the rebuttal of innocent association or propensity for untruthfulness. Whether the evidence has been admitted as evidence of bad character or as having to do with the facts of the offence under s.98 CJA 2003 the issues to be addressed in summing up are similar.

Directions

- Identify for the jury the bad character evidence upon which the prosecution relies.
- Where the bad character evidence is disputed, or there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, these matters must be put before the jury and the jury should be directed that they must be sure that the disputed evidence has been proved before they can rely on it.
- Where a defendant has disputed that he is guilty of an offence of which he has been previously convicted it is to be presumed that he committed that offence unless the contrary has been proved on the balance of probabilities.
- Identify in detail the issues to which the evidence is potentially relevant.
- Direct the jury to decide whether the evidence adduced does establish the propensity, often described for the jury as tendency, contended for or provides support for the evidence of identity etc. and if so to what extent.
- Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury there may be a direction as to the effect upon the defendant's credibility: see "The credibility issue" in the Bench Book at pp. 176 - 178.
- Warn the jury against over-reliance on, or prejudice against the defendant arising from, evidence of previous convictions or reprehensible behaviour.
- Direct the jury that they must not convict the defendant, wholly or mainly, on the basis of previous convictions or reprehensible behaviour.

11(3) s.101(1)(e) - Evidence of substantial probative value in relation to an important matter in issue between the defendant and a co-defendant.

{Bench Book pp. 192 – 194}

Evidence is most commonly adduced through this gateway where there is a "cut throat defence" between defendants.

Directions

- The following must be identified for the jury:
  - ◊ the evidence of bad character/reprehensible behaviour;
  - ◊ the significance of this evidence as asserted by the co-accused;
  - ◊ any issue between the defendants or between any defendant and the prosecution about the evidence itself or its potential significance;
  - ◊ the burden of proof appropriate to the issue: if a defendant relies on evidence as exculpating him the jury must consider whether it is or may be true; if it is being considered as part of the evidence against a defendant the jury must be sure of its truth.
- The jury must consider whether it is proved to the required standard that the evidence does demonstrate the matter in issue (e.g. a tendency to untruthfulness, violence, committing offences of the type etc).
- Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury, there may be a direction as to the effect upon credibility of the defendant: see "The credibility issue" in the Bench Book at pp. 176 - 178.
- Warn the jury against over-reliance on, or prejudice against the defendant arising from, evidence of previous convictions or reprehensible behaviour.
- Direct the jury that they must not convict the defendant, wholly or mainly, on the basis of previous convictions or reprehensible behaviour.

11(4) s.101(1)(f) - Evidence to correct a false impression given by the defendant

{Bench Book pp. 195 - 197}

Evidence will commonly have been admitted through this gateway in conjunction with propensity (e.g. the defendant claims in interview and/or in evidence that he was not the sort of person who would attack an old person, while previous convictions reveal the opposite).

Directions

Where the evidence has **not** been admitted to establish propensity but a previous conviction or other bad character evidence has gone before the jury, for example because the defendant claimed he had never been in trouble before, directions to the jury must include:

- The identification of the evidence in detail.
- Where the evidence is disputed, or there has been an explanation of it by the defence so the conclusions to be drawn from it are disputed, these matters must be put before the jury.
- Where evidence is disputed the jury should be directed that they must be sure that the evidence has been proved before they can rely on it.
- Identify in detail the issue(s) to which the evidence is potentially relevant. If the evidence has been admitted to correct a false impression this is likely to include a direction as to the effect upon credibility: see "The credibility issue" in the Bench Book at pp. 176 - 178.
- Warn the jury that the previous convictions do not establish a tendency to commit offences of the type with which the defendant is charged.
- Warn the jury against over-reliance on, or prejudice against the defendant arising from, evidence of previous convictions or reprehensible behaviour.
- Direct the jury that they must not convict the defendant, wholly or mainly, on the basis of previous convictions or reprehensible behaviour.

11(5) s.101(1)(g) - Defendant's attack upon another person

{Bench Book pp. 198 – 201}

Where evidence has been admitted under this gateway and there is no other significance (e.g. a defendant facing a charge of burglary has made an attack on the character of a prosecution witness so that his previous convictions for violence have come to be admitted) the directions to the jury must include:

Directions

- Identification of the evidence.
- Where the evidence is disputed or there has been an explanation of it by the defence so the conclusions to be drawn from it are disputed, these matters must be put before the jury.
- Where evidence is disputed the jury should be directed that they must be sure that the evidence has been proved before they can rely on it.
- Where a defendant makes an attack on the character of another person, the jury are entitled to know of the character of the defendant who has made that attack so that they have information both about the defendant who makes the attack and about the person attacked when they are deciding where the truth lies.
- Warn the jury that the previous convictions do not establish a tendency to commit offences of the type with which the defendant is charged.
- Warn the jury against over-reliance on, or prejudice against the defendant arising from, evidence of previous convictions or reprehensible behaviour.
- Direct the jury that they must not convict the defendant, wholly or mainly, on the basis of previous convictions or reprehensible behaviour.

12 Cross admissibility

{Bench Book pp. 202 - 208}

A direction about cross admissibility is to be given when evidence relating to one count is admissible as evidence on another, such as when evidence from two or more witnesses of a number of similar incidents may rebut a particular defence or negative a suggestion of coincidence.

It is important to distinguish evidence which is cross admissible from evidence of propensity, although it is possible for evidence on one count to be admissible on one or more other counts for either or both of these reasons (cross admissibility and/or propensity) and great care has to be taken to identify the basis/bases for the admissibility of such evidence so that appropriate directions are given to the jury.

What follows assumes that there are two charges arising out of separate allegations made by two complainants. If there are more charges and/or complainants the direction must be tailored accordingly.

