Judicial College

CROWN COURT BENCH BOOK

Directing the jury

First supplement

October 2011

Contents

Introduction

This is the first supplement to the Bench Book. There have in the last 18 months been several important developments for the attention of trial judges. The main areas are:

- The collective responsibilities of jurors (page 7).
- Marshalling expert evidence (page 30).
- Good and bad character directions for the defendant in the same summing up (page 39).
- Admissibility and treatment of material in the hands of the defendant which tends to establish a relevant disposition (page 42).
- Significance of standard of proof when a co-accused relies on the bad character of the defendant (page 45).
- Test for admissibility of cross-examination as to bad character of non-defendants (page 48).
- What is hearsay (page 49)?
- Hearsay statements from anonymous witnesses (page 51).
- New partial defence to murder of loss of control (page 63).
- New partial defence to murder of diminished responsibility (page 73).
- When to give a collusion/contamination direction (page 81).

The purpose of the Bench Book is to provide information, advice and assistance to judges specifically relevant to the task of summing up and jury management. It has therefore been necessary to be selective when choosing material to be included. The test has been whether the case law or statute has relevance to the task of summing up. It should not, therefore, be assumed that this supplement is a complete almanac of important legal developments. Regular study of the Judicial College criminal e-letter is advised.

Christopher Pitchford

October 2011

How to use the Bench Book

Shortly before publication of the Bench Book in March 2010 Lord Judge CJ made the following statement in *Ramchuran* [2010] EWCA Crim 194 at paragraph 29:

> "29 . . . For many years now, and in different forms, the Judicial Studies Board has offered assistance to trial judges which takes the form of a collection of specimen directions. They are invaluable. They are frequently repeated, directly and verbatim, by trial judges when summing up. Generations of judges are indebted to the Judicial Studies Board for accepting the huge burden of producing the specimen directions and regularly updating them in the light of legal developments. However eminent and distinguished those who have prepared the specimen directions over the years, the Judicial Studies Board has never asserted, and would have been wrong if it had chosen to assert, that these specimen directions constituted authority binding on trial judges. On occasions this court has approved or adopted a specimen direction or part of a specimen direction. When that happens, it is vested with the authority of the court. But until then, helpful, valuable, indeed indispensable as the Judicial Studies Board specimen directions may be in practice, and however likely it is that if the question arose for decision the court would approve a particular direction, the situation is unchanged. The specimen directions provide guidance for trial judges, not authority binding them or for that matter binding this court."

Lord Judge said much the same in his foreword to the Bench Book. In the experience of the JSB (now the Judicial College) the former practice of criticising directions to the jury on the ground that they did not conform to a specimen direction has, since the publication of the Bench Book, much reduced. We are heartened by this development but there are occasional exceptions. In our view, even where a direction has been approved by the Court of Appeal, it does not automatically follow that a direction in identical terms in another case is either correct or appropriate. Every specimen or illustration is available for adaptation and improvement depending upon the requirements of the case. As Lord Judge said in the foreword to the Bench Book, it is a useful starting point only. For more recent observations to the same effect see *Hayes* [2010] EWCA Crim 773 at paragraph 12, per Hughes LJ, Vice-President, and *Wahid* [2010] EWCA Crim 1851 at paragraph 40, per Aikens LJ.

We reiterate that the assistance which the Judicial College provides to judges should never be cited as though *authority* for the proposition being advanced or suggested. The Bench Book has no contribution to make to precedent. Only decisions of the court do that. See for example *Williams* [2010] EWCA Crim 2552 (**Chapter 5: Prosecution case and principles of criminal liability (8) Causation**, page 15 below) and *Wood* [2011] EWCA Crim 1478 at paragraphs 49–52.

Chapter 1: Structure and content of the summing up

Bench Book page 1

Mistaken introduction of inadmissible evidence

From time to time inadmissible evidence will be placed inadvertently before the jury. In the event of appeal the Court of Appeal will need to consider the effect of the error upon the safety of the verdict. The test adopted may be of some assistance to trial judges when considering the terms of warnings to the jury and/or applications to discharge the jury in consequence of such errors. In *Brown* [2010] EWCA Crim 1337 the court (Thomas LJ, Openshaw and Macduff JJ) dismissed an appeal when the judge had given a warning to the jury in emphatic terms:

> ". . . you must not, absolutely not, allow my inadvertent reference *[in summing up]* to that 999 call and reading a part of the transcript, you must not use that in any way in your deliberations . . . That is an absolute prohibition because you have not heard it in evidence and it has not been tested. Put it to one side . . . There is plenty of other material to work with. Please disregard that; that is an error, but it is an error which, in my judgment, is not so grievous that it means we go back and start all over again. It is essential that the defence must have confidence in knowing that when judging the case against him, you put that matter out of your minds."

In *P* [2010] EWCA Crim 1296 the Court of Appeal (Elias LJ, Stadlen J and Sir Geoffrey Grigson) held that the reading to the jury during summing up of a passage which had been deliberately redacted from the witness statement of a child protection officer was fatal to the safety of the conviction. The appellant, a man of good character, had been charged with offences against children. The redacted section of the statement was capable of conveying to the jury that the appellant had behaved improperly towards children on other occasions. Elias LJ explained the court's approach as follows:

> "12. The law in this area is clear. The fact that a passage is read to the jury which ought not to have been read does not of itself render the verdict unsafe. In the case of *Lambert, McGrath and Brown* [2006] EWCA Crim. 827, Lord Phillips, then Lord Chief Justice, stated that it was wrong to start from the assumption that a mistake of this nature vitiates the trial. He said this at paragraph 57:
>
> > "Sometimes in the conduct of a trial . . . as a result of an oversight on the part of counsel and the judge, or the judge alone, a direction is omitted or material is placed before the jury which should not have been. It is wrong to start with the premise that such an oversight vitiates the trial. The question must always be whether, when viewed in the context of the trial as a whole, the safety of any verdict which has been given or is to be given, has been put in jeopardy or the fairness of the trial has otherwise been prejudiced to an extent that calls for the discharge of the jury or the quashing of a verdict."
>
> The important question that has to be asked, as both counsel accept, is whether the jury might have come to a different conclusion if the passage had not been read to them.
>
> 13. In the case of *Tufail* [2006] EWCA Crim. 2879, Pitchford J giving the judgment of this court

(May LJ, Pitchford and Teare JJ) set out three considerations which should be borne in mind in a case of this kind. They are, first, the nature of any warning to ignore the material. In this case of course there was no such warning. The matter emerged for the first time during the summing up and counsel did not alert the judge to the mistake. He took the view, he tells us, that if the jury had been asked to ignore that particular part of the evidence then that may have had the effect of appearing to emphasise it.

14. The second consideration is the strength of the case against the appellant. We are not prepared to say that it was a weak case, as counsel submits. There was cogent evidence given by the complainants and GC did give explanations for the lies which were referred to in the evidence.

15. The third consideration is the degree to which the jury may have been influenced and that is really the decisive consideration. Indeed, the other two considerations have a direct bearing on the answer to this question.

16. Bearing in mind that this was a case where the defendant was of good character and that the evidence was summarised to the jury by the judge himself, we have come to the conclusion that the verdict here is not safe. We think that it is possible that this passage may have influenced the jury. Plainly if some members of the jury had formed the impression as a result of this passage that there may have been some earlier sexual misdoings of some kind with other boys, even if falling short of criminal conduct, then it would inevitably have influenced the way in which they approached the evidence in this case. It is unfortunate because it was only part of the evidence that the jury had to consider, but we cannot discount the possibility that it could have been decisive, or at least very influential. Accordingly, we quash the convictions."

For a further example of the mistaken admission of prejudicial evidence which, in the result, did not impact upon the safety of the verdict, see *Sammon* [2011] EWCA Crim 1199 (Pitchford LJ, Blair and Edwards-Stuart JJ) at paragraphs 54–65. The trial judge considered the prejudice which the inadmissible material may generate. He explained to the jury the reason why the evidence was irrelevant, proved nothing and was prejudicial. He gave explicit directions to the jury as to that evidence which could and that which could not support the prosecution case.

Equipping the jury for its task

In *Sampson* [2007] EWCA Crim 1238 the appellants had been charged, *inter alia*, with conspiracy to steal from EPI Ltd, a company which they controlled, and conspiracy to falsify accounting documents. The allegation was that they had diverted funds from the company for their own use while pretending that legitimate services had been provided. This was achieved, it was alleged, by corrupting a landfill operators' tax credit system created for the benefit of approved bodies (including EPI Ltd) whose responsibility it was to administer landfill levies for the benefit of the environment. The prosecution case was that the appellants had, through EPI, purported to make grants for environmental purposes while requiring "kick-backs" which they diverted to themselves with no consideration provided. The defence case was that the payments were honestly received for services rendered to grant recipients. The trial took seven months. The principal argument raised on appeal was that the summing up failed to assist the jury to apply the evidence to the relevant issues. The court (Maurice Kay LJ, McCombe J and Mrs Justice Swift) allowed the appeal. On the subject of summing up Maurice Kay LJ noted that the purpose of a summing up was properly to equip the jury to discharge their task. He noted the vast quantity of evidence much of which was of peripheral relevance which need not have been referred to at all. The summing up had not, however, been structured to concentrate upon the cases respectively for the prosecution and the defence on each of the principal counts in the indictment. At paragraph 88 he concluded:

> "88 . . . The central contention is that the summing up at no stage provided the jury with a clear structure for their task. As we have related, the summary of the evidence was sequential, without a serious effort to relate particular witnesses and passages to specific counts on the indictment or defendants. We adopt a description used by [counsel]. It was a 'dispiriting recitation'. We have referred to one passage in which the judge plainly perceived that the jury were finding it wearisome. There were later passages where the same could be, indeed was, said. Nowhere did the judge draw together any of the multiple strands in the case. He did not take individual counts and summarise the evidence relied upon by the prosecution to support the particular count and the case for the individual defendant against it. In a case of this duration and complexity, it was incumbent upon him to do so. Over three weeks elapsed between the conclusion of the evidence and the commencement of the summing up. In shorter and less complicated cases, the failure of a judge to structure a summing up with the identification of issues and appropriate cross references may not be fatal. However, in this case we have come to the regretful conclusion that the summing up did not 'properly equip the jury to discharge their task'. We do not consider that the shortcomings of the summing up were the result of any partiality on the part of the judge. Quite the contrary. In some respects, his approach was as unhelpful to the prosecution as it was to the defence. One way of testing the sufficiency or otherwise of the summing up is to read it from beginning to end and then ask the question: Did it explain the prosecution and defence cases such that the jury could embark on their task with a clear structure and with issues defined and related one to another? It ought to be possible for an outsider to read a summing up from scratch and to understand the case and the issues. We regret to say that all three members of this court found it very difficult to do so upon one or even two readings of the summing up. If that was our experience, we have to assume that the jury was not properly assisted by it."

See also *Hopkins and Priest* [2011] EWCA Crim 1513 for a further example of a factually complicated trial which required a summary of the evidence tailored (i) to each count in the indictment and (ii) to the case of each defendant.

Summarising the defence case

In *Davies* [2011] EWCA Crim 1177 (Richards LJ, Roderick Evans J and the Recorder of Cardiff, HH Judge Nicholas Cooke QC) the appellant had been charged with a series of sexual assaults against a single complainant over a period of years. On appeal he complained that the summing up failed adequately to reflect the defence case. Giving the judgment of the court, Roderick Evans J said:

> "41. The judge then dealt with various prosecution points but he never returned to fulfil his promise that he would deal with the defence points. It is correct that some of the points were mentioned by the judge as he dealt with parts of the evidence but there was no set piece in which the defence criticisms were dealt with as the judge had dealt with the prosecution's points. It is well established that a judge in summing up a case to the jury does not have to remind the jury of all the evidence in the case or repeat for the jury all the points made or relied upon on behalf of a defendant. However, when a judge tells a jury that he will deal with a particular set of criticisms it is important that he does so especially when he has made countervailing points for the other side. This the judge failed to do."

Chapter 2: Introductory words at the commencement of trial

Bench Book page 9

In *Thompson and Others* [2010] EWCA Crim 1623 Lord Judge CJ drew attention to the importance of collective responsibility among members of a jury and of directions to the jury about it:

> "**Collective responsibility**
>
> **6. The verdict of the jury, whatever it is, is delivered in open court in their presence. It is the verdict of them all (or where appropriate, the statutory majority). They have collective responsibility for the verdict. What has perhaps not been sufficiently emphasised thus far is that the collective responsibility of the jury is not confined to the verdict. It begins as soon as the members of the jury have been sworn. From that moment onwards, there is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed. Where it appears that a member of the jury may be misconducting himself or herself, this must *immediately* be drawn to the attention of the trial judge by another, or the other members of the jury.** So, if for example, an individual juror were to be heard saying that he proposed to decide the case in a particular way regardless of his oath to try it on the evidence, or he were demonstrating a bias based on racism or some other improper prejudice, whether against a witness or the defendant, these things must be reported to the trial judge. So must outside interference, such as imparting information or views apparently gathered from family or friends, or using a mobile telephone during deliberations, or conducting research on the internet. The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself.
>
> *7.* Recent research (Thomas: *Are Juries Fair?* February 2010) addressed the risk that a substantial proportion of jurors may not know, or be uncertain about what they should do if they are concerned that something improper or irregular has occurred or is occurring among them. With this concern in mind we have examined both the material sent to potential jurors before trial and the directions commonly given by judges at trial, after the jury is sworn, as exemplified by those given in the cases now before us. None was unfair or deficient. We believe, however, that the material supplied to potential jurors could with advantage be strengthened. We invite Her Majesty's Courts Service to consult the Judicial Studies Board (JSB) on how best to explain the collective responsibility of jurors examined in the previous paragraph.
>
> **8. The directions given by trial judges should underline unequivocally the collective responsibility of jurors for their own conduct. We do not attempt to lay down a standard form of words. We anticipate that an appropriate explanation of this responsibility can usually be combined with the kind of general introduction to the duties of the jury which judges deliver immediately after the jury is sworn. This fits naturally with the explanation of the basic rule, that they have just taken an oath to try the case on the evidence heard in court. It fits equally comfortably with the explanation to jurors that their discussions will always be respected as confidential, but must be confined to themselves, and not extended to include family and friends. The direction to report any concern or possible irregularity among their own number**

> **can be combined readily with a similar direction to report any approach made to them by any third party, and the anxieties that such directions are capable of generating can be allayed, if the judge thinks it helpful, by explaining that such occurrences are rarely encountered. Jurors should readily understand that any irregularity, if unusually it should it occur must be brought to the attention of the trial judge immediately, since precisely because of confidentiality and collective responsibility for the verdict, it will be too late to do so after the end of the trial.** There is useful guidance which can be adapted to the needs of any individual case in the recent new edition of the JSB Bench Book." [emphasis added]

Suggested subjects for direction appear at pages 9 and 10 of the Bench Book, in particular in the present context, paragraphs 2, 4 and 5. To be added to the list of prohibited communications in paragraph 2 is discussion or comment by "Twitter". See illustration below.

On 20 December 2010, the Lord Chief Justice issued Interim Practice Guidance entitled "The Use of Live Text-Based Forms of Communication (Including Twitter) from court for the Purposes of Fair and Accurate Reporting". The effect of the Interim Guidance was to clarify the circumstances in which judges may allow the use of mobile electronic devices to transmit text-based communications directly from the courtroom for the purpose of reporting the proceedings. Clearly judges will need to be satisfied that any permitted use of a device for electronic communication from a court room is strictly controlled to ensure that inadmissible material is not disclosed and that the device is not otherwise used for an improper purpose. The guidance is available at *www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/lcj-guidance-live-text-based-communications-20122010.pdf*.

In *Lambeth* [2011] EWCA Crim 157 (Moses LJ, Kenneth Parker J and the Recorder of London, HH Judge Peter Beaumont QC), the court emphasised the importance of paying heed to Lord Judge's guidance in *Thompson* (above). At paragraph 7 Moses LJ said:

> "7 . . . The judge was also asked to tell the jury that they should not be tempted to make any investigations of their own on the internet. This is consistent and indeed obeys the strictures of the Lord Chief Justice on this topic. The judge declined to do so. He took the view that to warn the jury not to be tempted to use the internet would amount to an invitation to go and do it. In so considering he paid insufficient regard to the reasoning and directions of the Lord Chief Justice. One of the points of instructing the jury not to do so is to put the other members of the jury on guard should one of their number be tempted to do so and made them aware of the concept of collective responsibility for the proper conduct of the trial. By doing so he invites members of the jury to be on guard lest one of their number should disobey the instruction and invites them to draw that to the attention of the judge. In that way collective responsibility might ensure that the practice of looking things up outside the scope of the evidence is avoided."