Directions

- The jury should be directed that on each of the charges the evidence of the complainant who is **not** the subject of the charge they are considering ("B") may be relevant to the issue of whether the evidence of the complainant who is the subject of the charge they are considering ("A") is true. This also applies to the evidence of A when they are considering the charge relating to B and what follows applies to the evidence of one to the charge relating to the other.
- Before B's evidence could be relevant to the charge relating to A, the jury would have to be sure that his evidence had not been influenced in any way, whether consciously or subconsciously, as a result of hearing about the allegations made by A. [*Here specify the evidence of any circumstances relevant to this, including evidence of opportunity for B to have heard of A's allegations from A directly or from others and, if there is evidence of opportunity, any evidence given about what occurred at that time*.] Unless the jury are sure that there has been no contamination of that kind then B's evidence cannot be relevant to the issue of whether what A said about the subject matter of that charge is true and the jury must not take any account of it for that purpose.
- If the jury are sure that there has been no contamination, they should go on to consider the degree of similarity between the allegations of A and B. If the jury consider that there is a significant degree of similarity it is open to them, if they think it right to do so, to consider whether it is no coincidence that two complainants each made such similar allegations against the defendant and whether it is more likely, if they are sure that it is not a coincidence, that he is guilty of one or both of the offences with which he has been charged.

13 Bad character of a person other than the defendant

{Bench Book pp. 209 – 211}

Such evidence will have been admitted under s.100(1) CJA 2003, for example on an issue of credibility of a prosecution witness or where it is alleged by the defendant that another person is responsible for the crime that he is alleged to have committed.

Directions

- The following must be identified for the jury:
    - ◊ the evidence of bad character/reprehensible behaviour;
    - ◊ the potential significance of this evidence;
    - ◊ any issue about the evidence itself or its potential significance;
    - ◊ the burden of proof appropriate to the issue: if a defendant relies on the evidence the jury must consider whether it is or may be true; if it is being relied on by the prosecution the jury must be sure of its truth.
- The jury should be directed to decide whether the evidence adduced does establish the issue or issues identified and if so to what extent.
- Depending on the nature and extent of the convictions, or other evidence of bad character that has gone before the jury, there may need to be a direction as to the effect on the credibility of the person if he was a witness.
- 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 issue raised.

14(2/i-iv) Hearsay - Witness absent

{Bench Book pp. 214 – 220}

When summing up to a jury the judge should not refer to the statutory provisions under which the hearsay came to be admitted.

In many cases 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.

The task of the jury is to assess the probative value (weight) and reliability of the evidence so admitted.

Directions

The following must be identified for the jury

- ◊ whether the evidence is agreed or disputed and, if disputed, the extent of the dispute;
- ◊ the source of the evidence (e.g. a deceased witness or business records). The jury should be 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 his own or of another to serve;
- ◊ where the statement is oral, evidence about the reliability of the reporter;
- ◊ 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);
- ◊ the difficulties, if any, which the other side may have in challenging or rebutting the evidence in the absence of the maker of the statement;
- ◊ the burden of proof appropriate to the issue: if a defendant relies on the evidence the jury must consider whether it is or may be true; if it is being relied on by the prosecution the jury must be sure of its truth..

- The jury must be directed that the evidence was not on oath and has not been tested in cross-examination and that if there had been cross-examination there would have been questions relating to, for example, the sincerity or the faulty memory of the reporter, the possibility of ambiguity, misperception etc; and that the jury cannot know how the witness would have reacted to such cross-examination.

14(3/i) Hearsay – witness present - previous inconsistent statement [s.119]

{Bench Book pp. 221 - 222}

This situation normally arises when a previous statement has been put to a witness to challenge the witness and demonstrate inconsistency or after the witness has been turned hostile.

When dealing with inconsistent statements regard must be had as to whether the evidence is being relied on by the prosecution or the defence and directions should be tailored accordingly.

Where the consistency of the witness is in issue but the witness is not made hostile

The inconsistency and the witness' final position (either agreement or disagreement with the statement) should be identified in the course of the review of the evidence.

Directions

- The jury should consider whether a particular inconsistency is significant. If they find that it is not significant they should ignore it.
- If they find that it is significant, they should consider whether they accept any explanation 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 the witness' evidence (as a whole or on this point, depending on the nature and extent of the inconsistency).
- If they do not accept any explanation, then they should consider what effect this has on their view of the reliability of the witness (as a whole or on this point, depending on the nature and extent of the inconsistency).
- It is for the jury to decide the extent to which any inconsistency in the witness' evidence affects their judgement of the reliability of that witness.
- Those parts of the statement which were introduced in the course of the witness' 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 the witness said in the statement is (or if relied on by the defence, may be) true/accurate and what he said in the witness box is not, they are entitled to rely on what he said in the statement rather than what he said in the witness box - and vice versa.
- 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.

Where the witness is made hostile

Directions

- The jury should be directed that they heard about the statement that the witness made [*specify e.g. to the police/defence solicitor*] because although the witness was called by the prosecution/the defence he gave evidence which did not support the party calling him but instead effectively changed sides: he said one thing in the statement and another when he gave evidence in the witness box.
- Both what the witness said in the witness box and what he 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.
- They should take account of the witness' inconsistency and any explanation he gave for it when considering his reliability as a witness. It is for them to judge the extent and importance of any inconsistency and what the significance of that inconsistency is.
- They jury are entitled, depending on what they make of the witness' inconsistency and any reason he gave for it, not to rely on any of his evidence at all, but if after careful consideration they are sure that what the witness said was (or in the case of a defence witness, was or may be) true, either in the statement or when he was in the witness box, they may take account of it in reaching their verdict/s.
- 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.

14(3/ii) Hearsay – witness present - statement to refresh memory [s.139 and 120(3)]

{Bench Book pp. 223 - 224}

Sometimes a witness may refresh his memory from an earlier account (e.g. witness statement/notebook/ transcript of interview) before giving any evidence about a particular topic. In this event, if he adopts what he said earlier, that is his unequivocal evidence. On other occasions a witness gives some evidence about a topic, then refreshes his memory and then, in the light of what he said earlier, changes his account.

Directions

- The jury should be directed that the witness was allowed to read his earlier account to refresh his memory. It is usually helpful to remind the jury of the length of time between the events about which the witness was giving evidence, the giving of the earlier account and the giving of the evidence in court.
- They should be directed that the witness' evidence comes both from what he said in court and also the/those parts of the earlier account which were put to him.
- Where he said one thing in court and another in the earlier account, even if he then adopted what he said in the earlier account, the jury should consider any explanation given by the witness for the change and in the light of that consider which, if either, of the evidence (initially) given in court and the evidence in the earlier account they are satisfied they can rely on.

14(3/iii) Hearsay – witness present - statement to rebut an allegation of fabrication [s.120(2)]

{Bench Book pp. 224 - 226}

Directions

- It should be explained to the jury that the reason that they heard about the witness' earlier account was because it was suggested to the witness that he had invented his evidence and it is relevant to the question whether the witness has in fact done so and whether his evidence is true or false. (It is implicit that the earlier account will have been given before the point at which the witness is alleged to have invented the evidence.)
- It is for the jury to decide, depending on what they make of the earlier account, whether it rebuts the suggestion that the witness' evidence is invented.
- The jury should be directed that the earlier account, or that part of it which has been used for this purpose, is evidence in the case for them to consider and they are entitled to use it to decide whether or not the witness has been consistent and, if they are satisfied that he has been, that is something they may keep in mind when deciding whether or not his evidence is truthful.

14(3/iv) Hearsay – witness present - statement as evidence of person, object or place [s.120 (4) and (5)]

{Bench Book pp. 226 - 227}

Directions

- It should be explained to the jury that the earlier account (or part of it) was put into evidence because the witness said that, to the best of his belief, he made the earlier account and it is true.
- The jury should be directed that if they accept the witness' evidence about the earlier account and his state of mind (which usually will not be in issue) then that account is evidence in the case.
- When considering the evidence of the earlier account the jury should judge the accuracy and reliability of the witness' recollection at the time he gave that account rather than at the time he was asked to recall matters in court.

14(3/v) Hearsay – witness present - statement of matters now forgotten [s.120 (4) and (6)]

{Bench Book pp. 227 - 228}

Directions

- It should be explained to the jury that the earlier account (or part of it) was put into evidence because the witness said that, to the best of his belief, he gave that account and it is true, that it was given when matters were fresh in his memory and that he can no longer remember them.
- The jury should be directed that if they accept the witness' evidence about the earlier account and his state of mind (which usually will not be in issue) then they are entitled to consider that account.
- If the jury do consider that account, they should judge the accuracy and reliability of the witness' recollection at the time he gave the account rather than at the time that he was asked to recall matters in court.

14(3/vi) Hearsay – statement of complaint [s.120 (4), (7) and (8)]

{Bench Book pp. 228 - 230}

Directions

- It should be explained to the jury that the statement (or part of it) was put into evidence because the witness said that, to the best of his belief, he made the statement and it is true and that the jury are entitled to hear evidence about a complaint which a person made before the proceedings began.
- The jury must be directed about the following matters:
    - ◊ the complaint itself falls to be judged as part of the evidence of the complainant witness;
    - ◊ evidence of a witness' complaint is evidence about what that witness has said on another occasion: it originates from the complainant witness and so does not provide independent support for that witness' evidence;
    - ◊ the context in which the complaint was made;
    - ◊ the length of time which elapsed between the subject matter of the complaint (the event/s complained of) and the making of the complaint;
    - ◊ any explanation for any delay in making the complaint;
    - ◊ the consistency/inconsistency of the complaint with the witness' 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.
- 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.

14(3/A) Distress

Evidence of complaint is sometimes coupled with evidence of distress: it is most commonly, but not invariably, encountered in conjunction with a complaint, whether that be at or about the time of the events alleged, in a recorded interview or when giving evidence. It is unusual for a complainant to have shown distress but not to have made any complaint at the same time but this may occur.

Directions

In giving a direction about distress the jury should be told that because distress is behaviour shown by the complainant, before they can rely on such evidence as consistent with or supporting the complainant's account they must be sure that the distress was:

- genuine; and
- not caused by something unconnected with the matter complained of.

In order to resolve these matters the jury should be directed to:

- look at all the circumstances in which the complainant's distress was observed by the witness/es who describe it; and
- consider the significance, if any, of time that has elapsed between the event/s about which the complainant makes complaint and the time of apparent distress. This may be linked to a direction about any delay in making the complaint itself.

Although it is a matter for the jury to decide, some situations are more compelling than others and it is not in every case that the jury must be warned to exercise caution about such evidence: e.g. evidence that a complainant ran along a street moments after an alleged event and banged on the nearest front door whilst screaming hysterically may be more compelling than evidence that a complainant was tearful whilst giving an account at a police station a month after the alleged event.

Care must also be taken not to give a "circular" direction: i.e. a direction which has the effect of directing the jury that they may only use distress in support of the complainant's evidence if they are sure that the complainant's evidence is true!

14(4) Hearsay - statements in furtherance of a common enterprise [s.118(1)7]

{Bench Book pp. 231 - 232}

A statement, whether oral or in writing, made by one party to a common enterprise, if it is a reasonable interpretation that it was made in furtherance of the common enterprise, may be admitted as evidence to prove that a defendant who was not party to the statement participated in the common enterprise, provided that there is some other evidence of the defendant's involvement. Such evidence commonly arises out of telephone communication (text or speech) between alleged co-conspirators.

Directions

- The purpose for which the evidence was adduced must be explained to the jury.
- The limitations of the evidence must also be explained. For example:
    - ◊ the defendant 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;
    - ◊ any ambiguities or shortcomings in the statement;
    - ◊ the defendant 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.
- This evidence is only part of the evidence and the jury must consider the evidence as a whole.
- The jury must not convict the defendant solely on the basis of such evidence: they may only convict him if there is other evidence which implicates the defendant and they are sure on all of the evidence that he is guilty.

14(5) Hearsay - Res Gestae [s.118(1)4]

{Bench Book p. 233}

To be admissible such a statement must:

- have been made by a person "so emotionally overpowered" by an event that the possibility of concoction or distortion can be disregarded; **or**
- have accompanied an act which can properly be evaluated as evidence only if considered in conjunction with the statement; **or**
- relate to a physical sensation or mental state such as intention or emotion.

Directions

- The judge should remind the jury of the statement in the context of the situation in which it was made.
- Depending on the reason for the statement having been admitted in evidence, the jury should be directed that:
    - ◊ they must exercise caution;
    - ◊ before they may rely on it they must be sure:
        - ■ that it was genuine and spontaneous and not the result of, for example, deliberation, distortion, rehearsal or ill-will;
        - ■ that, if sure that it was genuine and spontaneous, it was not made as the result of a mistake as to the circumstances about which it was made;
    - ◊ if they are not sure about these things they must ignore the statement completely;
    - ◊ if they are sure that they can rely on the statement, they must decide what weight they should attach to it, bearing in mind its limitations: for example 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.