At a trial on charges of possession of drugs (*McDonnell* [2010] EWCA Crim 2352) it was discovered that, despite a clear warning from the judge at the outset, a juror had carried out internet research of his own into the use of boric acid and phenacetin in the manufacture and dilution of cocaine, and sentencing for drugs offences. The jury bailiff saw the material on the table in the jury room at the end of a day's deliberations. When the jury returned the judge asked them to surrender the material. He was told that the material had not been shared by other members of the jury. He declined to discharge the jury but directed them as follows:

> "We have looked into the matter of the further information you have sought and obtained from the Internet and other sources. I am afraid the first thing I have to say is you shouldn't have done this. You shouldn't have sought and obtained this further information. It flies in the face of my instruction to you not to seek further information about the case from external sources. Also I told

> you at an early stage of my summing up to try the case only on the evidence put before you in court. You must put out of your minds the information you gained from the Internet and other sources external to the case. You must not bring this external information into the balance when you are deliberating on your verdicts. The reason, as I have said, is that it is not fair to the defence, it is not fair to the defendants, it is not fair to the prosecution. They have no chance to make representations to you about such material. That is why you must not seek it and obtain it.
>
> Can I ask you to please continue your deliberations but as you do so you must put this external material that you have obtained out of your minds. Above all I have to say of course don't do it again. Don't seek any further information external to the case, from external sources in connection with this case. Consider only the evidence put before you in court by the parties and reach your verdicts only on that evidence that was put before you."

The Court of Appeal (Moore-Bick LJ, McCombe J and HH Judge Gilbert QC) examined the question whether disobedience to the judge's instruction (in accordance with *Thompson* (above)) rendered the verdicts unsafe. Moore-Bick observed at paragraph 21 and 22:

> "21. In our view, trial judges faced with a situation of this kind should take the same approach, that is, investigate the position and consider whether there is reason to think that the jury might be influenced to reach a decision otherwise than on the evidence in the case.
>
> 22. There are five related aspects of the matter which, in our view, need to be considered in this case. The first, and obviously most important, is the material itself; the second, the fact that private researches were carried out contrary to judge's directions; third, consideration of what, if any, other material may have been viewed that potentially affected the jury's decision; fourth, whether there was a risk that the conduct would be repeated; and fifth, what, if any, steps were taken by the judge to remedy the position. We think it necessary to have regard not simply to the logical relevance of the material but also to the possibility that the jury might have been adversely influenced by information that is not logically probative but nonetheless potentially prejudicial."

The court considered the nature of the material acquired by the juror in detail together with the effect which the judge's direction could be assumed to have had. It concluded that on this occasion the convictions were safe.

In *Mpelenda and Another* [2011] EWCA Crim 1235 the judge gave to the jury explicit warnings against seeking information relevant to the trial from the internet and explained why such behaviour would create unfairness in the trial process. He provided written directions to the jury upon the requirement of proof of participation in a case of joint enterprise (common purpose to do really serious harm). After retirement one of the jurors searched the internet for assistance as to liability in a joint enterprise case. The following morning she told one of her colleagues to whom she gave a lift to court that presence at the scene of the crime and a failure to intervene in an attempt to prevent the offence was sufficient proof of participation. These facts emerged four days after the appellant's conviction. The appeal was allowed.

The experience of trial judges and the Court of Appeal is that some jurors continue to be unaware of the seriousness of disobeying the judge's directions. The terms in which the jury is addressed upon the subject of extraneous enquiries and collective responsibility remain, as Lord Judge CJ said in *Thompson*, a matter for individual judgement. It seems to the writer that it is important for the jury, particularly in a long or difficult or emotionally harassing trial, not to become isolated from the judge and the advocates but to seek the assistance of the court whenever they need it. It will help to hold regular housekeeping sessions, keeping the jury informed as to the forthcoming programme of evidence and the progress of the timetable. There is a

tension between making a jury feel at ease at the commencement of the trial on the one hand and delivering a strict warning as to their conduct on the other. Judges will, as usual, be using their individual talents to achieve both objectives. The following is offered as an illustration only.

Illustration – ***preliminary words to the jury – prohibition against seeking outside information – collective responsibility***

Ladies and gentlemen, now that you have been sworn as our jury you have undertaken some solemn duties which I must explain to you. You and I have different tasks to perform, but we have one important role in common. We are all judges. I have the task of making any decisions of law that are required, of ensuring that the trial is fair, and of making sure that the evidence is presented to you properly. You have the responsibility of deciding whether, upon all the evidence which is brought before you, the defendant is guilty or not guilty of the charge which has just been read out. The only evidence upon which you are permitted to make that decision is the evidence which is presented to you in court. Our system of trial depends upon the parties, the prosecution and the defence, to present the evidence. Neither the judge nor the jury interferes with that process except in rare circumstances. When all the evidence has been heard the advocates will address arguments to you as to the conclusions they ask you to draw from that evidence. I will then give you directions upon the law which you must apply and will summarise for you the evidence which you have heard. [I will be providing my essential directions of law to you in writing.] Following my summing up, you will retire to consider your verdicts. Each of you has an equal voice. By a process of discussion of the evidence and the issues together as a group of twelve you will decide, after applying law as I have directed you, whether your verdict should be guilty or not guilty.

If at any time during the trial or during your retirement you wish to receive further assistance as to the evidence or the law or procedure you are welcome to send me a note with your request. What you must not do under any circumstances is try on your own to discover information about any person or issue involved in this trial, whether a witness, the defendant or anyone or anything else. Nor must you seek assistance upon the law or procedure outside court. As I have said, if you have any such requests please make them to me and I will do my very best to assist. There is a simple reason for this but it is fundamental to our system of trial. If it goes wrong the whole trial may have to be re-started even if the problem comes to light after you have returned your verdict. If that were to happen, the parties, the defendant and the witnesses would have to go through the whole trial again at a cost of many thousands of pounds. The reason for this strict rule is that the prosecution and the defence are entitled to address you in argument upon any evidence which is given. I am the only person authorised to explain to you the law which you must apply to the case. If you were to obtain information from some outside source such as Google or Facebook or Twitter, or indeed from any traditional sources such as books, neither the advocates nor I would know about it. If we do not know about it we cannot comment on it. That would not be fair to the defendant or to the public whom you represent. It would not in other words be a fair trial.

The second important obligation which you undertake is not to discuss the evidence or the trial with anyone outside the jury. You have a duty of confidentiality to the court, to the parties and to one another. That means that when you leave this courtroom during any break or when you go home at the end of the day you must not talk to strangers, or friends or relatives about the case. If you were to do that there would be an obvious risk that when you retired with your colleagues you would take with you not just your own view about the case but someone else's as well. That must not happen.

Only you twelve who have listened to the evidence together are entitled to reach a conclusion together. It is no-one else's business. For the same reason I must ask you only to discuss the case when all twelve of you are together in your jury room.

Have I made myself clear? Does any of you have any questions about these opening remarks?

These duties you owe, members of the jury, both as individuals and, collectively, as a group of twelve. If at any time someone tries to engage you in conversation about the case and will not take no for an answer, or if you become aware that someone else in the jury is not sticking to the rules which I have just explained, you should report the matter immediately to me. If indeed you are concerned about any aspect of the trial whether before or after you retire to consider your verdict you should say so straight away, or it may be too late to help.

[These instructions are given to juries at the start of every criminal trial in the Crown Court. I am sure you will act accordingly. In fairness to you I must warn you that if any one of you was deliberately to ignore my instructions and act contrary to them he or she might be found in contempt of court and liable to imprisonment.]

Now to some housekeeping. I am told by the advocates that the trial will last . . . .

Note that in *HM Attorney General v Fraill and Stewart* [2011] EWCA Crim 1570 and [2011] EWHC 1629 (Admin) the Lord Chief Justice added the following comments on the judge's appropriate directions to the jury:

> "61. One of his directions implied that the obligation of jury secrecy might somehow cease to apply after verdicts have been reached and the trial concluded. We do not agree. For the reasons already given in this judgment, the confidentiality required of jurors throughout the trial continues indefinitely after its conclusion. Our second reservation arises from the direction . . . that they should not discuss the case at all until they retired to consider their verdict. Again, we do not agree. Obviously a jury cannot decide a case until it has heard all the evidence. But in principle if all twelve jurors are together, and they are on their own in the privacy of the jury room, they are not prevented, if they wish, from discussing aspects of the evidence which they have heard so far, or reflect together on matters raised in the case or by the evidence. The correct approach is for the judge to direct the jury never to discuss the case unless they are all together, and in private, and further to direct them that whatever their discussion at any stage of the case, they will obviously keep open minds and not jump to conclusions until the evidence is completed and the summing up has been given."

Chapter 4: Preliminary directions of law

(8) Alternative verdicts

Bench Book page 29

In *Matthew and Warrington* [2010] EWCA Crim 1859 the accused were jointly charged with murder. On the defence case they may have been guilty not of murder or manslaughter but section 18 causing grievous bodily harm with intent. The Court of Appeal held that *Coutts* [2006] UKHL 39 and *Foster* [2007] EWCA Crim 2869 should have been drawn to the trial judge's attention and the section 18 offence left to the jury as an alternative. In the result the verdicts were safe because the trial judge had in his directions to the jury explicitly confronted the danger identified in *Coutts.* The judgment of the court delivered by the Vice-President, Hughes LJ, particularly at paragraph 15, provides assistance upon the proper application of the *Coutts* principle:

> "15 . . . Like this court in *Foster*, we derive from *Coutts* these propositions applicable to the present case:
>
> 1. The decision which verdicts are to be left to the jury is a matter for the judge. It is not to be left to the Crown. The judge will of course entertain submissions on all sides, but the decision is his.
>
> 2. The primary test for whether an alternative verdict should be left is whether it would suggest itself to the mind of an ordinarily knowledgeable and alert criminal judge.
>
> 3. Such a verdict should ordinarily be left if it is obviously raised on the evidence.
>
> 4. The test for the safety of a conviction where such a count which ought to have been left has not been, as formally adumbrated in the speech of Lord Ackner in *R v Maxwell* [1990] 1 WLR 401 at 408, is not workable and must not be applied. That test was this. Is there material which satisfies the appellate court that the jury may have convicted out of a reluctance to see the defendant get clean away with what on any view was disgraceful conduct? We accept the proposition adumbrated before us by Mr Farrer that in effect the consequence of *R v Coutts* is to reverse this proposition in this sense. Rather than make an assumption that the jury will not have been affected by the absence of an alternative verdict unless the contrary is shown, the mere fact of the absence of choice is capable of giving rise to this danger. The assumption, as Mr Farrer neatly puts it, is reversed. The danger in question, referred to in Lord Ackner's test which we have already mentioned, was spelt out more clearly by their Lordships in *Coutts* by reference to a part of the judgment of Callinan J in the Australian High Court in *Gilbert v The Queen* 201 CLR 414 at 441, paragraph 101:
>
> > 'The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.' "

(9) Delay

Bench Book page 30

NB: A correction is required at paragraph 2, page 30 and footnote 34 (see *CPS v F* below).

In *CPS v F* [2011] EWCA Crim 1844 a five-judge court (Lord Judge CJ, Hughes and Goldring LJJ, and Ousley and Dobbs JJ) emphasised the distinction between (i) an application for a stay of the prosecution for abuse of process on the ground of delay and (ii) a submission of no case to answer under the second limb of *Galbraith.* The court concluded that *Smolinski* [2004] 2 Cr App R 40 had been misunderstood. Mistakenly purporting to follow *Smolinski* a practice had developed of deferring applications to stay the prosecution until the close of the prosecution or the close of all the evidence. Lord Judge CJ explained that the court in *Smolinski* had been discouraging the making of *any* application for stay of the prosecution. The better course was for the evidence to be heard (the trial process being the appropriate means of testing the effects of delay) and for the judge to rule under the *Galbraith* principles, if necessary, whether the case should be left to the jury. He continued at paragraph 45:

> "45. Where there are genuine grounds for an application to stay on the basis that a fair trial will be impossible because of incurable prejudice to the defendant caused by delay, that application is, by its nature, preliminary to rather than part of the trial process. The contention is that the trial should not take place at all. If it is to be made, notice should be given before the trial begins. In the end of course the time when it should be dealt with by argument and ruling is a matter for the trial judge. Although we can envisage cases in which, for example, the application is based on prejudice resulting from the absence of long-lost evidence, such as institutional records, and where the evaluation of the significance of the absence of such evidence may best be undertaken at the close of the Crown's case, in general the question whether the trial should proceed at all should take place before evidence is called. If the ruling is deferred, there is, as this case demonstrates and as Lord Lane envisaged, a significant danger that the submissions to the judge would conflate *Galbraith* principles with the issue of abuse of process. If the application succeeds, it will almost inevitably appear that the judge has usurped the function of the jury. Moreover if the issue is not dealt with before the evidence is heard, the complainant, whose account may, notwithstanding the long delay, be a truthful one, will have been through the ordeal of giving evidence within and as part of a trial process which, afterwards, will then be held to have been an abuse of that very process. That is hardly fair. We do not propose to be prescriptive. However, unless there is a specific reason for deferment, an application to stay on abuse of process grounds is preliminary to the trial, and ought normally to be dealt with at the outset. But perhaps most important of all, as all the authorities underline, it is only in the exceptional cases where a fair trial is not possible that these applications are justified on the grounds of delay, even when the pre-condition to a successful application, serious prejudice, may have occurred, The best safeguard against unfairness to either side in such cases is the trial process itself, and an evaluation by the jury of the evidence."

The court concluded with the following statement of the relevant principles:

> "49. (i) An application to stay for abuse of process on grounds of delay and a submission of 'no case to answer' are two distinct matters. They must receive distinct and separate consideration. See paragraphs 39–40.
>
> (ii) An application to stay for abuse of process on the grounds of delay must be determined in accordance with *Attorney-General's Reference (No 1) of 1990*. It cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice to the defendant occasioned by

the delay which cannot fairly be addressed in the normal trial process. The presence or absence of explanation or justification for the delay is relevant only insofar as it bears on that que. See paragraphs 38–40.

(iii) An application to stop the case on the grounds that there is no case to answer must be determined in accordance with *R v Galbraith*. For the reasons there explained, it is dangerous to ask the question in terms of whether a conviction would be safe, or the jury can safely convict, because that invites the judge to evaluate the weight and reliability of the evidence, which is the task of the jury. The question is whether the evidence, viewed overall, is such that the jury could properly convict. See paragraphs 36–37.

(iv) There is no different *Galbraith* test for offences which are alleged to have been committed some years ago, whether or not they are sexual offences. See paragraph 41.

(v) An application to stay for abuse of process ought ordinarily to be heard and determined at the outset of the case, and before the evidence is heard, unless there is a specific reason to defer it because the question of prejudice and fair trial can better be determined at a later stage. See paragraphs 43–45."

This important decision makes no specific reference to the judge's task of drawing attention in the summing up to the exigencies of delay. As the court pointed out, however, the trial process will in the vast majority of cases make adequate allowance for any disadvantages, particularly to a defendant, caused by delay in the prosecution of an offence. It will only have that effect if the judge gives to the jury the appropriate assistance as to their approach to the issue of delay and its impact upon the strength of the prosecution case – see Bench Book page 33.

Chapter 5: The prosecution case and principles of criminal liability

(8) Parties to crime

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

Bench Book page 68

For a factual situation in which it was inappropriate to direct the jury that presence alone was sufficient to generate an inference of encouragement, see *Willett* [2010] EWCA Crim 1620. The appellant was in the passenger seat of a car which his brother was driving. They had been disturbed by the owner of a van from which they had been stealing. The victim attempted to prevent them leaving by standing in front of the car. The driver ran over him. The court (Moses LJ, Henriques and Tugendhat JJ) found that in the circumstances only evidence of active encouragement could suffice to justify a conviction of the appellant as an aider and abettor of his brother's act of murder or manslaughter.

Aiding and abetting causing death by dangerous driving

Bench Book pages 63, 68

In *Webster* [2006] EWCA Crim 415 (see Bench Book page 63) the Court of Appeal identified on the facts of that case there were two ways in which the prosecution could establish the guilt of D, the owner of a vehicle, as an aider and abettor of P, the driver, of causing death by dangerous driving: (1) D handed the controls to P with actual foresight that P, by reason of his drunken condition, would probably drive dangerously; and (2) D encouraged the driver, in the course of the journey, to drive dangerously. As to (2) a failure by D to intervene to prevent the dangerous driving was *evidence* of encouragement but not proof of encouragement which was a decision for the jury.

With respect, the application of the *Powell and English* concept of joint enterprise is, on the facts of the present case, at best partial. This is an extension of the *Powell and English* principle in line with *Reardon* and *Bryce* – see Bench Book pages 61–63. The requirement in *Powell and English* for the guilt of an aider and abetter was participation in a common design to commit crime A with knowledge that one of the joint participants might, in the course of it, commit crime B with the requisite intent. In *Reardon, Bryce* and the present case no common design was alleged.