14(6) Multiple hearsay [s.121]

{Bench Book pp. 234 - 235}

If a decision has been made to admit multiple hearsay, in addition to the directions relating to the purpose for which the hearsay has been admitted, further directions, tailored to the specific facts of the case must be given, to include a "Chinese whispers" direction.

Directions

- Should set out each stage of the transmission of the information; and
- Should direct the jury to consider the risks, if any, of a failure to transmit the information in its original form.

15(1) Confessions

{Bench Book pp. 237 - 241}

A confession that is a statement adverse to the interests of the defendant may have been made in a number of different circumstances (e.g. to an acquaintance, a stranger or to the police in interview).

Directions

- There must be a review of the terms of the confession and any subsequent explanation given by the defendant casting doubt upon its terms and effect.
- If the fact of the confession is disputed, the jury must decide whether they are satisfied that a confession was made. The jury should be reminded of relevant evidence in support of the making of the confession and of any defence evidence tending to rebut the making of the confession.
- If the confession was made to the police as a result of any alleged oppression, the jury must be reminded of the evidence of the allegations and directed that only if they are sure that there was no oppression may they rely upon the confession.
- If the confession is alleged to have been made in breach of the Codes of PACE 1984, detail the breach/es alleged by the defendant and the prosecution's response and direct the jury 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.
- If a confession is said to have been made by a defendant 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 the defendant in reliance on that confession.

  **"Mentally handicapped" is the term used in s.77 PACE 1984 but when directing the jury there should be a sensitive description of the defendant's vulnerability.*

15(2) Lies

{Bench Book pp. 242 - 249}

Whether a direction should be given to the jury in respect of any admitted or proved lie or obvious change of account should be the subject of discussion with the advocates. If a direction is to be given, care should be taken to identify with the advocates the lie/s or change of account to which it is to relate.

Directions

- Before the jury may use a lie/change of account they must be sure of **all** of the following:
  - ◊ the lie/change of account is proved or admitted;
  - ◊ it was deliberate and did not arise through confusion or mistake;
  - ◊ it was not told for a reason unconnected with guilt of the offence (e.g. through fear the truth would not be believed, to protect another, or for some other reason advanced by the defendant).
- If the jury are not sure of **any** of the above they must be directed that the lie/change of account is not relevant.
- If the jury are sure there was a lie or change of account **and** that it was deliberate **and** not told for a reason unconnected with guilt they may use the lie/change of account as some support for the prosecution case.
- It must be made clear that a lie can never by itself prove guilt.
- In a case in which by telling lies in interview the defendant failed to mention matters on which he now relies in his defence, so that a s.34 "adverse inference" direction is required [see 15(4)], a direction in relation to his lies must be incorporated within the adverse inference direction.

15(3) Out of court statements by another as evidence for and against the defendant

{Bench Book pp. 250 - 257}

1. Out of court statements made by another as evidence **for** the defendant usually fall for consideration under s. 76A PACE 1984 where one defendant seeks to have a confession made by another defendant in the same trial admitted as a relevant matter in issue: See Bench Book p. 252 – 254 for the interpretation of the words of s. 76A "an accused person who is charged in the same proceedings".
2. Out of court statements made by one defendant as evidence **against** another defendant usually fall for consideration where a co-defendant implicates that defendant in his interview. Subject to any application to admit such evidence as hearsay under one or more of the provisions of the CJA 2003, for example as a previous inconsistent statement, it is settled law that this is not admissible against the other defendant. What one defendant says about another in the witness box is admissible.

Directions in relation to (1) above

Whilst the confession has been admitted in evidence as evidence for one defendant (because it exonerates him) it will also provide evidence against the co-defendant whose confession it is. It is likely that in the course of the s. 76A application to admit/exclude it there will have been evidence on a voir dire. Where the issues explored on the voir dire are explored again in front of the jury, the judge must give careful directions which inevitably will be case-specific.

Directions should include the following:

- When considering the case of the defendant who seeks to rely on the statement, if the jury find:
    - ◊ on a balance of probabilities that the statement was not obtained by oppression or anything said or done which is likely to render it unreliable; **and**
    - ◊ that it is or may be true,

the statement is capable of supporting that defendant's case.

- When considering the case of the defendant who is alleged to have made the statement:
    - ◊ 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;
    - ◊ 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.

Directions in relation to (2) above

- Unless exceptionally the co-defendant's out of court statement has been admitted under one or more of the hearsay provisions, the jury must be directed that what the co-defendant said about the other defendant is not admissible in that defendant's case and they must disregard it, because that defendant was not present when the co-defendant made the statement and so was not in a position to comment, challenge or rebut what the co-defendant said.
- If the co-defendant's out of court statement has been admitted as evidence against another the jury must be warned about the possible dangers of relying on the statement, because:
    - ◊ the other defendant 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 he might have said if he had been present;
    - ◊ the co-defendant was being accused of a criminal offence and so had his own position to look after when he was being interviewed and this may, or may not, have best been served by diverting attention towards, and putting blame on, the other defendant.
- If the statement was admitted as an inconsistent statement, the jury should only rely on it as evidenceagainst the other defendant if they are sure that what the co-defendant said in his interview was the truth and that when he gave evidence he was lying.
- If the statement was made by the co-defendant to a third party, before the jury could rely on the statement they would have to be sure that the third party's evidence about what the co-defendant said to him is true, accurate and reliable both as to the fact that the conversation took place and to its contents.
- If the co-defendant has given evidence the jury should be directed that his evidence is relevant and admissible and that they may have regard to it in the other defendant's case, because the evidence was given in the presence of the other defendant and he has had the opportunity to comment, challenge and rebut the co-defendant's account: see also the directions at Chapter 9 relating to the special need for caution when considering such evidence.

15(4) Defendant's failure to mention facts when questioned or charged

{Bench Book pp. 258 – 267}

Not every case in which a defendant does not mention something when questioned which he relies on in court requires a direction: whether a direction is necessary will depend on the nature of the matter relied on and its context in the case as a whole. In particular it is not appropriate to give an adverse inference direction where the fact which the defendant has failed to mention is one which is agreed by the prosecution to be true.

If no adverse conclusion should be drawn from the defendant's failure to mention a fact/s, the jury must specifically be directed that they must not hold against him the fact that, when he was questioned, the defendant did not mention the fact/s which he now relies on.

The need for, and the content of, such directions should be discussed with the advocates before speeches.

Directions

- The jury must be reminded that the defendant was cautioned, highlighting the fact that he was told that:
  - ◊ he did not have to say anything: he had a right to say nothing;
  - ◊ it might harm his defence if he did not mention when questioned something which he later relied on in court - and so he was aware that conclusions might be drawn against him if he failed to mention facts when he was being interviewed which he later relied on; and
  - ◊ anything he did say might be given in evidence.
- The following should be identified in discussion with the advocates before speeches and then in the summing up to the jury:
  - ◊ the fact/s which the defendant failed to mention but which is/are relied on in his defence;
  - ◊ the reason/s, if any, which the defendant gave for failing to mention those facts;
  - ◊ the conclusion/s which it is suggested might be drawn from his failure to mention those facts, usually that it has been made up after the interview and is not true.
- The jury must be directed that they may only draw such an inference:
  - ◊ 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; and
  - ◊ if there is no sensible explanation for the defendant's failure other than that he had no answer at that time or none that would stand up to scrutiny. In this regard the jury must consider any explanation which the defendant gave for his failure and be told that unless they are sure that that was not the genuine reason for his failure they should not draw any conclusion against him as a result of it; and
  - ◊ if they think it is fair and proper to draw such a conclusion.
- The jury must be directed that if they do draw such a conclusion they must not convict the defendant wholly or mainly on the strength of it.

Where a defendant claims that he did not answer questions on his solicitor's advice:

- A special direction should be given if evidence has been given that the defendant's reason for silence/not mentioning a fact/facts was that he had been advised by his legal representative to remain silent. The jury should be directed that:
    - ◊ if they decide that the defendant 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 him from his silence, because a person who is given legal advice can choose whether to follow it or not and the defendant was made aware at the time of the interview that his defence might be harmed if he did not mention a fact/s on which he later relied at trial;
    - ◊ in deciding whether, despite having been advised to remain silent, the defendant could reasonably have been expected to mention the fact/s on which he now relies they should take account of such things as his age, his maturity, the complexity of the fact/s on which he now relies and any evidence about the reason for the advice being given;
    - ◊ if they find that the defendant had a good defence but chose to say nothing on his solicitor's advice they should not draw any conclusion against him;
    - ◊ if they are sure that the real reason for the defendant's silence was that he had no defence to put forward and merely hid behind the legal advice which he had been given, they would be entitled to draw a conclusion against him.

15(5) Defendant's failure to account for objects, substances and marks

{Bench Book pp. 268 – 270}

The direction in relation to a defendant's failure to mention facts when questioned or charged [see 15(4)] is easily adapted to deal with this situation.

15(6) Defendant's failure to account for presence at a particular place

{Bench Book p. 271}

The direction in relation to a defendant's failure to mention facts when questioned or charged [see 15(4)] is easily adapted to deal with this situation.

15(7) Defendant's failure to make proper disclosure of the defence case

{Bench Book pp. 272 – 282}

A defendant who relies on matters in court which have not been disclosed in, or are inconsistent with, a Defence Statement may attract adverse comment and the jury may be invited to draw adverse inferences. Where there is such potential, it should be identified and discussed by the judge and the advocates at the earliest opportunity.

Such cases are fact-specific and the judge must give directions to the jury in the light of (i) the extent of any differences between the Defence Statement and the defence advanced by the defendant and (ii) whether there is any justification for it/them.

In a case where there is potential for an adverse inference to be drawn it is likely that it will be suggested that the defendant's failure (i) to provide any Defence Statement or (ii) to provide a timely Defence Statement or (iii) to disclose in his Defence Statement something which he has relied on in court is indicative of a false/fabricated account.

Regard must be had to the considerations set out on pages 275 and 276 of the Bench Book and care must be taken if the defendant suggests that the Defence Statement was not made by him, or not prepared with his authority, or is contrary to his instructions at the time that it was made.

An 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 if a defendant is to rely on matters in court, and its purpose. This is best done when the Defence Statement is first raised before the jury and should be repeated in the summing up.

Directions

- In a case where no adverse inference is to be drawn the jury must be directed accordingly.
- In a case in which there is potential for the jury to draw an adverse inference the jury must be given a direction similar to that in relation to the direction given when a defendant does not mention when questioned something which he later relies on in court [see 15(4)].
- The jury should be reminded of:
    - ◊ any delay in providing the Defence Statement;
    - ◊ the difference/s between the Defence Statement and the matters on which the defendant has relied in court;
    - ◊ the particular adverse inference/s which they have been invited to draw;
    - ◊ any reason given by the defendant for his failure to provide a Defence Statement, on time or at all, or for any inconsistency between the Defence Statement and his case in court.
- If the jury find that the reason/s are or may be genuine and/or that any difference is not significant, then they should ignore the fact that the defendant did not provide such details in the/any Defence Statement.
- If the jury are satisfied that the reason/s are not genuine and that the only explanation for the defendant's failure to provide, earlier or at all, the details on which he now relies is that he did not have any defence, or any defence which he thought would stand up to scrutiny, they are entitled to have regard to such a failure as evidence which tends to support the prosecution's case.
- The jury may only use such evidence in this way if they conclude that the prosecution's case is sufficiently strong that it calls for an answer and that it is fair and proper to do so.
- They must not convict the defendant solely or mainly on evidence that he did not disclose the matters on which he has relied in court any earlier than he did or at all.

15(8) Defendant's silence at trial

{Bench Book pp. 283 – 288}

Where a defendant indicates that he does not intend to give evidence:

The warning for a represented defendant is:

"Have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so or, having been sworn, without good cause refuses to answer any question, the jury may draw such inferences as appear proper from his failure to do so?"

The warning for an unrepresented defendant is:

"You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath and be cross-examined like any other witness. If you do not give evidence or, having been sworn, 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. Afterwards you may also, if you wish, address the jury by arguing your case from the dock. But you cannot at that stage give evidence. Do you now intend to give evidence?"

The question of whether there is an adverse inference to be drawn from the fact that the defendant did not give evidence must be addressed with the advocates before speeches.