In *Martin* [2010] EWCA Crim 1450 the court (Hooper LJ, Gross J and HH Judge Moss QC) considered a type (2) 'encouragement' case and posed the question whether foresight of consequences was also required. At paragraph 32 Hooper LJ suggested that an appropriate direction might be to the following effect:

> "32. On a charge of aiding and abetting causing death by dangerous driving in these [i.e. type (2)] circumstances:
>
> You must be sure that P committed the offence of causing death by dangerous driving and—
>
> > (i) D knew that the driver, P, was driving in a manner which D knew fell far below the standard of the a competent and careful driver;

> (ii) D, knowing that he had an opportunity to stop P from driving in that manner, deliberately did not take that opportunity;
>
> (iii) by not taking that opportunity D intended to assist or encourage P to drive in this manner and D did in fact by his presence and failure to intervene encourage P to drive dangerously;
>
> [(iv) D foresaw that someone might be killed by P driving in this manner.]" [brackets inserted]

The court, in paragraph 33 of its judgment, expressly did not decide that the direction at (iv) *was* required, saying only that *if* the *Powell and English* [1999] AC 1 principle applied to aiding and abetting in these circumstances the direction might be required.

A person who aids and abets the commission of the offence is liable to tried as a principal offender (section 8 Accessories and Abettors Act 1861). An *intention to assist* the principal offender to commit the offence with knowledge of the essential ingredients of the offence is required (*Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App R 592) and recklessness is not sufficient. However, the offence of causing death by dangerous driving does not require proof of foresight of death. Section 1 Road Traffic Act 1988 provides, "A person who causes the death of another person by driving . . . dangerously on a road or other public place is guilty of an offence". By section 2A(1) of the Act a person is to be regarded as driving dangerously if "(1) the way he drives falls far below what would be expected of a competent and careful driver, and (2) it would be obvious to a competent and careful driver that driving in that way would be dangerous." By section 2A(3) "dangerous" refers to the danger either of injury or of serious damage to property. In considering whether driving is dangerous the fact finder must consider those circumstances which were and ought to have been within the knowledge of the driver. Accordingly, the principal offender commits the offence if, having regard to what he knows or ought to know about the circumstances (such as traffic, road and weather conditions), he drives in a manner which (i) falls well below the standard of a competent and careful driver, and (ii) it would be obvious to the competent and careful driver that driving in that way created a danger of injury to a person or serious damage to property.

It is suggested that foresight by D that someone might be killed is not required to prove that D aided and abetted P to commit the offence of causing death by dangerous driving – see e.g. *Robert Millar (Contractors) Ltd* [1970] 2 QB 54. What is required is proof that D encouraged P to drive dangerously as defined by section 2A of the 1988 Act. If D encourages P to drive dangerously and the dangerous driving causes death, D and P are both guilty. It does not seem to the writer that recourse to the *Powell and English* principle (joint enterprise with foresight that P might act in a particular manner, with a particular intention, with a particular result) is necessary or appropriate in the context of (1) there and then aiding and abetting dangerous driving by encouragement and (2) completion of the offence by consequences. In *Webster* the court acknowledged the requirement of foresight in the type (1) situation but the foresight required was of the dangerous driving not the death. In the type (2) situation the court observed (paragraphs 27–29) that the "encouragement" alleged was of present driving. In other words, no foresight was involved.

In *Martin* the Court of Appeal emphasised the need in such cases to provide assistance to the jury with the evidence upon which the prosecution could legitimately rely in proof of the dangerous driving and to identify, if necessary with written questions or directions, the essential ingredients of the offence alleged against D. It is suggested that the following are the essential requirements of a direction of law when it is alleged that the defendant, by encouragement, aided and abetted dangerous driving which caused death:

Illustration – ***route to verdict – aiding and abetting causing death by dangerous driving***

Are you sure that:

1. P drove dangerously i.e. in a manner (i) which fell far below what would be expected of a competent and careful driver by . . . and (ii) it would be obvious to a competent and careful driver that driving in that way created a danger of injury to the person or serious damage to property;

2. D knew that P was driving dangerously;

3. D knew that he had an opportunity to intervene to stop P from driving dangerously;

4. D deliberately did not intervene, intending to encourage P to drive dangerously;

5. D by not intervening did encourage P to drive dangerously;

6. P caused another's death by the dangerous driving encouraged by P?

If the answer to each question is "yes" D is guilty of aiding and abetting P to cause death by dangerous driving? If you answer any one question "No", your verdict is not guilty.

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

Bench Book page 73

The appeal of *A, B, C, & D (joint enterprise)* [2010] EWCA Crim 1622 (Hughes LJ, VP, Wyn Williams and King JJ) provides a stark reminder of the pitfalls for the trial judge when the jury, in a multi-handed trial, is required to deal with a multiplicity of issues. The appellants were jointly charged with murder. No weapon was involved but one or more of the appellants must, on the prosecution case, have caused really serious bodily harm with intent. There was no dispute that death resulted. The appellants were charged with murder. The judge was, therefore, required to direct the jury on alternative bases in respect of each accused: Paraphrasing, either (1) Did the defendant himself assault V with intent to do him really serious injury? or (2) Did the defendant take part in the execution of a plan to cause really serious harm to V? or (3) Did the defendant take part in the execution of a plan to cause some harm to V realising that there was a real risk that another or others might cause V really serious bodily harm [with intent]?

Direction (3) as provided to the jury was deficient because (i) it failed to require foresight by the defendant that one or more of the assailants might act *with the intent* required for murder and (ii) it failed to identify the pre-condition of secondary liability that one or more of the assailants committed the offence of murder.

Despite the active contribution of the advocates to the judge's written directions and routes to verdict these essential elements of the direction were overlooked. Hughes LJ, Vice-President, provided a helpful reminder of the range of situations in which the term 'joint enterprise' may be used:

> "9. The expressions 'common enterprise' or 'joint enterprise' may be used conveniently by the courts in at least three related but not identical situations:

i) Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals, as for example when three robbers together confront the security men making a cash delivery.

ii) Where D2 aids and abets D1 to commit a single crime, as for example where D2 provides D1 with a weapon so that D1 can use it in a robbery, or drives D1 to near to the place where the robbery is to be done, and/or waits around the corner as a get-away man to enable D1 to escape afterwards.

iii) Where D1 and D2 participate together in one crime (crime A) and in the course of it D1 commits a second crime (crime B) which D2 had foreseen he might commit.

These scenarios may in some cases overlap.

10. There is utility in the use of the expressions 'common enterprise' or 'joint enterprise' in each of these situations, especially to introduce a jury to the proposition that a man may be responsible for acts which his own hand did not physically commit, if those acts are within the common purpose. **But, as Lord Brown pointed out in** *R v Rahman* **at paragraph 63, the third scenario depends upon a wider principle than do the first and second. The important difference is that in the third type of scenario, D2 may be guilty of an offence (crime B) that he did not want or intend D1 to commit, providing that he foresaw that D1 might commit it in the course of their common enterprise in crime A.**

11. This case involves, as many murder cases do, consideration of the third type of scenario. Here, as the jury must have found, there was an agreed common purpose to commit crime A, the beating of the deceased. The question was this. If in the course of it, one or more participants inflicted not simply injury but *[with intent]* grievous bodily harm, when had crime B (murder) been committed by those who did not themselves personally inflict it?" [emphasis added]

As to the use of written directions Hughes LJ said at paragraph 2:

"2 . . . The judge had a substantial number of issues to cover in his directions apart from that of joint enterprise liability. It is common ground that he did so with care and accuracy. His decision to give the jury both (commendably brief) written directions and, even more helpfully, a 'route to verdicts' should be applauded. Judges need to decide case by case whether such aids are required, but a multi-handed murder with more than one possible basis for verdict to be considered is one which will ordinarily call for a 'steps to verdict' document at least."

When there is a common purpose to cause serious harm and the issue is whether the act committed by P was fundamentally different from that contemplated by D, it is unwise to elaborate, particularly if the effect is to water down a simple direction of law. The court (Toulson LJ, Mrs Justice Cox, HH Judge Barker QC, Common Serjeant) observed in *Mendez and Thompson* [2010] EWCA Crim 516 that the concept is in essence a simple one. The court accepted at paragraphs 45 and 47 the following explanation of fundamental departure:

"In cases where the common purpose is not to kill but to cause serious harm, D is not liable for the murder of V if the direct cause of V's death was a deliberate act by P which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by D. Mr Watson QC for the prosecution did not dissent from this proposition. The reference to 'a deliberate act' is to the quality of the act – deliberate and not by chance – rather than to any consideration of P's intention as to the consequences."

[Note, however, Lord Brown's formulation of the test in *Rahman* [2008] UKHL 45; [2009] 1 AC 129 at paragraph 68.]

Where the common purpose was to pursue and give a "severe beating" to V involving punches, kicks and stamps and the fatal injuries were thus inflicted, it was unnecessary to give a *Powell and English* or *Rahman* direction. What the jury needed to decide was the nature of the common enterprise. It was obvious that if D participated in such a common enterprise he participated with the *intention* required for murder: *Lewis* [2010] EWCA Crim 496, at paragraph 29, per Moore-Bick LJ. In *Stringer* [2011] EWCA Crim 1396 (Toulson LJ, Dobbs J and HH Judge Bevan QC) the court examined the nature of assistance and encouragement necessary to constitute "participation" in the joint enterprise.

Can protagonists be engaged in a joint enterprise?

In *Gnango* [2010] EWCA Crim 1691 (Thomas, Hooper, Hughes, Gross LJJ, Hedley J) D and P unlawfully took part in a gunfight in which each was firing at the other. One of P's shots killed a bystander. D was convicted of murder on the basis that (1) D took part in an unlawful joint enterprise with P to take part in an affray by shooting, (2) D foresaw that P might shoot with intent to kill or cause really serious injury and, in the process, shoot and kill an innocent bystander. The court, allowing D's appeal, held that there was no common purpose *to shoot and be shot at*. Each had an unlawful purpose but it was not a purpose held in concert with the intended victim. The prosecution appealed to the Supreme Court and judgment is awaited.

(9) Causation

Bench Book page 78

See 'Recent Developments in Causation' (2011), Professor David Ormerod.

General rule and causing death by driving

At paragraph 3, page 78 of the Bench Book the author expressed the opinion that "The prosecution must usually establish that the defendant's act was a substantial cause of the 'result' by which is meant a more than minimal cause". It was observed that the phrase "made a substantial and operative contribution to" (proposed by a Law Commission working party in 2002) was "an elegant and accurate synonym for caused". In *Williams* [2010] EWCA Crim 2552 (Thomas LJ, Silber J, HH Judge Wadsworth QC) the defendant was charged with causing death while driving without a licence and without insurance contrary to section 3ZB of the Road Traffic Act 1988 (added to the 1988 Act by the Road Safety Act 2006). In the Court of Appeal the prosecution conceded that without "fault, carelessness or lack of consideration in driving" the defendant's vehicle had collided with a pedestrian, Mr Loosemore, causing his death. It was argued on behalf of the appellant that the offence could not be committed without "fault" on the part of the driver and that:

> ". . . the Crown did not merely have to prove the appellant's driving was 'a cause' which was not minimal but was a substantial or major cause of the death of the deceased. The facts clearly established that the substantial or major cause of death was due to the actions of Mr Loosemore and not those of the appellant."

The court held that as a matter of statutory construction the offence required no proof of (manner of driving) fault by the driver. If it were not so, there would have been no point in section 3ZB because there already existed an offence of causing death by careless driving.

As to causation the appellant argued, relying on the Law Commission working party's use of the words "made a substantial and operative contribution to", that the prosecution was required to prove that the driving was a substantial, in the sense of being a "major", cause of the death. The court rejected this argument on the authority of *Hennigan* [1971] 3 All ER 133 (see Bench Book page 78, footnote 133 and page 83, paragraph 14). It was required only that the driving was a more than trivial, minimal or negligible cause of death. As Thomas LJ pointed out at paragraphs 25–31 of the court's judgment the Law Commission had consistently so defined the word "substantial". He concluded:

> "34. Secondly, in the context of the other offences where death results from driving (as we have set out at paragraph 12), it is difficult to conceive of any other intention of Parliament that if a person drove unlicensed or uninsured, he would be liable for death that was caused by his driving however much the victim might be at fault; it was therefore sufficient that the cause was not negligible. It may be a harsh and punitive measure with an evident deterrent element, but it is difficult to see how anything else can have been intended.
>
> 35. As is clear from all the cases, it is for the judge in each case to determine how to explain the meaning of causation to the jury in the context of the offence before the court. In many cases, no need will arise. But where it does the use of the terms 'substantial' and 'significant' have been suggested in that context as conveying the meaning that the cause must be 'more than negligible'. The tenor of the draft 2003 report is to the same effect, though in the context of the much more definitive task of codification. However, the words 'substantial' and 'significant' can give rise to further difficulty. For example, substantial can be defined in this context as 'essential or material' or 'firmly established' or 'weighty'; 'significant' can be defined to mean 'important'. The terms may not convey the necessary clarity required in every case.
>
> 36. In a case such as the present, it seems to us that the task of the judge is to explain to the jury what is meant by cause. A simple reference to 'significant' or 'substantial' would in the present case have been insufficient, as the terms could easily have been misunderstood. It is evident from the jury's question that they considered 'the principal, main or major' cause of the death was Mr Loosemore stepping into the road. Had the judge used the terms 'significant' or 'substantial', he would not have conveyed the meaning as decided in *Hennigan* (and as applied in *Barnes* and *Girdler*) and in our view plainly intended by Parliament in relation to s3ZB. As the comments in relation to this offence we have set out at paragraphs 15–17 make clear, some take the view that the offence is objectionable in principle. It is therefore particularly important that the jury is given clear guidance as to the meaning of the section in cases such as this; the reasons are well explained by Mrs Nicola Padfield in *Clean Water and Muddy Causation*: *is causation a question of law of fact or just a way of allocating blame* [1995] Crim LR 683 at 692–3. A jury must clearly understand the statutory legal requirements. The judge was right therefore to explain to the jury that what was necessary was a cause that was more than minute or negligible, as that is what Parliament clearly intended."

The same explanation of the word "substantial" in the term "substantial impairment" was adopted by the court in the application of the partial defence to murder of diminished responsibility (see *R* [2010] EWCA Crim 194, **Chapter 16: Defences**, page 60 below).

The phrase "made a substantial and operative contribution to" does not, it is suggested, convey and was not intended to convey any new legal meaning of the word "substantial". The elegance of the phrase lies in the synonym "operative contribution to" (a result) as an explanation of the concept of the word "cause".

It is necessary to repeat (see How to use the Bench Book, page 3 above) that the assistance which the Judicial College provides to judges should *not* be treated as material to be cited as authority.

Williams has since been applied in *MH* [2011] EWCA Crim 1508. The defendant was driving his van without insurance and without a licence along a trunk road when a car being driven erratically in the opposite direction by a driver, who had recently consumed a cocktail of drugs including heroin, crossed the centre white line and collided with him. The defendant's driving was without fault. The trial judge held that "the jury could not reasonably be directed that in any real sense the defendant was a cause of . . . the death". The Court of Appeal (Hooper LJ, Holroyde J and HH Judge Mettyear), having considered Professor Ormerod's commentary on *Williams* [2011] Crim LR 471, held that the judge's conclusion could not be reconciled with the law as explained in *Williams.* It was for the jury to decide whether the presence of the defendant "driving" on the road was a more than negligible cause of the fatal collision.

Chapter 6: Measures for witnesses

(1) Special measures

Bench Book page 97

See March 2011 (third) edition of *Achieving Best Evidence: Guidance on interviewing victims and witnesses, and guidance on using special measures* at www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf.

ABE interview transcripts

The Court of Appeal (Aikens LJ, Royce J, HH Judge Wadsworth QC) in *Popescu* [2010] EWCA Crim 1230 provided guidance as to the proper handling of transcripts of ABE interviews, commencing at paragraph 35:

> (i) Great care should be taken if transcripts of video evidence are to be given to the jury.
>
> (ii) The transcript should only to be given to the jury if there is a very good reason, and only then following discussion between the judge and counsel in the absence of the jury.
>
> (iii) If transcripts are given, the judge must warn the jury then and there to examine the video as shown, not least because of the importance of the demeanour of the witness in giving evidence.
>
> (iv) Before evidence in chief, the judge should consider whether the jury will be allowed to retain the transcript for cross-examination. Discussion with counsel should take place.
>
> (v) Transcripts are to be withdrawn from the jury once the video evidence in chief had been given, except in very exceptional circumstances.
>
> (vi) If the transcripts are retained during cross-examination, they are to be taken from the jury once the witness has finished giving evidence.
>
> (viii) The general rule should be that the jury do not thereafter have the transcripts again, but if they do, it has to be for a very good reason.
>
> (ix) The jury is also not to be permitted to retire with the transcripts except in exceptional circumstances. Those exceptional circumstances would usually only be present if the defence positively wanted the jury to have the transcripts and the judge is satisfied that there are very good reasons why the jury should retire with the transcripts. That has to be the subject of discussions with counsel and a specific ruling from the judge.
>
> (x) The judge should explain to the jury during the summing up why they are being allowed the transcripts and the limited use to which they could be put, namely to aid the jury to understand the evidence in chief of the relevant witness, and that the defence wanted the jury to retain the transcripts. The judge must ensure that the cross-examination and re-examination of the witness is fully summed up to the jury, and the jury should be reminded to take all that evidence into account.