The adverse inference may arise if:

- the defendant's guilt is in issue; **or**
- the defendant's physical or mental condition is not such that it is undesirable for him to give evidence; **or**
- the defendant, having been given the statutory warning at the time when he could have given evidence, declined without good cause to do so.

It may be appropriate in some cases to remind the defence advocate that no reason for the failure can be advanced in the course of his speech.

Directions - general

In every case where a defendant has not given evidence but has given an account in interview the jury should be directed that:

- such an account is part of the evidence;
- they should bear in mind that the account has not been given on oath and has not been subject to cross examination;
- if, as is common, parts of the account amount to admissions those parts may be considered to have more weight than denials unsupported by evidence.

Directions where an adverse inference may be drawn

These must include a reminder of the warning given to the defendant at the time that his opportunity to give evidence arose and directions that:

- the defendant had an absolute right not to give evidence;
- the burden of proving the case rests throughout upon the prosecution;
- the fact that the defendant did not give evidence means that there is no evidence from him to rebut, contradict or explain the evidence of prosecution witnesses.
- if the jury are sure that
    - ◊ the prosecution case is sufficiently strong to call for an answer and
    - ◊ there is no sensible reason for the defendant not to have given evidence, other than that he has no answer to the prosecution case or none that would stand up to cross examination,

  then they may conclude that the reason that he did not give evidence is because he has no answer or none that would stand up to cross examination and they may regard the fact that he did not give evidence as lending some support to the prosecution case.
- an inference drawn from the fact that he did not give evidence cannot of itself prove guilt.

Directions where there is to be no adverse inference

Where no adverse inference arises, for example because of the physical or mental condition of the defendant or because the defendant is absent, the jury must be given directions that:

- the defendant had an absolute right not to give evidence; .
- the burden of proving the case rests throughout upon the prosecution;
- although the fact that the defendant did not give evidence means that there is no evidence from him to rebut, contradict or explain the evidence of prosecution witnesses, the fact that he did not give evidence must not be held against him.

16(1) Alibi

{Bench Book pp. 289 – 292}

An alibi direction must be considered in the context of:

- any failure to mention the alibi when interviewed under caution;
- any failure to comply with provisions as to notice to be given in the Defence Statement;
- any change from any earlier notified alibi.

The existence of any of the above considerations will give rise to the need for further directions [see 15(4) and 15(7)] and should be discussed with the advocates before speeches.

Directions

- An alibi is evidence that the defendant was somewhere other than alleged by the prosecution.
- It is not for the defendant to prove he was elsewhere, once the issue is raised it is for the prosecution to satisfy the jury so that they are sure that he was where the prosecution say he was.
- Even if the jury are sure that the alibi raised is false that does not of itself prove the guilt of the defendant: there have been cases when a false alibi has been raised to bolster a true defence.
- If the jury are sure the defendant was present as the prosecution alleges, the jury must also be satisfied of any other elements of the offence that are in issue.

16(2) Self Defence

{Bench Book pp. 293 – 305}

Although self-defence is defined by s.76 CJ&IA 2008 this has not changed the law. There will rarely, if ever, be a need to refer the jury to the statute when summing up.

Directions

- Once self-defence is raised it is for the prosecution to disprove it.
- If the defendant was, or may have been, acting in lawful self defence he is not guilty.
- Lawful self defence involves the defendant:
    - having an honest belief that he was under attack or was about to be attacked so that he needed to defend himself. The fact that his belief was mistaken does not deprive him of the defence unless his mistake arose through voluntary intoxication; and
    - using force that was no more than reasonably necessary to repel the attack or threatened attack: acknowledging that in the heat of the moment the defendant may not be able to judge exactly what force is necessary. A defendant's honest belief that he did no more than necessary is strong evidence that the force was reasonable.
- Self-defence does not arise if the jury are sure that the defendant did not honestly believe he needed to defend himself or if they are sure that the force he used was more than reasonably necessary.

NOTE: These directions relate to self-defence but the same principles apply to defence of another or defence of property – and the directions are easily adapted.

16(3) Duress

{Bench Book pp. 306 – 314}

If an offence is committed under "duress" the defendant is excused criminal liability.

- The defence is not available to those charged with murder, attempted murder and a limited number of other very serious offences.
- The defence is not available to a person who becomes voluntarily involved in criminal activity where he knew or might reasonably have been expected to know that he might become subject to compulsion to commit the act now charged.
- The ambit and requirements of the defence are such that it is particularly suited to a sequential Route to Verdict.

Directions

- It is for the defence to raise the issue of duress; once raised it is for the prosecution to disprove.
- The defence must raise evidence of each of the following four matters:
    1. that the defendant was threatened; **and**
    2. that the threat was such that the defendant believed that he or a member of his immediate family or someone for whom he felt responsible would be subject to immediate or imminent death or serious violence; **and**
    3. that it was the threat/s of death or serious violence that was/were the direct cause of the defendant committing the offence; **and**
    4. that a person of reasonable firmness of the defendant's age and background would have been driven to act as the defendant did.
- 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.

NOTE: The same principles apply to the defence of duress of circumstance or necessity.

16(4) Insane and non-insane automatism

{Bench Book pp. 315 – 329 and 395}

These defences are a comparative rarity in the Crown Court. When either is raised it will usually be in the context that the act alleged to constitute the offence is admitted and the issue for the jury will be whether the defendant had any control over his actions.

Directions - non-insane automatism

- Once evidence is raised by the defence that when the defendant did the act alleged he had lost all self control it is for the prosecution to make the jury sure that the defendant had not completely lost his ability to control his actions.
- If the jury consider the defendant did or may have completely lost the ability to control his actions and his disability arose from some wholly involuntary cause (e.g. an unforeseen reaction to prescribed medication) the defendant is not guilty.
- If the jury consider the defendant did or may have completely lost the ability to control his actions and his disability arose from the voluntary consumption of alcohol or drugs the defendant is not guilty of a crime of specific intent but may be guilty of a crime of basic intent.

Directions - non-insane/insane automatism

These directions are complex and must be crafted to be case specific; they are outside the scope of this work and reference must be made to the Bench Book.

17(1) Sexual offences - alerting the jury to the danger of assumptions

{Bench Book pp. 353 – 362}

There is a real danger 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 in a fair and balanced way.