In *W* [2011] EWCA Crim 1142 the appellant was convicted of rape and penetration of his step-daughter, C, aged 14. The judge informed the jury during his summing up that they could watch a replay of the recorded ABE interview if they wished. The court found that the normal practice was to refuse to replay a video of a child witness unless the jury indicated that they wished to be reminded of the manner in which the evidence was given, as distinct from what was said (*Rawlings* [1995] 2 Cr App R 222). The court emphasised that:

> ". . . whether the video is replayed or not, any repetition of the child's evidence to the jury after retirement should be accompanied by the warning emphasised and required in *Rawlings* [1995] 2 Cr App R 222 and *McQuiston* [1998] 1 Cr App R 139 and that in addition, in order to achieve fairness and to support the warning given, the judge ought to remind the jury of the evidence given by the complainant outside the video itself and indeed, in order to maintain that fair balance, may also have to refer to other relevant parts of the defence evidence."

The *Rawlings* warning is to the effect that the jury should guard against the risk of giving the video disproportionate weight simply for the reason that they are hearing it a second time and should bear well in mind the other evidence in the case, and the judge should after the tape has been replayed, remind the jury of the cross-examination and re-examination of the complainant, whether the jury ask him to so or not. *McQuiston* requires a similar warning if the transcript is provided to the jury rather than the video replayed.

(2) Anonymous witness

Bench Book page 99

For some helpful guidance upon the application of the Coroners and Justice Act 2009 (which replaced the Criminal Evidence (Witness Anonymity) Act 2008, see Professor David Ormerod's paper 'Still Taking Blind Shots at a Hidden Target? Witness Anonymity under the Coroners and Justice Act 2009' (2011) and Ormerod, Choo and Easter *The Witness Anonymity and Investigation Anonymity Provisions* [2010] Crim LR 368. The requirement to give warnings to avoid prejudice remains (section 190, 2009 Act).

The Court of Appeal has examined the propriety of orders for witness anonymity made in several recent decisions : *Chisholm* [2010] EWCA Crim 258; *Shakiq Khan and Others* [2010] EWCA Crim 1692; *Okuwa* [2010] EWCA Crim 832; and *Taylor and Others* [2010] EWCA 830.

Anonymous witnesses and hearsay

In *Ford* [2010] EWCA Crim 2250 and *Fox* [2010] EWCA Crim 1280 the Court of Appeal held inadmissible hearsay evidence from witnesses who could not be identified – see **Chapter 14: Hearsay evidence**, page 49 below.

(3) Intermediaries

Bench Book page 103

For an important analysis of the difficulties presented to the court by the evidence of severely disabled witnesses and of the appropriate means of overcoming them, see *Watts* [2010] EWCA Crim 1824.

Chapter 7: Identification evidence

(1) Visual identification

Bench Book page 108

General note: The Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes A, B and D) Order 2011 (SI 2011 No 412) brings into force a revised PACE Code D, which has effect from 7 March 2011. It provides new guidance to distinguish eye-witness identification procedures such as video identification from procedures for obtaining recognition evidence by viewing CCTV and similar images (see paragraphs 3.34–3.37 for CCTV recognition evidence: cf Bench Book page 113). It also provides greater protection for witnesses attending a video identification by removing a suspect's entitlement to be informed of the date and time of the viewing and to have a representative other than a solicitor attend the viewing. This does not remove the requirement to record a viewing if no representative of the suspect attends, but aims to prevent associates of the suspect intimidating a witness before a viewing.

Breach of Code D

In *Gojra* [2010] EWCA Crim 1939 the Court of Appeal examined the circumstances in which the investigating officer had decided not to require an identification procedure for a witness and the terms in which the consequential breach of Code D and its relevance should be explained to the jury. The analysis is valuable and is reproduced in full. Rafferty J, giving the judgment of the court (Hughes LJ VP, Rafferty and Maddison JJ), said:

> "67. Gojra *[the appellant]* was arrested on 29.5.08 after a man named Green, initially unwilling to make a statement, decided to do so on 21.4.08. It is true that at no stage during his arrest or before arriving at the police station did Gojra, during an obvious denial of involvement, explicitly say that he was not present when the offences took place. Gojra made no comment in lengthy interviews on 29.5.08 and on 30.5.08. Haq *[the witness]* was never invited to any identification procedure. The Crown argues that not until service of his Defence Statement dated 10.3.09 just before the start of the trial on 16.3.09 and after the vast preponderance of the evidence had been served was it clear that identification was disputed. The Defence Statement contained no alibi particulars. The Crown submits that there is no reason why the police should have been able to second-guess Gojra so as to infer that his was an identification as opposed to a credibility case. That the police chose to ask Mohammed to attend an identification parade was out of an abundance of caution, not necessity. There was it is argued no obligation to ask Haq to attend an identification procedure. Gojra can hardly complain if he leaves clarification of the issue so late that there is insufficient time to hold a parade, so that it is his own team which has deprived him of the safeguard he might otherwise have enjoyed. Since there was no obligation to hold an identification procedure for Haq there can have been no breach of the Code. As there was no breach there was no need to direct the Jury that there had been one and no basis for telling the jury that Gojra had lost an important safeguard. The Judge's direction to the jury that such a procedure might have been 'desirable' was, in the circumstances, generous. He was under no duty to go any further and certainly under no duty to give a 'Forbes' direction.
>
> 68. At no stage before his Defence Statement was served, the Crown argued, did Gojra question the ability of either Nawaz to identify him. At no stage before trial did his solicitor invite the police to hold an identification procedure.

69. Haq had given a description of the Asian as follows: 'his skin tone and facial features, he looked like he is a nephew or cousin of (Dhir). I thought this because of his facial features looked to me like he was a relative of Dhir. I cannot say definitely just that he was related. He had very short black hair. He is young man. He is younger than Mohammed, about 23 years old'. According to Haq he was available to attend an ID procedure.

70. **(Code D3.12**) provides that whenever:

> 'i) a witness has identified a suspect or purported to have identified them prior to any identification procedure (**D3.5 to D3.10**) having been held;
>
> ii) there is a witness available who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so, and they have not been given the opportunity to identify the suspect in any of the procedures (**D3.5 to D3.10**); and
>
> iii) the suspect disputes being the person the witness claims to have seen, an identification procedure shall be held unless it is not practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence. For example, when it is not disputed that the suspect is not already well known to the witness who claims to have seen them commit the crime.'

71. DC Peel, officer in the case upon the retirement of DS Wade, gave evidence that no ID procedure was held since the police felt they had enough evidence against Gojra without it. This it is suggested was a flagrant breach of the Codes and prejudiced Gojra. The Code is designed to safeguard against mistaken identity and to test the reliability of the witness's identification. Gojra lost the chance that Haq would either not have picked out Gojra, then aged not the described 23 but 37 and looking nothing like Dhir, or would have picked out another volunteer. There being a breach of Code D it is submitted that the trial Judge should have explained within his summing up the way in which it arose, the protection it was designed to give and the potential prejudice to Gojra who had lost the safeguard of putting eyewitness identification to the test. He should have told the jury it should give the breach such weight as it thought fit: *R v Forbes* [2001] 1 AC 473, HL.

72. We have no difficulty concluding that Haq should have been invited to an ID procedure. We do not consider that the formality of the service of Gojra's Defence Statement was the *moment critique* for the realisation that identity was in issue. It must have been apparent to the police long before then, and at the latest at a bail application presented by leading counsel long before the trial and well in advance of the service of Gojra's Defence Statement, when explicitly the issue was set out. It may be that DC Peel failed to understand the obligation imposed upon the police by the Codes and certainly one of his answers in cross-examination might suggest that to be so.

73. The judge in summing up said:

> 'Criticism that Haq was not involved in an identification parade. It might have been desirable if he was but ask yourselves whether that really is relevant to your fact-finding. The Crown say it is not at all because you had a positive identification from Mohammed Nawaz. Counsel on behalf of Mr Gojra, no, he should have been invited and it is rather cavalier of Mr Peel to have told you that he did not think it was necessary, given there had been one positive identification from Mohammed.'

> **74. This in our judgment was a misdirection. It was not a question of whether it were desirable to hold a parade, rather there existed a positive obligation to hold one. Otherwise, once there was one positive identification the police could avoid the risk of another witness failing to make a positive identification, thus undermining their case. The judge's summing up may have given the impression that the failure to hold an ID procedure was of little consequence whereas he should have given a full *Forbes* direction.**
>
> 75. It is at least possible that there was, for the Crown, a somewhat embarrassing difference between the evidence of DC Peel, who told the jury that identification by Haq was not necessary since one positive identification sufficed, and DS Wade, who explained the absence of a procedure which Haq could attend by Haq's being out of the jurisdiction. Be that as it may, the consequential question is the effect on the safety of the conviction of the absence in the summing up of mention of the breaches of the Code. That counsel for Gojra had addressed the jury on it is no answer – **Gojra was entitled to the imprimatur of the court. The jury should have been told of the protection extended to a suspect by the statutory scheme. There should have been set out a reasoned path through the provisions so as to put in context the possible prejudice to Gojra as a consequence of the breach. The process did not need to be complex or wordy but it did need to be clear and unequivocal. Such guidance might have affected the jury's approach to its task and we are persuaded that on this Ground Gojra must succeed. It follows that his conviction is unsafe and will be quashed.**" [emphasis added]

For an illustration of the *Forbes* direction see page 111 of the Bench Book.

In *Pecco* [2010] EWCA Crim 972 the court (Stanley Burnton LJ, Tugendhat J, HH Judge Stewart QC) held the value of an identification procedure to be "negligible" when the appellant was the only individual depicted wearing a distinctive rose tattoo on her neck. There was no other evidence linking the appellant with a robbery and, fatal to the conviction, was the absence from the judge's directions of an explicit warning of the real danger that the identification was made because the appellant was the only person shown wearing such a tattoo (although the witness said she had relied on the appellant's facial features) and the appeal was allowed.

In *Preddie* [2011] EWCA Crim 312 convictions were quashed for a number of reasons, including breaches of PACE Code D which involved an improper street identification; the appellants should have been arrested and any identification procedure carried out at the police station (see Code D, para 3(2)(d)). The judge failed to explain the significance of the Code D infringements.

In *Brown* [2011] EWCA Crim 80 the Court of Appeal, following *George* [2002] EWCA Crim 1923, accepted that 'a defendant must not be convicted on the evidence of a qualified identification alone'.

An identifying witness who recognised the defendant was permitted to give evidence of the defendant's name based upon what he was afterwards told: *Phillips* [2010] EWCA Crim 378. Either the witness gave evidence of reputation as a common law exception to the hearsay provisions of the CJA 2001 (section 118, rule 3(c)) or in the interests of justice under section 114(1)(d).

(2) Identification from CCTV and other visual images

Bench Book page 113

(1) Comparison made by jury

Bench Book page 114

In *Rafiq Mohammed* [2010] EWCA Crim 2696 (Pitchford LJ, Henriques J, HH Judge Milford QC) the court assumed (without deciding) that a comparison of walking gait by an expert podiatrist for the assistance of the jury was a legitimate exercise founded on relevant expertise but allowed the appeal because the images were of insufficient quality for a reliable comparison to be made.

See also *Jabar* (below)

In *Otway* [2011] EWCA Crim 3 (Pitchford LJ, Cranston J, HH Judge Wide QC) the appellant challenged the "expertise" of a podiatrist to make a comparison between the walking gait of the suspect and of the appellant. The court held that upon the evidence adduced at trial the expertise was established and that fresh evidence received *de bene esse* in the appeal was not capable of undermining it. The court made observations upon the limitations of the evidence and the need for advance preparation when its admissibility is to be challenged.

(2) Recognition by witness

Bench Book page 117

In *Jabar* [2010] EWCA Crim 130 the victim had won some money in a Ladbrokes betting office. On her way home she was robbed. The police recovered CCTV evidence from Ladbrokes and from the hallway in which the robbery took place. The investigating officer circulated the images asking whether colleagues recognised the suspect in either image. Two officers made an identification of the appellant. The prosecution further invited the jury to make the comparison for themselves. The judge directed the jury that while they could make the comparison it might be "dangerous" for them to reach a conclusion unless they considered that their own conclusion was supported by the recognition of the two police officers. The court (Hooper LJ, Wyn Williams J and HH Judge Warwick McKinnon) accepted that on the authority of *Attorney-General's Reference No 2 of 2002* [2002] EWCA Crim 2373, [2003] 1 Cr App R 21 it was legitimate to invite the jury to make a comparison between a photographic image of the suspect and the defendant sitting in the dock provided that the image is "sufficiently clear" (at paragraph 19(i) Rose LJ). In the court's view the images were insufficiently clear to permit the jury to make the comparison and the court, making the comparison itself, concluded that no jury could properly be sure that the images were of the appellant. The court was also concerned that the "recognition" evidence was tainted by the absence of the procedures required by the subsequent decision in *Smith* [2008] EWCA Crim 1342, [2009] 1 Cr App R 36 (521). Hooper LJ said:

> "12. The judge was asked to rule on the admissibility of the evidence of the two officers, DC Crookston and DC Smith. In order to resolve the factual issues surrounding their recognition of the appellant a *voir dire* was held and subsequently the judge gave a ruling admitting the evidence. There was a conflict in the evidence on the *voir dire* between the officer in the case PC Hasse and DC Crookston. PC Hasse said that he had sent out an email with the still images asking anyone whether they could identify the person committing the robbery. It was his evidence that he had asked in the email a simple question whether anyone receiving the email recognised the person. He said that he received a reply to that email from DC Crookston saying that she did. If that evidence was accurate there were no emails produced to the judge to support that evidence. That we find surprising. But DC Crookston gave a different account of how it was that she was to see the images. She said that she had received a phone call from PC Hasse to ask her whether she was the officer who had arrested Mr Jabar in May 2007 and she said that she was. Thereafter PC Hasse took the CCTV film and images to the police station where DC Crookston was stationed.

> **There is no doubt that what happened thereafter was not in accordance with best practice. No contemporaneous note was taken about what was said to DC Crookston and what her reply was.** In his ruling, having regard to the conflict of evidence, the judge proceeded on the assumption, at least on the possible assumption, that DC Crookston knew that it was suggested that it was Jabar on the video. **In her words, at least on the *voir dire*, she said that she remembered PC Hasse asking her if she remembered dealing with Jabar and asking her if she would view some CCTV footage to see if she could identify him on it. We do not know whether or not the robber was pointed out to her. There were a number of young people in Ladbrokes that day, but it seems at least possible that PC Hasse did as Mrs Whitby did for us, namely identify which one was the robber.**
>
> 13. It seems to us clear, notwithstanding the submissions of Mrs Whitby, that what DC Crookston was being asked to do was to say whether she could see Mr Jabar on the video footage and on the stills. It is right to say that she gave reasons why she recognised the person and gave evidence that she was satisfied that the person on the CCTV images and stills was in fact Mr Jabar. It is sufficient to say in this case, without going into any more detail, that we are concerned about the way that the procedure was carried out. **It is right to say the judge made his decision before the recent decision of this court in *Smith* [2008] EWCA Crim 1342, [2009] 1 Cr App R 36, which sets out what procedures should be followed if officers are going to look at CCTV images and stills in circumstances like this.** It might have been very different if the evidence of PC Hasse was right and that DC Crookston identified the appellant without any prompting, but the jury could never have been sure that that is what happened because of the evidence of DC Crookston and indeed the judge did not approach the ruling on that basis."

At the very least the procedure of the exercise and the responses of the witnesses to the invitation to view the images with a view to recognition should be contemporaneously recorded. For further discussion of the procedural safeguards for recognition evidence from images and the requirement for a modified *Turnbull* direction see pages 113–121 of the Bench Book. Note also the amendments to Code D referred to at the commencement of this chapter of the supplement at page 24.

(4) Identification by voice

Bench Book page 133

Flynn and St John was distinguished in *Tamiz (aka Miah) and Others* [2010] EWCA Crim 2638 where interpreters/transcribers were not seeking to identify the speakers heard in good quality recordings as any individuals but ascribing speech to either the first speaker, X, or the second speaker, Y. The identities of X and Y were established by other evidence.

Myers [2010] EWCA Crim 3173 provides an illustration of circumstances in which voice identification may be considered more reliable than usual. The identifying witness in this case had been blind for 30 years and had learnt in that time to "use his ears as his eyes".