Guidance may be required on:

- the need to avoid making any judgment based on stereotypes. This may include reference to the dress or behaviour of the complainant particularly when it has given rise to comment by one or more advocates or when it might give rise to potential scepticism by the jury.
- where the complainant and defendant are known to each other, particularly if they have had a relationship, the need to avoid assuming that activity was consensual.
- the effect of trauma on demeanour when giving evidence.
- the intoxication of the complainant and/or the defendant.
- the absence of a physical struggle particularly in an allegation of rape. Submission should be distinguished from consent.
- the absence of immediate complaint.
- the complainant having an inconsistent memory of events.

Such guidance must be crafted with care and discussed with the advocates before speeches. It may also be necessary to discuss these directions after speeches, depending on the arguments advanced by the advocates.

This is a particularly sensitive area of a summing up and regard must be had to the discussion and illustrations in the Bench Book.

17(2) Sexual offences - allegations of historical sexual abuse

{Bench Book pp. 363 - 365}

The issue of delay in general is dealt with in the Bench Book at pp. 30 – 34 and in this Companion at p. 12.

It is common in cases of historical abuse that there have been prior reports/complaints of the defendant's behaviour to others but no action was taken. On occasions the behaviour will have been reported to the police without the matter coming to trial. In such cases reference should be made to the Bench Book pp. 221 - 227 and in this Companion at pp. 51 - 56.

If it appears that the jury are being invited to make the assumption that if the allegation were true complaint would have been made at the time, some guidance to the jury is likely to be required. This must be carefully crafted, discussed with the advocates before speeches and they must be told what the judge proposes to say to the jury.

This is a particularly sensitive topic within a summing and regard must be had to the discussion and illustrations in the Bench Book at pp. 363 - 365.

17(3) Sexual offences – the evidence of child witnesses

{Bench Book pp. 366 - 370}

There are no special rules as to the competence of child witnesses but where a child is very young or has particular difficulties the judge may have had to decide the issue of competence before receiving the evidence. Once this evidence is admitted careful directions are necessary.

Directions

- Depending on the age of the child it may be of assistance to the jury to give some guidance about the limits of a child's understanding and to explain that events may appear different through the eyes of a child.
- It may also assist the jury to give some explanation of the following:
    - ◊ the reason for taking the evidence in chief of a child through the ABE interview, namely that it is important to obtain a young witness' account of events at the earliest opportunity because of the difficulties children are known to have in perceptions of time and the passage of time;
    - ◊ where offences are said to have occurred within the family home, the difficulties which a child may have perceived he had in reporting matters;
    - ◊ where there is alleged to have been grooming, the concept of grooming and the difficulties that may arise in a witness' realisation and/or recollection of innocent attention becoming sexual.

All these directions must be specific and will require careful crafting. This is another particularly sensitive topic within a summing and regard must be had to the discussion and illustrations in the Bench Book at pp. 366 - 370.

17(4) Sexual offences - consent, capacity and voluntary intoxication

{Bench Book pp. 371 – 376}

Consent

For the purposes of the Sexual Offences Act 2003 a person consents to sexual activity if he or she agrees by choice and has the freedom and capacity to make that choice.

Directions

- The prosecution must prove that the complainant did not consent to the sexual activity alleged.
- The absence of consent may be proved by the complainant giving evidence of one or more of the following:
    - being overcome by force from the outset;
    - expressing a choice not to participate in the act but the defendant persisting despite the expressed wish;
    - being frozen with fear;
    - submitting (not consenting) as a result of express or implied threats by the defendant.
- Where there has been an allegation of rape or other non-consensual sexual activity within or immediately after a long term partnership, further guidance will be required about the distinction between the "give and take" that occurs within a relationship and the absence of consent.

Capacity and voluntary intoxication

Directions

- If the jury are sure that the complainant was unconscious or so intoxicated by reason of drink or drugs so as to be unable to make a free choice, the complainant was not consenting.
- If the jury consider the complainant had, or may have had, the capacity to make a choice and did make a choice to consent, even if it was not a decision that would have been made when sober, it remains a consent.

18A Summing up - closing directions

At the conclusion of the summing up, a number of directions are required in every case which will include most, if not all, of the following topics.

Unanimous verdict

The jury should be directed that:

- Their verdict must be unanimous in respect of each count and each defendant.
- They may have heard of majority verdicts but they should put this out of mind. Should the time come when the court could accept a majority verdict this would not be for a significant time and would only arise if the judge were to take the initiative and bring them back into court to provide further directions. They should concentrate on reaching a unanimous verdict.

Deliberations

- Deliberations: how they carry out their deliberations is entirely for them but they may find it helpful to select one of their number to chair their discussions. They will in any event have to select one of their number to speak on their behalf when they come back into court to deliver their verdict/s.
- There will inevitably be debate in the jury room and, at least initially, different views will be expressed. The jurors should listen to the views of others and be prepared for give and take as they seek to reach verdicts with which they are all able to agree.

Timing of retirement

- If the jury are retiring shortly before the usual time for the midday adjournment they may be told that they will be provided with refreshments during the adjournment and advised (if it be the case) that a verdict will not be taken between 1pm and 2pm to permit staff to have a break.
- If the jury are to retire later in the afternoon they should be told that they are not under any pressure and that if they have not reached a verdict by 4.30 they will be asked to return to court and asked whether they wish to continue with their deliberations if they feel they are close to reaching a verdict or whether they would prefer to adjourn and resume in the morning.

Exhibits

- Any exhibits which they wish to have will be made available to them.
- If CCTV footage has been viewed in the course of the evidence, the jury should be told that they may view it again. The arrangements for this should be discussed and agreed with the advocates before speeches. Where it is possible for the jury to have a DVD player in their room care must be taken to ensure that the DVD provided contains nothing that they have not seen in court and the jury should be warned not to carry out any experiments (e.g. identification not already in evidence). In other cases, for a variety of reasons, it will only be possible for the jury to view the DVD in open court. Whatever the arrangements, they should be explained to the jury before they retire.
- It will never be appropriate to provide the ABE interview of a witness for a jury to view in their room. If it is necessary for the interview or part of it to be played this must be done in open court but if the jury ask to be reminded of such evidence, it can usually be provided by the judge from the transcript though care must be taken also to remind the jury of any cross examination on that part of the evidence and of any other evidence which relates to it.

Breaks

- The jury should be informed of any arrangements that have been made for smoking breaks or breaks for any other reason.