(5) Identification by DNA

Bench Book page 138

There have been developments in the admission of controversial DNA evidence since the decision of the Court of Appeal in *Reed, Reed and Garmson* [2009] EWCA Crim 2698. In *Broughton* [2010] EWCA Crim 549 Thomas LJ

drew attention to a misunderstanding of the court's judgment in *Reed.* The court had not said at paragraphs 48 and 74 (see pages 138–139 Bench Book) that evidence of DNA analysis was inadmissible when the quantity of available material fell below the stochastic threshold of 100–200 picograms. At paragraphs 31 and 32 of *Broughton* he said:

> "31. The appellant's submission is, we conclude, founded upon a misunderstanding of the decision in *Reed & Reed*. This court recognised that in the current state of technology there is a stochastic threshold between 100 and 200 pg above which LTDNA techniques, including the LCN process used by the Forensic Science Service (FSS), can be used to obtain profiles capable of reliable interpretation. Specifically, the court observed that above this threshold a challenge to the validity of the method of analysing LTDNA by the LCN process should not be permitted in the absence of new scientific evidence. However, the court did not hold or make any observation to the effect that below the stochastic threshold DNA evidence is *not* admissible. To the contrary, the court explained at paragraph 48:
>
> > '. . . Above that threshold (often called the stochastic threshold), the stochastic effect should not affect the reliability of the DNA profile obtained. Below the stochastic threshold the electrophoretograms may be capable of producing a reliable profile, if for example there is reproducibility between the two runs.'
>
> 32. It was therefore necessary to apply the relevant principles relating to the admissibility of expert evidence in cases of this kind which are set out in *Reed & Reed* at paragraphs 111 to 113. Although the courts of England and Wales have adopted a more flexible approach in admitting expert evidence than some jurisdictions, a court must consider whether the subject matter of the evidence is part of a body of knowledge or experience which is sufficiently well organised or recognised to be accepted as a reliable body of knowledge or experience. If the field is sufficiently well established to pass the ordinary tests of reliability and relevance, then that is sufficient. The weight of the evidence should then be established by our familiar adversarial forensic techniques. As we have set out at paragraph 9 above, the judge set out a different test; it was too low."

The judgment is also important for its analysis of scientific evidence which demonstrated that although the quantity of material was at the limit of acceptability the improvements in techniques of analysis and the interpretation of results by an experienced and practising scientist rendered the evidence reliable and, therefore, admissible. However, the judge was insufficiently explicit in his direction to the jury that they must ignore the statistical conclusions reached by the scientist unless they could be sure that her interpretation of the profile was correct (see paragraphs 39–49) and the appeal was allowed.

The same error of interpretation of *Reed* had been made by defence counsel in *C* [2010] EWCA Crim 2578. The issue was one of reliability of the analysis and results, not the quantity of material. However, the judge had been wrong to designate the pre-trial *voir dire* in which he ruled the DNA evidence to be admissible as a preparatory hearing under section 29 Criminal Procedure and Investigations Act 1996. The objections of the defence to the admissibility of the evidence should have been considered as the culmination of adherence to CPR 33 as explained in *Reed* paragraphs 131–132.

One of the issues considered in *Reed, Reed and Garmson* was possible transfer of cellular material (see Bench Book, page 139). In *Weller* [2010] EWCA Crim 1085 the court was invited to receive fresh expert evidence on the subject of the reliability of evidence of transfer given at trial. The court (Thomas LJ, Coulson J, Sir Geoffrey Grigson) emphasised the importance of current and continuing laboratory experience to the weight to be afforded to the evidence of an expert in a developing scientific field such as forensic DNA analysis. The "fresh" evidence was rejected and the appeal dismissed.

Chapter 8: Expert evidence

Bench Book page 148

Marshalling multi-disciplinary expert evidence for trial and summing up – shaken baby syndrome

In *Henderson* [2010] EWCA Crim 1269 the court (Moses LJ, Rafferty and Hedley JJ) reviewed the convictions of three appellants for the murder of infant children. The prosecution case was that the children had died from non-accidental shaking or similar causes. The appellants relied on fresh expert evidence on appeal. Following from the observations of Judge LJ in *Kai-Whitewind* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31 and Thomas LJ in *Reed, Reed and Garmson* [2009] EWCA Crim 2698 (see Bench Book pages 140, 148–153) the court provided important advice upon the preparation for trial and the handling at trial of highly specialised expert evidence. While the guidance is provided in the context of medical expertise it applies in principle whenever the jury will be required to evaluate competing and challenging expert evidence. Subject headings have been added to the following extract from the judgment of Moses LJ given on behalf of the court:

> **Does the prosecution proceed on a logically justifiable basis?**
>
> "200. A just resolution of the three trials to which these appeals relate depends upon the judge ensuring, so far as possible, that they proceed on what Judge LJ described as a logically justifiable basis (*Kai-Whitewind* [90]). In Henderson that process established, for the reasons we have given, the guilt of the appellant. By contrast, in *Butler* there was no logically justifiable basis upon which a reasonable jury properly directed could conclude that the expert evidence adduced by the Crown established guilt. Certain lessons from these appeals in relation to case management and the structure and content of the summing up may achieve the objective described by Judge LJ in prosecutions which depend solely on medical report evidence.
>
> ***Pre-trial***
>
> **The importance of advance preparation**
>
> 201. Justice in such cases depends upon proper advanced preparation and control of the evidence from the outset at the stage of investigation and thereafter. The police and the Crown Prosecution Service acknowledge the sensitivity of these cases and that the evidential picture may change as opinions from experts are obtained by either the prosecution or the defence. The approach of the prosecution in such cases has been published in *Guidance on the Prosecution Approach to Shaken Baby Syndrome Cases* by the Director of Public Prosecutions on 14 February 2006 and in updated legal guidance by the Crown Prosecution Service in relation to child abuse, access to which is obtainable on the internet.
>
> 202. The problem for the courts is how to manage expert evidence so that a jury may be properly directed in a way which will, so far as possible, ensure that any verdict they reach may be justified on a logical basis.
>
> 203. In *Kai-Whitewind* Judge LJ rejected the contention that where there is a conflict of opinion between reputable experts, expert evidence called by the Crown is automatically neutralised [84]. He emphasised that it was for the jury to evaluate the expert evidence even where the experts disagree as to the existence of the symptoms upon which their opinions were based

[88–89]. But how is a jury to approach conflicting expert evidence? We suggest it can only do so if that evidence is properly marshalled and controlled before it is presented to the jury. Unless the evidence is properly prepared before the jury is sworn it is unlikely that proper direction can be given as to how the jury should approach that evidence. Thus the jury will be impeded in considering that evidence in a way which will enable them to reach a logically justifiable conclusion.

Pre-trial hearings by an experienced nominated trial judge

204. It is in those circumstances we must emphasise the importance of the pre-trial process. First, we suggest that the judge who is to hear a particular case should deal with all pre-trial hearings, save for those in which no issue of substance is to be considered. Second, it is desirable that any judge hearing cases such as these, which depend entirely on expert evidence, should have experience of the complex issues and understanding of the medical learning. This is easy enough to achieve in the Family Division, more difficult in a criminal jurisdiction.

Robust case management essential

205. Proper and robust pre-trial management is essential. Without it, real medical issues cannot be identified. Absent such identification, a judge is unlikely to be able to prevent experts wandering into unnecessary, complicated and confusing detail. Unless the real medical issues are identified in advance, avoidable detail will not be avoided.

Narrowing the issues and admissibility

206. The process of narrowing the real medical issues is also vital in relation to another important function of the judge in advance of the trial. He should be in a position to identify whether the expert evidence which either side wishes to adduce is admissible. This assessment is as difficult as it is important. The test adopted by this court in *Harris* was described in the judgment of King CJ in *R v Bonython* [1984] 38 SASR 45: First, whether the subject matter of the opinion falls within the class of subjects upon which the expert testimony is permissible and second, whether the witnesses acquired by study or experience have sufficient knowledge of the subject to render their opinion of value in resolving the issues before the court. *Bonython* was cited by this court in *R v Reid & Ors [should read Reed, Reed and Garmson]* [2009] EWCA Crim 2698 [111(i)] with the qualification that it is important that the court acknowledges advances to be gained from new techniques and new advances in science. *Reid [Reed]* is concerned with DNA evidence but the observations of the court in relation to the admissibility of expert evidence apply with equal force to cases concerning baby shaking as it applied to the developing science of DNA. We shall return to emphasise the importance of Part 33 of the Criminal Procedures Rules 2010 in the context of these cases. We shall say no more about admissibility since the unsatisfactory state of the law has been the subject of the Law Commission Consultation paper No 190 *The Admissibility of Expert Evidence in Criminal proceedings in England and Wales*, and is likely to lead to changes in the current approach of *laissez-faire*, which the Law Commission suggests requires reform (3.14).

Is the witness really an expert?

207. Courts should be familiar with the report *Sudden Unexpected Death in Infancy: The Report of a Working Group Convened by the Royal College of Pathologists and The Royal College of Paediatrics and Child Health* chaired by Baroness Kennedy QC published in September 2004. The Kennedy report cautions against doctors using the courtroom to "fly their personal kites or push a theory from the

far end of the medical spectrum". It recommends a checklist of matters to be established by the trial judge before expert evidence is admitted, including:

1. Is the proposed expert still in practice?
2. To what extent is he an expert in the subject to which he testifies?
3. When did he last see a case in his own clinical practice?
4. To what extent is his view widely held?

208. We emphasise the third, which was of importance in these appeals. The fact that an expert is in clinical practice at the time he makes his report is of significance. Clinical practice affords experts the opportunity to maintain and develop their experience. Such experts acquire experience which continues and develops. Their continuing observation, their experience of both the foreseen and unforeseen, the recognised and unrecognised, form a powerful basis for their opinion. Clinicians learn from each case in which they are engaged. Each case makes them think and as their experience develops so does their understanding. Continuing experience gives them the opportunity to adjust previously held opinions, to alter their views. They are best placed to recognise that that which is unknown one day may be acknowledged the next. Such clinical experience, demonstrated, for example, by Dr Peters in the case of Henderson, may provide a far more reliable source of evidence than that provided by those who have ceased to practise their expertise in a continuing clinical setting and have retired from such practice. Such experts are, usually, engaged only in reviewing the opinions of others. They have lost the opportunity, day by day, to learn and develop from continuing experience.

Criminal Procedure Rules Part 33

209. *Reid [Reed]* also contains important observations as to Part 33 of what are now the Criminal Procedure Rules 2010. Those rules need to be deployed to ensure that the overriding objective to deal with criminal cases justly is achieved (1.1). The rules are designed to ensure that the expert opinion is unbiased (33.2.1) and in particular, by virtue of 33.3(1), that an expert report provides evidence of relevant experience and accreditation (a), details of any literature relied upon (b), that any range of opinion should be summarised and reasons given before the opinion of the expert (f) and that any qualifications to that opinion should be stated (g). *[See further Bench Book page 148–152.]*

Meeting of experts, areas of agreement and disagreement, minute of meeting

210. Generally, it will be necessary that the court directs a meeting of experts so that a statement can be prepared of areas of agreement and disagreement (33.6.2(a) and (b)). Such a meeting will not achieve its purpose unless it takes place well in advance of the trial, is attended by all significant experts, including the defence experts, and a careful and detailed minute is prepared, signed by all participants. Usually it will be preferable if others, particularly legal representatives, do not attend. Absent a careful record of the true issues in the case, it is difficult to see how the trial can be properly conducted or the jury properly guided as to the rational route to a conclusion. The court may be required to exercise its important power to exclude evidence from an expert who has not complied with a direction under [33.6(2), 33.6(4)]. The court should bear in mind the need to employ single joint experts where possible (33.7).

Court's power to order disclosure of previous reports and adverse judicial comment

211. In the context of Part 33 we should draw attention to the fact that defence experts are not obliged to reveal a previous report they have made in the case, still less to reveal adverse criticism made by judges in the past. But a failure to do so will not avail the defence. A judge may well be able to exercise his powers under the Criminal Procedure Rules to ensure that in advance of a trial a defence expert has made disclosure of any relevant previous reports and any adverse judicial criticism. Failure to do so would be contrary to the overriding objective and will achieve no more than to expose the expert to cross-examination on those points at trial. It is difficult to see how those acting on behalf of the defendant could permit an expert report to be advanced without satisfying themselves that previous reports have been disclosed and any adverse judicial criticism identified and disclosed. Failure to do so by either side will only cast suspicion upon the cogency of the opinion. A defence team which advances an expert without taking those precautions is likely to damage its client's case.

Raising the validation of the expertise pre-trial

212. A case management hearing may often present an opportunity for concerns as to previous criticism of an expert and an expert's previous tendency to travel beyond their expertise to be aired. While such history may not be a ground for refusing the admission of the evidence, it may well trigger second thoughts as to the advisability of calling the witness.

The route to a logically justifiable conclusion must be explained

213. As we indicated, if the case is to proceed on a logically justifiable basis, it must surely be concluded on a logically justifiable basis. A logically justifiable conclusion depends upon the structure and quality of the directions in summing up given by the judge. We have already drawn attention to the consequences in *Schmidt* [2009] EWCA Crim 838 of a summing up which failed to direct the jury as to the issues [116].

The judge must identify the relevant medical issues and the evidence should be marshalled and timetabled accordingly

214. The essential medical issues which the jury have to resolve should be clear by the time the trial starts. Those issues should have been defined and the expert evidence, identifying the sources on which the evidence is based, should also be clear before the trial starts. Thus the direction of evidence-in-chief, cross-examination and any submissions, either at the close of the prosecution case or in speeches to the jury, should be focused. Of course the evidence in such trials, as in any criminal trial, may take on a different colour as the case progresses. But we suspect that with proper advance trial management, the unforeseen is far less likely to occur in cases which depend entirely upon expert scientific evidence.

Summing up

Preparation, discussion with counsel

215. By the time the judge comes to sum up the case to the jury the issues and the evidence relevant to the issues should be understood by everyone, including the jury. While it is conventional to discuss the law with counsel, the judge should, generally, take the opportunity to discuss the issues of medical evidence before the time comes for counsel to address the jury.

The judge will thus be in a position carefully to structure his summing up to those issues. He will be able to identify which evidence goes to resolution of those issues. He should generally sum the case up to the jury issue by issue, dealing with the opinions and any written sources for those opinions issue by issue, unless there is good reason not to do so. Merely repeating the expert evidence in the order in which that evidence was given serves only to confuse. It is pointless, literally. It deflects the jury from their task. It does not save them, as they must be saved, from avoidable details. It blurs their focus on evidence going to the real issues. The summing up should enable anyone concerned with an adverse verdict to understand how it has been reached.

216. In the Family Division judges will set out the features of the expert evidence on which a judgment is required and those factors which form the basis of the judgment they have reached. So too a jury should be confronted with the issues it must decide and the factors they should consider as the basis for judgment, one way or the other. Anyone reading a summing up composed in that way should be able to understand the route followed by the jury in reaching its verdict.

Shaken baby cases – the possibility of an unknown cause

217. There are two features of the content of a summing up in cases such as these which, we suggest, are important. First, a realistic possibility of an unknown cause must not be overlooked. In cases where that possibility is realistic, the jury should be reminded of that possibility. They should be instructed that unless the evidence leads them to exclude any realistic possibility of an unknown cause they cannot convict. In cases where it is relevant to do so, they should be reminded that medical science develops and that which was previously thought unknown may subsequently be recognised and acknowledged. As it was put by Toulson LJ, "today's orthodoxy may become tomorrow's outdated learning" (*R v Holdsworth* [2008] EWCA Crim 971 at [57]). In cases where developing medical science is relevant, the jury should be reminded that special caution is needed where expert opinion evidence is fundamental to the prosecution [57].

Assisting the jury with evaluation of competing evidence

218. Second, the jury need directions as to how they should approach conflicting expert evidence. *Kai-Whitewind* teaches that the mere fact that expert differs from expert is no ground for withdrawing the case from the jury. But how is the jury to approach such a conflict? To suggest, in cases where the expert evidence is fundamental to the case, that the jury should approach that expert opinion in the same way as they do in every other criminal case, is inadequate. It is difficult enough for Family Division judges to express their reasons for accepting or rejecting conflicting expert evidence, despite their experience. Juries, we suggest, should not be left in cases requiring a higher standard of proof to flounder in the formation of a general impression. A conclusion cannot be left merely to impression. In the appeal of Henderson, Dr Leestma gave, if we may say so, a most beguiling impression, courteous and understated as it was. But there were, as we have concluded, sound reasons relating to his experience in comparison with Dr Al-Sarraj for rejecting what he told us. Lacking the experience of Family Division judges, a jury needs to be directed as to the pointers to reliable evidence and the basis for distinguishing that which may be relied upon and that which should be rejected.

219. In *Harris* the court pointed out the assistance given by Cresswell J [271]. That guidance is of assistance not only to judges, practitioners and experts themselves, but also to a jury. If the issue arises, a jury should be asked to judge whether the expert has, in the course of his evidence, assumed the role of an advocate, influenced by the side whose cause he seeks to advance. If

> it arises, the jury should be asked to judge whether the witness has gone outside his area of expertise. The jury should examine the basis of the opinion. Can the witness point to a recognised, peer-reviewed, source for the opinion? Is the clinical experience of the witness up to date and equal to the experience of others whose evidence he seeks to contradict?
>
> 220. Of course, none of these features will determine the case. Not all of these features are even relevant in every case. But we seek to emphasise the importance of guiding the jury as to the proper approach to conflicting opinions. An overall impression can never be the substitute for a rational process of analysis. The jury are not required to produce reasons for their conclusion. Nevertheless, the judge should guide them by identifying those reasons which would justify either accepting or rejecting any conflicting expert opinion on which either side relies.
>
> 221. We acknowledge the danger of being over-prescriptive in relation to directions to the jury. But judges, we suggest, need to remember that their directions are part of the means by which they ensure that a case which depends on expert evidence proceeds to its conclusion on a logically justifiable basis."