18(1) Empanelling a jury

{Bench Book pp. 377 - 381}

See pp. 1 - 2 in this Companion.

18(2) Jury management – discharge of a juror or jury

{Bench Book pp. 382 - 385}

The judge has a discretion to discharge a juror or the whole jury if the necessity (that is a "high degree of need") arises.

Whether a necessity arises is a matter of fact and degree in a particular case. In some cases, such as individual misconduct, illness or unavoidable personal commitment, only the juror concerned needs to be discharged. In other cases, for example where there is a risk that information known to or improperly obtained by one juror has been shared with other members of the jury, or where inadmissible material which is seriously prejudicial to a defendant has become known to the jury, it may be necessary to discharge the whole jury.

In cases of potential bias, the test to be applied is whether a fair-minded and informed observer would conclude that there was a real possibility that the jury/juror would be biased.

As soon as any potential problem is raised, if it relates to an individual member or members of the jury, consideration should be given to isolating the juror/jurors concerned.

Before any decision is taken the judge must investigate the situation carefully, consulting the advocates as soon as possible and taking time to reflect. Depending on the potential problem it may be possible to investigate it by reference to a single juror, without the involvement of the jury as a whole, but in cases in which the potential problem affects the jury as a body, this will not be possible or desirable.

Consideration should be given to whether it is necessary to discharge all, or only one or more members, of the jury and to whether, if the jury were to be given appropriate directions either they could all continue to serve or they could continue to serve without a juror/jurors whom it has been necessary to discharge in consequence of the enquiry. The minimum number of jurors required for a trial to continue is nine.

Consideration must also be given to:

- what if anything to say to a juror or jury on discharge. It is vital to warn a discharged juror or jury not to discuss the circumstances with anyone;
- what is to happen to the juror/jury after discharge. It may be necessary to discharge the juror or jury from current jury service so that there is no risk of contaminating any remaining jurors or a new jury;
- what to say to the remaining jury members when one or more jurors have been discharged. Great care needs to be taken in this regard.

18(3) Jury management – conducting a view

{Bench Book p. 386}

One or more of the parties, or the jury, may ask to view a particular location. It is for the judge to decide, having consulted the advocates, whether a view should be held but no view may be held after the jury has retired.

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: when on a view the court is still sitting and proper procedures must be followed throughout.

The view must be attended by the judge, jury, jury ushers (who must stay with the jury at all times), advocates, court clerk and a "logger" to record the proceedings. The defendant must be allowed to attend if he wishes and appropriate arrangements for this must be made. Attendance of others is a matter for the judge's discretion.

Travelling to and from the location must be very carefully regulated and 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. Usually a coach is used and it is important that different parties, in particular the jury, are kept apart and go to and remain in appropriate seats.

Communication at a view should be discouraged. Any communication between the judge and the advocates and/or the jury must be recorded. If any evidence is taken this must be in the hearing of the judge, advocates, defendant and all members of the jury and must be recorded.

Jurors may ask questions at a view but any question should be asked in writing, by a note handed to the judge who should discuss the question with the advocates before proceeding further. In some cases it may be possible to deal with the question at the scene. In others the jury may be told that their question will be answered when back at court.

Subject to the jury asking, in the manner above, for any particular feature/s of the location to be identified, such feature/s as the jury, any of the advocates or the judge wish to have identified, and the procedure for doing so, should be agreed in advance.

18(4) Jury management - the Watson direction

{Bench Book p. 387}

The circumstances in which this direction is given, sometimes known as the "give and take" direction, are rare.

After the jury have been deliberating for a significant time in the context of the particular case and, usually, after they have been given a majority direction, if the judge considers that any further direction to the jury might help he should discuss this with the advocates. If the judge decides to give such a direction he must not put the jury under any pressure or give rise to any perception that he is doing so.

If the judge decides 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):

Direction

"Each of you has taken an oath (or made an affirmation) to return a true verdict according to the evidence. No one must be false to that oath (or affirmation) but you have a duty not only as individuals but also collectively. That is the strength of the jury system. Each of you takes with you into the jury box your individual 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 (or affirmation). That is the way in which agreement is reached. If unhappily [ten of] you cannot reach agreement, you must say so."

19 Verdict - majority verdicts

{Bench Book pp. 388 - 389}

Directions

No majority verdict direction can be given unless the jury has been deliberating for at least 2 hours although in practice, to allow time for the jury to go from court to their retiring room and vice versa, at least 2 hours and 10 minutes is to be taken as a minimum.

The jury should be directed that:

- They should still, if it is possible to do so, reach a verdict on which they are all agreed.
- 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.

This assumes that the jury has 12 members: if there are less than 12 members the majority permitted is:

- *if there are 11 jurors: at least 10;*
- *if there are 10 jurors: at least 9.*

If there are 9 jurors, no majority verdict is permitted.

19A Directions to the jury on overnight or other adjournments during retirement.

Where a jury have not reached verdicts by the close of the day and it is necessary to adjourn overnight the jury should be called into court and asked, preferably informally by the judge, whether they have reached verdicts on all counts upon which they are all (or if a majority direction has been given, upon which at least ten of them) are agreed. On the assumption that the jury indicate that they have not reached such verdicts they should be directed:

- If they feel they are close to achieving verdicts and wish to continue to a conclusion they may do so but they must not feel under any pressure and if **any** of them would prefer to adjourn overnight and resume their deliberations in the morning they may do so.

In the event of an overnight adjournment the jury must be given the following directions:

- The case is at a sensitive stage and the warnings given earlier about not speaking to anyone about the case are of special importance.
- Jury deliberations must be confined to the jury's retiring room when all of them are present to hear the views of any other juror. For this reason they must not discuss the case any further even among themselves until they have returned to the courtroom, the jury ushers have been sworn and they have been asked (by the judge) to return to their jury retiring room to continue their deliberations.
- They should leave the case completely to one side and do no work on it at all until after they have been brought back into court in the morning, the jury ushers have been re-sworn and the jury have returned to their jury room to resume their deliberations.
- For this reason the direction which they have already been given that they must not communicate with anyone about the case, seek any information or undertake any research of any kind should be reinforced.

An adaptation of the above should be given to a jury who are to separate during the day for smoking breaks or if deliberations have to be suspended for any reason.