It is suggested that competing expert evidence from different areas of expertise, whether medical or not, will require the judge to identify the constituent parts of the scientific evidence which leads the prosecution to advance its "logically justifiable conclusion". It will be necessary for the judge to identify the areas of scientific dispute, to summarise the evidence for and against the proposition advanced and, where appropriate and in suitably balanced terms, to assist with the evaluation of the evidence. Jurors have, time and again, indicated their gratitude for written explanatory material which in such a case might include a list of issues accompanied by the names of the experts who have contributed to each one. In this way jurors may more readily follow the judge's summary both of the issues and the evidence required to resolve them.

Science and expertise – podiatry

See *Rafiq Mohammed* [2010] EWCA Crim 2696 and *Otway* [2011] EWCA Crim 3 **(Chapter 7: Identification evidence (2) Identification from CCTV and other visual images** at page 26 above).

Chapter 9: Corroboration and the special need for caution

Bench Book page 155

Perjury

In *Cooper* [2010] EWCA Crim 979 the appellant had given evidence at his trial that he would not have been using a hand held mobile telephone in his car at the time of an alleged motoring offence because he had a hands-free system installed. He produced a letter from the installer (W) to confirm his installation. However, W had, when composing the letter, simply accepted the appellant's assertion as to the installation date. Subsequent investigation revealed that the date accepted was erroneous. W was called to give evidence at the appellant's subsequent trial for perjury. W said he had since checked his work sheets which on analysis showed that the system had been installed two months after the relevant motoring incident. The judge directed the jury that they could treat the business records as corroboration. The Court of Appeal (Lord Judge CJ, David Clarke and Lloyd Jones JJ) held that since the records of W's work were prepared by W himself they did not represent a source of evidence independent of the witness. There was no corroboration and the appeal was allowed.

Evidence of accomplice received after section 73 SOCPA 2005 agreement

In *Daniels and Others* [2010] EWCA Crim 2740 the principal witness for the prosecution was an accomplice, Stewart, who had made an agreement under section 73 Serious Organised Crime and Police Act 2005. The appellants contended that the prosecution's decision to call Stewart was an abuse of the process of the court and should, alternatively, be excluded under section 78 Police and Criminal Evidence Act 1984. The court (Richards LJ, Griffith Williams J, HH Judge Rook QC), having examined these issues together with the effect of legal professional privilege for Stewart and (at paragraphs 42 and 45) the strength of the warnings given by the trial judge to the jury, dismissed the appeal. The direction given by Langstaff J concerning S's motivation for giving evidence, approved by the court, was:

> "Do not lose sight of the fact that some witnesses may have reasons of their own for being not wholly truthful. In particular, take care when you are looking at the evidence of Sonny Stewart. He was 'One of the gang'. He has done what has been described as the deal of the decade if not of the century, got away with murder, engaged in a deal which the Prosecution are said have 'Done a deal with the devil', two of the phrases. You may think that if he had been in the dock you would have been asking whether he was guilty of murder.
>
> Well, he offered a plea to manslaughter. Plainly, you may think, the prosecuting authorities accepted that in order to put his evidence before you. They do so on the basis that he promised, in a form of agreement which is authorised by an Act of Parliament, the SOCPA agreement, . . . to tell the whole truth. That does not mean to say he has told the whole truth, it is for you to decide the extent to which he has done. It has been strongly suggested that to secure the deal he might have emphasised some other defendants' roles or even in the case of Daniels, invented them. Does he have a reason to do so? Has he minimised his own role? Your distaste for the procedure does not matter, you must avoid prejudice. But you should be careful of the fact that he might have interests of his own to serve. He did not mention a word of Johnny Daniels's involvement on the day he was first interviewed by the police to see if they would enter into an agreement, yet the

very next morning almost the first thing he did was to volunteer his name. Look carefully at why that was. Do you accept that the reason he did not mention Daniels on the 16th June last year, was that he was worried, scared about what he thought Daniels might do to him and his family? Or was it because he wanted to offer a name to secure a beneficial deal?"

Chapter 10: Good character of the defendant

Bench Book page 161

A Penalty Notice for Disorder (a form of Fixed Penalty Notice) from a police officer giving the recipient/defendant the option of paying the penalty or going to court is not a conviction or, as distinct from a caution, an admission of guilt even if the fine is paid, and should not be treated as impugning a defendant's good character: *Hamer* [2010] EWCA Crim 2053.

Page 162

In *Remice* [2010] EWCA Crim 1952 the Court of Appeal (Maurice Kay LJ, Calvert-Smith and Cranston JJ), applied paragraph 57(2) and (3) of the guidance in *Gray* in holding that when the judge, notwithstanding old or irrelevant convictions, exercises his judgement to treat the defendant as of good character, the defendant is entitled to an unqualified good character direction. It is not appropriate to withhold a *direction* by leaving it to the jury to decide whether to treat the defendant as of good character or not, even with a "steer". The court referred to decisions to the same effect in *R v M(CP)* [2009] 2 Cr App R 3 (footnote 309, page 163 Bench Book) and *Baquari* [2010] EWCA Crim 1279. It is for the judge, in accordance with the guidance in *Gray*, to make the decision whether a good character direction should be given. Having decided that the good character direction is due it should be given in unmodified form unless one of the exceptions applies. In *Hall* [2011] EWCA Crim 159 the court observed that there had been no change in emphasis as to the requirements of the good character direction between the January 2009 Specimen Direction and the March 2010 Bench Book.

The judge may be faced with the prospect of giving both a conditional or qualified good character and a bad character direction in respect of the same defendant, as to which see **Chapter 11** next.

Good character in an historical sexual abuse case

In *GJB* [2011] EWCA Crim 867 (Stanley Burnton LJ, Henriques and Foskett JJ) the court held that the circumstances (where a considerable period had elapsed between the behaviour alleged and the complaint made to the police) required the judge to emphasise the importance of the defendant's good character. The jury should have been directed that the fact the defendant had committed no similar offence with children during the intervening 10 years was an aspect of his good character to which they should have specific regard (see Bench Book pages 33–34).

Chapter 11: Bad character of the defendant

Bench Book page 171

Directions generally

Good character and bad character in the same summing up

The issue which arose in *Bill* [2010] EWCA Crim 612 (Laws LJ, Beatson and Blake JJ) must be one which will arise in other cases:

What is the appropriate form of a good character and a bad character direction when the defendant was admittedly of good character at the time when the alleged (but disputed) reprehensible behaviour took place?

In *Bill* the appellant, a man with no convictions, had been charged with the attempted abduction of a five-year-old child. He alighted from his car, which he had stopped in the middle of the road, left the door open, approached the child and asked her if she had seen his cat. He engaged her in further conversation. By that time the child was also in the middle of the road. Her uncle rounded the corner and told her to get on the pavement. The incident went no further but the appellant returned to his car and continued to drive slowly around the estate. When arrested the appellant admitted that he had been driving around the estate but said he had been trying to free up his brakes. When the brakes were tested no fault was detected. In evidence he said that he could not remember the child and had no recollection of speaking to her.

The prosecution successfully applied to adduce evidence of the appellant's behaviour on previous occasions under section 101(1)(d) Criminal Justice Act 2003. Two years before, a report was made to the police, supported by reputable witnesses, that the appellant had been seen loitering at a children's playground, apparently watching the children. The appellant had been employed by the firm which installed the playground and the appellant claimed he was just taking a professional interest in the work he had done. The Court of Appeal upheld the judge's decision to admit the evidence. Even if it was not evidence of "propensity" to abduct a child it was evidence of capable of being similar fact evidence within the pre-Act meaning given to such evidence in *DPP v P* [1999] 2 AC 447.

In his summing up the judge first informed the jury why they had heard the evidence of the appellant's previous behaviour, namely:

> ". . . knowing it may help you to resolve an issue which has arisen, namely of whether the defendant has a propensity to commit the kind of offence with which he is now charged, namely attempting to abduct a child. The prosecution say that the evidence . . . demonstrates that he has an unhealthy interest in children and therefore it makes it more likely that what he was doing . . . was attempting to abduct a child. You must of course . . . keep it at the forefront of your minds at all times that Mr Bill was never convicted of any offence arising out of [the earlier incidents]. In fact he was never prosecuted for any offence . . . [P]roviding you exercise caution and bear in mind those points [i.e. the appellant's innocent explanation] you may use the evidence of what the defendant did . . . if you think it helpful to do so, when considering the issue of whether he has a propensity to commit the offence with which he is now charged."

The judge proceeded to inform the jury, as in *Chohan* (see Bench Book page 176), that they could also take into account the previous behaviour when considering the appellant's credibility as a witness:

> "In addition you may also take the . . . evidence into account in [another way] if you think it right to do so. [Y]ou may take it into account when deciding whether or not the defendant's evidence to you was truthful. A person, if he has a previous bad character, may be less likely to tell the truth but it doesn't follow that he is incapable of doing so. You must decide to what extent if at all the evidence . . . helps you when judging his evidence . . . ."

Next the judge reminded the jury of the similarities in the conduct observed on each occasion and proceeded to provide the jury with the standard *good* character direction. Laws LJ pointed out that the juxtaposition of these directions did not sit well. The two credibility directions were contradictory, as were the two propensity directions. Furthermore:

> (1) it was doubtful whether the evidence of past behaviour was *capable* of supporting an inference of propensity to abduct children (although no finding was made); and
>
> (2) the evidence of past behaviour could not, independently, support the assertion that the appellant was less likely to tell the truth. It was a direction which should not have been given in the circumstances of the case and gave rise to the reasonable possibility that the jury convicted the appellant because they relied on the credibility direction.

This is an example of a case such as was contemplated by Lord Phillips CJ in *Campbell* [2007] EWCA Crim 1472 when the particular previous behaviour alleged added little or nothing to the issue of the defendant's truthfulness. If the defendant had an unhealthy interest in children he was probably not telling the truth. If he did not he was probably telling the truth. Laws LJ continued:

> "26 . . . **Assuming that the appellant was entitled to a conventional good character direction, the judge's task was to configure such a direction with the need to guide the jury as to the use they might make of the [bad character] evidence.** In this task great care was needed. It was not sufficient simply to include in the summing up specimen directions from the Judicial Studies Board without an analysis in the judge's mind reflected in his text of how the various matters with which he had to deal should fit together." [emphasis added]

There was, in the respectful opinion of the writer, a further problem with the judge's propensity directions. If the evidence was of propensity to commit the offence charged at all (which it was probably not) the jury had, first, to consider whether they were sure the defendant's innocent explanation was untrue and, second, whether they were sure that the propensity alleged by the prosecution was proved. Only then was the jury entitled to consider the third issue, whether and to what extent that propensity assisted them to resolve the defendant's guilt of the offence charged (see Bench Book pages 177–178). It is not sufficient to present the jury with a summary of the alleged bad character evidence and ask the jury to exercise care before deciding whether and to what extent it helps them.

However, it is suggested that the evidence of the appellant's past behaviour *was* evidence capable of rebutting the appellant's implied defence of innocent association with the child he was accused of attempting to abduct (implied because his principal defence was that there was no conversation with the child). The jury, if they rejected the appellant's explanation, might conclude that he had an unhealthy interest in children – a disposition towards misconduct relevant to an important matter in issue between the defendant and the prosecution but short of evidence of a propensity to abduction of children (section 101(1)(d)) (as to which see also *D, P and U* at page 42 below).

The following illustration is an attempt to "configure" the good and bad character directions in a way which assists the jury to approach the issues sequentially and correctly.

Illustration – *good and bad character directions*

The defendant is a man of middle years, of good character, with no previous convictions recorded against him. Good character is not a defence to the charge he faces but it is relevant to your consideration of the case in two ways. First, the defendant has given evidence. His good character is a positive feature of the defendant which you should take into account when considering whether you accept his evidence. Secondly, the fact that the defendant has not offended in the past may make it less likely that he acted as is now alleged against him. What weight should be given to the defendant's good character on the facts of this particular case is a decision for you to make. In making that assessment you are entitled to take into account everything you know about him. This becomes particularly relevant when you have reached a conclusion about the evidence of the defendant's earlier behaviour.

Let me explain. You have heard that on earlier occasions, some two years ago, Mrs X and Mr Y saw the defendant watching children in the playground which he had helped to construct. What they saw so concerned them that they contacted the police. They explained the reason for their concern. At the time, the defendant gave an innocent explanation for his conduct, an explanation which he has repeated in evidence. You must first decide whether you are sure the defendant was watching the children because he had an unhealthy, in other words a sexual, interest in them or it may be, as the defendant told you, he was merely taking a personal pride in the work he had done. When you make that assessment you should bear in mind the defendant's good character in the two ways I have described: a man of good character is more likely to tell the truth and is less likely to behave inappropriately towards children. If you consider that the defendant's interest in the playground was or may have been innocent, this evidence ceases to be relevant and you can and should forget all about it.

But, if you are sure that the defendant, despite his previous good character, was taking a sexual interest in the children, it is evidence which is relevant to the issue whether the defendant committed the attempted abduction. The prosecution suggests that if the defendant has a sexual interest in children that interest makes it more likely that his conversation with G about the cat was not innocent at all but it was the beginning of his attempt to abduct her.

That is a proper approach to the evidence but I emphasise that it is a judgement only you can make. You should bear in mind the lapse of time between the two events; and remember, if you were to find the defendant behaved inappropriately towards children on a previous occasion, it does not follow that he must have behaved as he is charged in the indictment.

Lastly, you must consider carefully whether the evidence does or does not make it more likely that the defendant was trying to abduct G. If it does, be careful not to over-emphasise the importance of his past behaviour. It is what happened on this occasion and with what intent which matters.

The second way in which this evidence becomes relevant is in your assessment of the weight you should give to the defendant's good character. You must still bear his good character in mind when considering whether he is guilty of attempted abduction, but if you have concluded so that you are sure that he has an unhealthy interest in children, that fact becomes part of your knowledge of his character. You may conclude, if you think it right to do so, that in these circumstances the importance of his good character would be reduced or even removed altogether.

A similar situation arose in *Ferdhaus* [2010] EWCA Crim 220 (Maurice Kay LJ, Mrs Justice Sharp, Sir Christopher Holland). Two co-accused, Hussain and Ferdhaus, were running cut-throat defences to allegations of an insurance fraud whose object was to make false claims arising out of fake road traffic accidents. One accused (Hussain) wished to rely against the other (Ferdhaus) on unconvicted previous behaviour revealed in documents produced late in the day by the prosecution. The judge admitted the evidence under section 101(1)(e) Criminal Justice Act 2003 and in his summing up he explained how the evidence may be relevant to the dispute between the accused. Both accused had minor previous convictions and the judge had already agreed to give (and did give) the jury a good character direction. One of the appellant's complaints concerned the contradiction between the two directions. Maurice Kay LJ said at paragraph 20:

> "20. We should refer very briefly to the complaint that the jury would have been confused by the combination of the bad character direction and the good character direction. We do not think that any real prejudice has been established in relation to that. In one sense, the appellant received more than he was entitled to. The judge would have been entitled to tell the jury that if they found the bad character evidence proven, then the reliance on the appellant's otherwise accepted good character might not have been so appropriate. However, he did not give such a direction, probably because at no stage did the prosecution ever seek to rely upon the bad character evidence. Accordingly, the appellant, as well as Hussain, in confronting the prosecution case against them had the benefit of a full character direction."

It would seem that the court had in mind that the judge could, in terms similar to the illustration at page 41 above, have invited the jury to adopt a two-stage approach. If they were persuaded of the propensity, the weight to be given to the good character of the appellant was correspondingly reduced. (See also section 101(1)(e) at page 45 below.)

(2) Section 101(1)(d): Evidence relevant to an important matter in issue between the prosecution and the defence

Bench Book page 175

Propensity evidence is admissible in proceedings under section 4A Criminal Procedure (Insanity) Act 1964 when the issue is whether the accused person, unfit to plead, committed the acts alleged to constitute the offence: *Creed* [2011] EWCA Crim 144.

In *D, P and U* [2011] EWCA Crim 1474 the court (Hughes LJ, Vice-President, Roderick Evans and Gloster JJ) considered three cases in which the trial judge, in trials for offences of a sexual nature against children, had admitted in evidence the discovery in the defendant's possession of pornographic images of children (without showing the images to the jury). The Vice-President repeated the need to ensure that the basis for admission of the evidence was properly established and the need to analyse the purpose for which the jury could consider the evidence (see Bench Book pages 167 and 168 'Handling of bad character issues' and 'Purpose for which evidence may be used'). He said:

> "3 . . . We emphasise that it is necessary to address separately the different possible gateways for the admission of bad character evidence to be found set out in section 101(1). It is of course true that if evidence is admissible through any gateway, it may then be considered by the jury in any way to which it is legitimately relevant, whether it has primarily been admitted on that basis or not see *R v Highton and others* [2005] EWCA Crim 1985, [2006] 1 Cr App R 7 at 125, paragraph [10]. That, however, does not relieve the court of the duty of establishing which gateway or gateways are applicable. That exercise must be undertaken. It must be undertaken, first, in order to ensure

that bad character evidence is only admitted when the statute allows it. It must be undertaken, secondly, because the decision as to the relevant gateway or gateways will normally be of great help in identifying the way or ways in which the evidence can legitimately be used that is to say the issues to which it is relevant. As *Highton* itself makes clear, it is not the law that once bad character evidence is admitted, having by definition passed at least one gateway, it can thereupon be used by the jury in any way the jury chooses. On the contrary, it may be used on any issue to which it is legitimately relevant but not otherwise."

As to the admissibility of such evidence under gateway (d) and its treatment in summing up, the Vice-President continued:

"6 . . . Evidence that a defendant collects or views child pornography is of course by itself evidence of the commission of a criminal offence. That offence is not itself one involving sexual assault or abuse or indeed of any sexual activity which is prohibited. It is obvious that it does not necessarily follow that a person who enjoys viewing such pictures will act out in real life the kind of activity which is depicted in them by abusing children. It follows that the evidence of possession of such photographs is not evidence that the defendant has demonstrated a practice of committing offences of sexual abuse or assault. That, however, is not the question for the purposes of gateway D. The question under gateway D is whether the evidence is relevant to an important matter in issue between the defence and the Crown. Is it relevant to demonstrate that the defendant has exhibited a sexual interest in children?

7. It seems to us that this is a commonsense question which must receive a commonsense answer. The commonsense answer is that such evidence can indeed be relevant. A sexual interest in small children or pubescent girls or boys is a relatively unusual character trait. It may not be quite as unusual as it ought to be, but it is certainly not the norm. The case against a defendant who is charged with sexual abuse of children is that he has such an interest or character trait and then, additionally, that he has translated the interest into active abuse of a child. The evidence of his interest tends to prove the first part of the case. In ordinary language, to show that he has a sexual interest in children does make it more likely that the allegation of the child complainant is true, rather than having coincidentally been made against someone who does not have that interest. For those reasons, we are satisfied that evidence of the viewing and/or collection of child pornography is capable of being admissible through gateway D. **We emphasise that it does not follow that it is automatically admissible. There is nothing automatic about any of these bad character provisions. They require an exercise of judgment, case-specific, in every trial. Moreover, to say that the evidence is capable of admission under gateway D is only the first part of the exercise for the court. The court must also direct its attention to whether it is unfair to admit the evidence and of course in some cases it might be.**

8. The evidence with which we are dealing is evidence of propensity in the true sense of that word, by which we mean evidence of a character trait making it more likely that the defendant did indeed behave as charged. We are conscious that in the shorthand of the criminal courts the word 'propensity' is sometimes applied, no doubt conveniently, to the case where there is evidence that the defendant has previously committed an offence similar to that which is now charged. Propensity may of course be proved by evidence of the previous commission of such an offence, and it may well be that that is the kind of propensity evidence most frequently adduced, but it is not limited to that kind of material. On the contrary, it may include any evidence that demonstrates that it is more likely that the defendant did indeed behave as he has been charged. **It is however important that juries should be reminded that they cannot proceed directly from the possession of photographs to active sexual abuse. They must ask themselves whether this**

further step is proved so that they are sure. The exact direction will depend on the facts of each individual case. But it may be particularly important to remind the jury that the extra step does not follow and must be proved. One example might be a case where a young child had discovered the existence of the pornography and there is a realistic possibility that he or she has, as a result of seeing it, either invented or imagined an act of abuse against him or herself. That is but one example.

9. Accordingly, we recommend that when photographs of this kind are admitted for the purpose of demonstrating a sexual interest in children the jury should be told in terms that that is the issue to which it is relevant. As will be seen the juries in the cases before us were told that the evidence was relevant to precisely that question.

10. We also recommend, although the form of the summing up must be governed by the facts and circumstances of each case, that judges should consider including a warning to juries, in a case where there is such a risk, not to allow any revulsion at the use of child pornography to overcome the duty as jurors to examine carefully the question of whether the evidence shows that the interest has been translated beyond viewing and into active abuse.

11. In none of the cases before us were the photographs actually shown to the jury. It seems to us that that is a sensible practice which should generally be adopted. It is unnecessary that the jury should see the photographs and it would carry the risk, if they did, that some at least might find it difficult to avoid the effects of distaste. It seems to us likely that in most cases a suitable description of the general contents of the photographs which had in fact been found can be agreed and presented to the jury. Care should be taken that that description should be as neutral and dispassionate as possible. In one of the cases before us the jury was given, by agreement, the descriptions of categories of pictures to be found in the Copine scale. That is one way of doing it, but it seems to us better as a general proposition if what the jury is told by agreement to be linked to the photographs actually found, rather than to a more generalised description of categories." [emphasis added]

The Vice-President went on to caution against the blanket admission of such material. He said:

"19 . . . our general conclusion is that the possession of child pornography may, depending on the facts of the case, demonstrate a sexual interest in children which can be admissible through gateway D upon trial for offences of sexual abuse of children. It will not always be so. There may be a sufficient difference between what is viewed and what is alleged to have been done for there to be no plausible link. It may be right to exclude the evidence as a matter of discretion, particularly if its probative value is marginal. But that it is capable of being admitted under gateway D we entertain no doubt."

Finally, the court noted that judges had also been invited to admit such evidence through gateways (c) and (f). Trial judges should beware of admitting the evidence through other gateways when the realistic purpose of the evidence is to establish a relevant propensity.

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

Bench Book page 192

See *Ferdhaus* [at page 42 above]. The appellant complained that the judge's directions about the effect upon the appellant of the bad character evidence relied on by his co-accused Hussain were inadequate. The court found that they were adequate in the circumstances. In *Ferdhaus* the prosecution placed no reliance on the propensity evidence but if it had there would have been a problem for the judge created by the burden and standard of proof. From Hussain's point of view, if the evidence *may* establish a relevant propensity in Ferdhaus to commit similar offences, the jury should assume Ferdhaus's propensity for the purpose of deciding whether the prosecution has proved its case against Hussain. If the prosecution had been entitled to rely on the same evidence to establish Ferdhaus's propensity, a different standard would have applied. Before the jury could have treated the evidence as support for the prosecution's case against Ferdhaus, they had to be *sure* that the propensity was established. As Laws LJ put it in *Bill* [page 39 above] the directions need to be "configured" to bring clarity and fairness. The following are illustrations which may assist when either one or the other of these situations arises *(exceptionally for a direction on the evidence, a written direction might be prudent)*.

Illustration – ***previous bad character of defendant introduced with leave by co-accused – prosecution not relying upon the bad character evidence***

You have heard evidence to the effect that the defendant Ferdhaus has on previous occasions submitted insurance claims which were fraudulent. You will recall that counsel on behalf of the prosecution told you that he placed no reliance on that evidence. Therefore, when you are considering the case for the prosecution against Mr Ferdhaus, you must put the evidence of his alleged previous behaviour to one side and forget about it. It forms no part of the prosecution case against him.

However, the evidence does become relevant when you are considering the prosecution case against Mr Hussain. Mr Hussain asserts that Mr Ferdaus's previous behaviour makes it more likely that on the occasions now charged in the indictment Mr Ferdaus was acting dishonestly while he, Mr Hussain, was not. The reason it is said that these previous transactions help you is that the defendants are now blaming each other. Mr Hussain is saying: "It was not me who was acting dishonestly, it was him." Of the two defendants it is more likely that Mr Ferdhaus is guilty.

If, therefore, you consider that Mr Ferdhaus was or may have been acting fraudulently on those earlier occasions you should take that finding into account when you are considering the reliability of Mr Ferdhaus's allegations against Mr Hussain and when judging whether the prosecution has proved its case against Mr Hussain. The prosecution suggest that, even if Mr Ferdhaus did act or may have acted fraudulently in the past, that would provide you with no help on the issue whether Mr Hussain is guilty of these offences because, say the prosecution, the evidence shows that they were acting together and are both guilty. You must decide whether those previous claims made by Mr Ferdaus provide you with any assistance in Mr Hussain's case and, if so, to what effect.

Illustration – ***previous bad character of defendant introduced with leave by co-accused – prosecution now rely on the same evidence as evidence of propensity***

You have heard evidence to the effect that the defendant Ferdhaus has on previous occasions submitted insurance claims which were fraudulent. That evidence was introduced by counsel on behalf of Hussain. However, Mr A now submits to you that this evidence supports the prosecution case against Mr Ferdhaus that he committed the offences charged in the indictment. I am going to deal first with the effect of those previous transactions on the prosecution case against Mr Ferdhaus. You may treat Mr Ferdhaus's previous transactions as evidence supporting the prosecution case against him, but only if you are sure that (1) they were fraudulent transactions, and (2) they establish that Mr Ferdhaus has a propensity or a tendency to commit such offences, and (3) his propensity makes it more likely that he committed the current offences of fraud charged in this indictment. If you are sure, be careful not to over-value the evidence. Remember that it does not follow that just because a person has behaved badly in the past he has done so on this occasion. If you are not sure, you must ignore these past transactions when you are considering the prosecution case against Mr Ferdhaus.

I now turn to the relevance of the past Ferdhaus transactions when you are considering Mr Hussain's case. His case is that Mr Ferdaus's previous behaviour makes it more likely that on the occasions now charged in the indictment Mr Ferdaus was acting dishonestly while he, Mr Hussain, was not. The reason it is said that these previous transactions help you is that the defendants are now blaming each other. Mr Hussain is saying: "It was not me who was acting dishonestly, it was him." If, therefore, you when you are considering Mr Hussain's case you conclude that Mr Ferdhaus was or may have been acting fraudulently on those earlier occasions you should take that finding into account when judging whether the prosecution has proved its case against Mr Hussain.

The prosecution suggest that, even if Mr Ferdhaus did act or may have acted fraudulently in the past, that would not help you decide whether Mr Hussain is guilty of these offences because, say the prosecution, they were acting together and are both guilty. You must decide whether those previous claims made by Mr Ferdaus provide you with any assistance in Mr Hussain's case and, if so, to what extent.

(5) Section 101(1)(g): Defendant's attack on another person's character

Bench Book page 199

In *Higgins and Guy* [2010] EWCA Crim 308 the appellants made an attack on the character of the complainant. The court (Hooper LJ, Mackay and Griffith Williams J) found that the trial judge had in his summing up exceeded the boundary of legitimate comment upon the effect of the appellants' own bad character upon the credibility of their accusations against the complainant, but the evidence was so strong that the convictions were safe. See in particular paragraphs 48–53 in which Hooper LJ explored the boundary of legitimate comment.

Clarke [2011] EWCA Crim 939 (Elias LJ, Mackay and Hickinbottom JJ) was a case in which the judge admitted evidence of the defendant's previous convictions under section 101(1)(g) because he had made an attack upon the character of the complainant. On appeal he complained that the evidence provided no assistance to the jury as to his guilt (as evidence of propensity) and should for that reason have been excluded under section 101(3). The Court of Appeal explained the limited purpose for which the evidence had been admitted following *Singh* [2007] EWCA Crim 2140, *George* [2006] EWCA Crim 1652, *Bahanda* [2007] EWCA Crim 2929 and *Lamaletie and Royce* [2008] EWCA Crim 314. The evidence was relevant to the credibility of the evidence respectively of the complainant and the defendant. The judge, rightly, directed the jury that they could *not* use the evidence as any proof of guilt.

Chapter 12: Cross-admissibility

Cross-admissibility and bad character

Bench Book page 202

In *Rakib* [2010] EWCA Crim 870 the court (Elias LJ, Mackay and Hickinbottom JJ) approved the judge's direction to the jury that, if they were sure that the defendant had on the count 1 occasion exposed his penis to the complainant, they were entitled to take that finding into consideration when deciding whether he had exposed himself to the *same* complainant on the count 2 occasion. Giving the judgment of the court, Hickinbottom J said:

> "13. The other primary issue for the jury to consider was whether they were sure that, on the second occasion, the appellant exposed himself, as the offence required. Particularly given his case of non-presence, that issue relied exclusively upon the evidence of the complainant B. The jury found the appellant guilty on count 1: and it is implicit in that verdict that they were satisfied that, on that first occasion, the appellant was masturbating his exposed penis, with music playing, with the intent that someone should be attracted to see him, and with the intent that alarm and/or distress should be caused thereby. That was patently relevant to the issue as to whether he was exposing himself on the second occasion.
>
> 14. With respect to Mr Leake, we do not consider this to be a *Chopra* case, in which the prosecution rely upon the evidence of various matters mutually to support each other (*Chopra* [2006] EWCA Crim 2133; [2007] 1 Cr App R 16). This was a simpler case. If the jury were satisfied that the appellant exposed himself and committed the offence in count 1, then, clearly, that was a matter they could take into account when they considered whether they were satisfied that he exposed himself on the second occasion. The prosecution case was that, if the jury were satisfied on count 1, the circumstances and modus operandi of count 2 were so very similar – location, music to attract attention and hand movement – that they could be sure that he was doing the same as he was on the first occasion, including the exposure.
>
> 15. While positive findings against the appellant as to exposure on count 1 may well have fallen within the definition of 'bad character' within section 98 of the Criminal Justice Act 2003, this was not a case in which any deep consideration or complex direction was necessary or indeed appropriate. Such evidence was patently admissible under section 101(1)(d): and it was for the judge to ensure that it was dealt with properly, fairly and economically."

On the facts of the case it was the court's view that the bad character direction was not required. It seems clear, however, that the prosecution was relying upon the propensity of the defendant to expose himself (as proved in count 1) as evidence which made it more likely that he had exposed himself again (as alleged in count 2). We recommend caution. This decision should not be treated as authority for the proposition that a bad character direction is not generally required when the probative value of the evidence arises from its capacity to establish propensity.

Need for collusion/contamination direction in cross-admissibility cases

See *N (H)* [2011] EWCA Crim 730 (page 81 below).

Chapter 13: Bad character of a person other than a defendant

Bench Book page 210

In *Braithwaite* [2010] EWCA Crim 1082, Hughes LJ, Vice-President, at para 12 of his judgment provided assistance on the important features of section 100. Note the requirement for the judge's assessment under section 100(1)(b) whether the evidence in question "*substantially* goes to show (prove) the point which the applicant wishes to prove on the issue in question".

See also *Brewster and Cromwell* [2010] EWCA Crim 1194 (Pitchford LJ, Maddison and Macduff JJ) in which, following *Stephenson*, the court accepted that evidence of a witness's previous convictions might be admissible for the purpose of seeking to undermine the creditworthiness of a witness notwithstanding the convictions could not establish a propensity for untruthfulness (but note criticism in Crim LR December 2010).

Bench Book page 211

In *Miller* [2010] EWCA Crim 1153 the trial judge permitted prosecuting counsel to suggest to a witness called on behalf of the defendant that he was guilty of criminal offences with which he had been charged but upon which he had not been tried. The purpose was to obtain from the witness a response to the prosecution's assertion that he had an improper motive for giving evidence favourable to the defendant. The judge accepted an undertaking from the prosecution that it would be bound by the witness's answers. The witness denied guilt of the offences with which he had been charged. The court (Pitchford LJ, Maddison and Macduff JJ) held that leave to put these questions should not have been given since in the circumstances they were incapable of providing important explanatory evidence or evidence of substantial probative value. However, the judge in his summing up had given an emphatic direction to the jury that they should place no value upon the questions or the answers and the verdict was safe.

Chapter 14: Hearsay evidence

Bench Book page 212

What is hearsay?

At last, a definitive pronouncement by the Court of Appeal (Hughes LJ, Vice-President, Treacy and Edwards-Stuart JJ) as to the meaning of section 115 of the Criminal Justice Act 2003 was given in *Twist and others* [2011] EWCA Crim 1143. The occasion for the court's analysis was the content of text messages sent to and by the defendant, the purpose of admission of the evidence being to prove not the statement made in the messages but, by inference, an underlying and common understanding between the sender and the recipient. The court was thus dealing with the problem raised by the pre-2003 Act case of *DPP v Kearley* [1992] 2 AC 228 in which the House of Lords held (i) that the telephone calls made to the defendant's phone requesting drugs were inadmissible hearsay because the prosecution sought to rely on the "implied assertion" that the recipient was a drug dealer and (ii) were irrelevant if the only purpose of the evidence was to prove that the caller believed the recipient to be a drug dealer. In *Twist* the Vice-President, at paragraphs 3–19, traced the evolution of section 115 against the reasoning of the Law Commission whose draft was adopted in full. The court confirmed the decision in *Singh* [2006] EWCA Crim 660 that the hearsay aspect of the decision in *Kearley* was reversed by section 115. Thus, the court advised, at paragraph 17:

> "17 . . . it is likely to be helpful to approach the question whether the hearsay rules apply in this way:
>
> i) identify what relevant fact (**matter**) it is sought to prove;
>
> ii) ask whether there is a statement of **that matter** in the communication. If no, then no question of hearsay arises (whatever other matters may be contained in the communication).
>
> iii) If yes, ask whether it was one of the purposes (not necessarily the only or dominant purpose) of the maker of the communication that the recipient, or any other person, should believe **that matter** or act upon it as true? If yes, it is hearsay. If no, it is not.
>
> 18. The answers to these questions will be case-sensitive. The same communication may sometimes be hearsay and sometimes not, depending on the matter for which it is relied upon and the fact which it is sought to prove.
>
> 19. In addressing these questions, we would strongly recommend avoidance of the difficult concept of the 'implied assertion'. That was described by the Law Commission, rightly in our view, as 'a somewhat unfortunate expression' (paragraph 7.7). As the Commission went on to point out:
>
> > "First, it begs the question of whether the words or conduct in question *are* an assertion of the fact that they are adduced to prove. It is at least arguable that they are not assertive at all, but directly probative – in which case it would follow that they should not be caught by the hearsay rule.
> >
> > 7.8 Second, the word 'implied' is here used in an unusual sense. Normally it refers to a statement which is not expressly spoken or written but is intended to be understood from what is said or done. But where there *is* an assertion of the fact to be proved, it is immaterial

> whether that assertion is express or (in the ordinary sense) implied. An assertion of a fact is no less of an assertion because it is implicit in an express assertion of a different fact, or because it takes the form of nonverbal conduct such as a gesture. An assertion can therefore be implied (in the ordinary sense) without being what is described in the context of hearsay as an 'implied assertion'.
>
> As we have sought to explain, it no longer matters whether a statement is analysed as containing an implicit (or 'implied') assertion if the speaker's purpose does not include getting anyone else to accept it as true."

The court went on to point out that the mere fact that the message is not hearsay within the meaning of section 115 does not absolve the trial judge of a careful analysis of the question whether it is *relevant*, and capable of asserting the inference contended (therefore, whether the evidence should be admitted), nor of directions to the jury upon the reliability of the statements relied upon to the support the inference sought. It should not be thought that there are no consequences of a finding that a statement is or is not hearsay (see paragraphs 20–22).

Note: Professor Ormerod's commentary upon *Twist* will be published in the October 2011 edition of the Criminal Law Review.

Section 114(1)(d) Criminal Justice Act 2003: Interests of justice

As to the limits of the proper use of section 114(1)(d) when the purpose is to achieve the admission of evidence which does not qualify under section 116 see *Freeman* [2010] EWCA Crim 1997; *Ibrahim* [2010] EWCA Crim 1176; and *EED* [2010] EWCA Crim 1213.

When the judge is being invited to admit hearsay evidence in the interests of justice it is essential that the factors relevant to reliability and probative value set out in section 114(2)(a)–(i) of the Act, or so many of them or any others as are relevant, are considered and addressed. In *Bucknor* [2010] EWCA Crim 1152 (Hooper LJ, Andrew Smith and David Clarke JJ), at the appellant's trial for murder, the allegation was that five men, members of the OC gang, on three scooters carried out a drive-by shooting towards rivals at a Costcutter shop. The targets were missed but the deceased was killed. The prosecution case was that the appellant was a pillion passenger in possession of a gun which he fired in the direction of the shop. He was caught shortly afterwards in possession of a gun which he claimed he was carrying because others were out to kill him. He gave no replies in interview and in evidence denied possession of the gun. He admitted his presence but claimed it was innocent. The appellant agreed he had been given the street name "Hustlar" and that he had been a member of the OC gang in the past. He claimed he had ceased to be member when he was serving a prison sentence from which he was released shortly before the killing. The prosecution sought leave to adduce evidence of photographs found on an internet Bebo page. They were photographs admittedly of the appellant and taken by the appellant with his cousin's mobile phone on an occasion after his release from prison. They were so arranged as to give him the appearance of being a current OC gang member. A hyperlink to a YouTube page described the OC gang as violent.

The prosecution had no evidence of the IP source from which the Bebo material was uploaded. The defence objected to the admission of the evidence because the defendant, in evidence in the *voir dire*, denied that the Bebo page was his and that he had anything to do with its creation. He said he was unaware of the page until his arrest and did not know how to access it. Whether or not the page was created by the defendant it was hearsay and authorship must be proved. Since the prosecution could not prove authorship, the material should not, he argued, be admitted before the jury.

The judge said in his ruling:

> "I have been asked to consider section 114. If the jury came to the conclusion that they could not be sure that this was the defendant's handiwork, then they would be bound to come to the conclusion that it was hearsay evidence and consequently 114 comes into play, so says Mr Spens. If Mr Spens is right, then I have to consider whether it should be before the jury. I have come to the conclusion as I have stated already that a fair trial can still take place. I have considered section 114 (1) and I also considered section 114, subsection 2 and the provisions outlined (a) to (i). I have come to the conclusion this evidence is receivable by the jury and accordingly it will be."

He continued that even if the jury thought that the defendant might not have been involved in the compilation of the Bebo pages they could still treat the material as "general background to the case". Hooper LJ observed at paragraphs 40–45 that no analysis of source or reliability had been undertaken in the judge's ruling. As to the use which the jury were directed they could make of the Bebo pages the judge said:

> "Now, . . . I want to give you a direction in relation to the Bebo and the OC website on YouTube. As far as the OC or the YouTube material is concerned, it is simply background to the OC gang. As far as the Bebo material is concerned, you have heard that on that website, which you have seen and which you have copies of, material is shown which may depict – it is a matter for you whether it does – this defendant in a somewhat tough light. The defendant denies any knowledge of that material except some photographs which were taken by him on his cousin's phone.
>
> You decide when you are looking at that Bebo material whether *it is his website and whether he put the entries on it*, whether it be at the beginning or at some stage. If he did not or may not have done, then ignore the material because it cannot help you. If, however, you are sure it is his website or that at the very least the material on it is there to show him in a tough light and was put there by him, then you may use it to help you if you think it is fair and right to do so in determining whether his presence at the scene that night was accidental in the way that he has described and therefore innocent. [emphasis added by CA]

The judge did not in the end direct the jury that the Bebo evidence was capable of being "background" whether they were sure of authorship or not, but there was no specific reference to reliability or to the prejudice against which the jury should guard in the event that authorship was not proved. On the evidence before the judge the court found that the Bebo material should not have been left to the jury and the jury should not have been invited to speculate about its authorship. This was a strong case on the admissible evidence but the court was not prepared uphold the conviction.

The hearsay provisions of the Criminal Justice Act 2003 have widened but rationalised the admissibility of relevant evidence. It is tempting to assume that a "broad brush" approach to relevance, reliability, probative value and fairness will suffice. The statutory code exists to ensure that relevant and reliable evidence is admitted and unfair prejudice to the accused is avoided. A proper basis for admission of such evidence must be established and the terms in which such evidence is left to the jury should elucidate the jury's task of judging its reliability and effect while warning against the risk of unfair prejudice.

Hearsay statement by an anonymous witness

In *Ford* [2010] EWCA Crim 2250 the Court of Appeal (Laws LJ, McCombe and King JJ) considered the application of section 114(1)(d) when the statement the prosecution sought to adduce was made by a witness to a shooting in the form of a note which read "T921 RJK . . . heard gunshots and saw them getting into this car

but I don't want to get involved". The prosecution case was that the appellant had procured the commission of the offence by others while he was in custody. The court acknowledged the probative force of the evidence but accepted the argument that the trial judge had no power to admit the note because it was from an anonymous source. Laws LJ said:

> "16. In our judgment if the trial judge had power to let in this evidence there were very strong reasons for her to do so. But the applicant, by Miss Dunkley, who has put forward the point with great economy and clarity, says there is no legal power to admit this piece of evidence. She relies on *Mayers* [2008] EWCA Crim 2989 and *Horncastle* in the Court of Appeal EWCA Crim 964, but particularly in the Supreme Court at 2009 UKSC 14. It is most convenient simply to cite a short passage from her skeleton which introduces this material. She quotes paragraph 113 of this court's decision in *Mayers*:
>
> > '. . . we are being invited to re-write the 2008 Act by extending anonymous witness orders to permit anonymous hearsay evidence to be read to the jury. We cannot do so. Neither the common law, nor the 2003 Act, nor the 2008 Act permits it.'
>
> The 2008 Act is of course the Criminal Evidence (Witness Anonymity) Act 2008, which governs the admissibility of anonymous witness evidence for the purposes of a trial. Miss Dunkley's skeleton continues:
>
> > 'The Court of Appeal in *R v Horncastle and Others* [2009] EWCA Crim 964, para 48 upheld this decision: "The CJA 2003 is concerned with identified but absent witnesses. It does not permit the admission of the evidence of anonymous witnesses." '
>
> Then she says this:
>
> > 'The United Kingdom Supreme Court upheld this position in its judgment in *R v Horncastle* [2009] UKSC 14. Annexe 4 prepared by Lord Judge specifically approved the decision in *Mayers* and stated at paragraph 13 "the relaxation of some of the rules against the use of anonymous witnesses under the Criminal Evidence (Witness Anonymity) Act 2008 does not extend to witnesses who are not only anonymous but also absent . . . In short, such evidence is inadmissible".'
>
> That reasoning is relied on in a series of different contexts to be found in Lord Judge's Annexe 4 at paragraphs 16, 24, 38, 46, 54, 73, 80, 89 and 96.
>
> 17. On the face of it these materials appear to demonstrate that it is inescapable that anonymous hearsay evidence cannot be admitted under the present statutory regime. Hearsay evidence of course is admissible under the 2003 Act, but if anonymous evidence, whether hearsay or not, is to be admitted that can only be done by reference to the provisions of the Act of 2008. Quite plainly the statement of the unknown woman giving the car registration number is or would be anonymous hearsay evidence.
>
> 18. We have considered whether the reasoning of this court and that of Lord Judge necessarily applies in a case where the statement is made not by a known witness whose identity is sought to be withheld, but by a person whose identity is not known at all. In those circumstances it might be said that the 2008 Act is simply not in the picture. That being so the reasoning in *Mayers* at paragraph 113, cited by Lord Judge at paragraph 13 of Annexe 4 in *Horncastle*, may be said not to

apply. But we cannot see that such an argument could prevail. As we have already indicated, and we repeat it for convenience, the Court of Appeal in *Mayers* at paragraph 113 said:

> 'No surviving common law power to allow for witness anonymity survives the 2008 Act. The 2008 Act addresses and allows for the anonymity of witnesses who testify in court. This jurisdiction is governed by statute, and any steps to extend it must be taken by Parliament.'

19. The reality is then that a statement which is sought to be adduced in evidence in circumstances where the anonymity of its maker is sought to be preserved can only be so adduced if it falls within any of the provisions of the Act of 2008 which permit that to be done. The statement of this unknown lady does not fall within any such provision and it has not been contended that it does. In those circumstances it seems to us inescapable that the evidence was not admissible, the judge should not have let it in. Miss Dunkley's argument is correct . . . ."

See also *Fox* [2010] EWCA Crim 1280 (Maurice Kay LJ, Royce and Nicol JJ) in which the court came to a similar conclusion about a recorded telephone call made to the police during and immediately after a robbery. The witness gave his details to the police on condition that they would not be disclosed. The prosecution maintained the witness's confidentiality and he or she was not called to give evidence. The evidence was instead admitted under section 114(1)(d). The court held this was not permissible. The prosecution could not adduce anonymous evidence without complying with the 2008 Act. Note the commentary of Professor Ormerod at [2011] Crim LR 475.

It seems to the writer that these decisions could have a profound effect upon the ability of trial judges to admit documentary hearsay evidence from any anonymous source. Each of the witnesses considered by Lord Judge CJ in *Horncastle* was anonymous or absent from trial or both. Only in the case of those witnesses who were absent but identified did Lord Judge consider the application of section 114(1)(d) in a court in England and Wales. As to paragraphs 17–18 of *Ford* the writer wonders whether the Supreme Court really had in mind the exclusion of evidence which would formerly have been admitted under section 114(1)(d) in the interests of justice. For example, if an unidentified and therefore anonymous witness reads out a registration number to a witness who writes it down, and if the writer gives evidence at trial, is the evidence of the registration number written down inadmissible?

Chapter 15: The defendant's statements and bevaviour

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

Legal professional privilege

Bench Book page 259

In *Seaton* [2010] EWCA Crim 1980 the Court of Appeal (Hughes LJ, VP, Rafferty and Maddison JJ) gave important guidance upon the legitimate scope of questioning and comment when the defendant relies upon legal advice as a reason for making no comment in interview. Having reviewed the authorities the Vice-President said at paragraph 43:

> "43. The foregoing analysis leads us to the following conclusions:
>
> a) Legal professional privilege is of paramount importance. There is no question of balancing privilege against other considerations of public interest: *R v Derby Justices ex p B*.
>
> b) Therefore, in the absence of waiver, no question can be asked which intrudes upon privilege. That means, *inter alia*, that if a suggestion of recent fabrication is being pursued at trial, a witness, including the defendant, cannot, unless he has waived privilege, be asked whether he told his counsel or solicitor what he now says is the truth. Such a question would require him either to waive his privilege or suffer criticism for not doing so. If any such question is asked by an opposing party (whether the Crown or a co-accused) the judge must stop it, tell the witness directly that he does not need to answer it, and explain to the jury that no one can be asked about things which pass confidentially between him and his lawyer. For the same reasons, in the absence of waiver, the witness cannot be asked whether he is willing to waive.
>
> c) However, the defendant is perfectly entitled to open up his communication with his lawyer, and it may sometimes be in his interest to do so. One example of when he may wish to do so is to rebut a suggestion of recent fabrication. Another may be to adduce in evidence the reasons he was advised not to answer questions. If he does so, there is no question of *breach* of privilege, because he cannot be in breach of his own privilege. What is happening is that he is waiving privilege.
>
> d) If the defendant does give evidence of what passed between him and his solicitor he is not thereby waiving privilege entirely and generally, that is to say he does not automatically make available to all other parties everything that he said to his solicitor, or his solicitor to him, on every occasion. He may well not even be opening up *everything* said on the occasion of which he gives evidence, and not on topics unrelated to that of which he gives evidence. The test is fairness and/or the avoidance of a misleading impression. It is that the defendant should not, as it has been put in some of the cases, be able both to 'have his cake and eat it'.
>
> e) If a defendant says that he gave his solicitor the account now offered at trial, that will ordinarily mean that he can be cross-examined about exactly what he told the solicitor

on that topic, and if the comment is fair another party can comment upon the fact that the solicitor has not been called to confirm something which, if it is true, he easily could confirm. If it is intended to pursue cross-examination beyond what is evidently opened up, the proper extent of it can be discussed and the judge invited to rule.

f) A defendant who adduces evidence that he was advised by his lawyer not to answer questions but goes no further than that does not thereby waive privilege. This is the *ratio* of *Bowden* and is well established. After all, the mere fact of the advice can equally well be made evident by the solicitor announcing at the interview that he gives it then and there, and there is then no revelation whatever of any private conversation between him and the defendant.

g) But a defendant who adduces evidence of the content of, or reasons for, such advice, beyond the mere fact of it, does waive privilege at least to the extent of opening up questions which properly go to whether such reason can be the true explanation for his silence: *Bowden*. That will ordinarily include questions relating to recent fabrication, and thus to what he told his solicitor of the facts now relied upon at trial: *Bowden* and *Loizou*.

h) The rules as to privilege and waiver, and thus as to cross-examination and comment, are the same whether it is the Crown or a co-accused who challenges the defendant."

Condron v UK [2001] 31 EHRR 1 was distinguished on its facts by the ECtHR in *Adetoro v UK* [2010] ECHR 609, Appn 46834/06. The judge had omitted from his direction the warning that adverse inferences should not be drawn unless the jury was satisfied the defendant's reason for failing to answer questions was his realisation that he had no answer to give or none that would stand up to scrutiny. The Court of Appeal, while acknowledging the failure, upheld the conviction because the evidence was strong. The ECtHR held the application under Art 6 admissible but dismissed it. In an interesting reflection upon the *Mountford* dilemma (Bench Book page 261) the ECtHR said:

"51. The court further observes that an accused may choose to remain silent during police interviews for a number of reasons. Some will be unconnected with the accused's substantive defence. Such cases include where the accused has remained silent on the advice of his lawyer or because he does not consider that he is sufficiently lucid to understand the questions asked or the nature of the proceedings (see, for example, *Beckles* and *Condron*, both cited above). In other cases, an accused will choose not to answer questions at a police interview for a reason which is inherently linked to his substantive defence. Such cases generally arise where the accused has some reason to conceal the truth. In such cases, it is artificial to separate consideration of the substantive defence from consideration of the explanation for the accused's silence because in order to accept the plausibility of the explanation for the applicant's silence, the plausibility of the applicant's account of events from which the reason for silence stems must also be accepted.

52. In the present case, the applicant refused to answer questions put to him by the police. At trial, his defence was that he had not participated in any robbery conspiracy but had merely been involved in the buying and selling of stolen cars. His explanation for his failure to mention this in response to direct questions during the police interviews was that he did not wish to incriminate others in respect of the buying and selling of stolen cars. The court therefore concludes that the reason for the applicant's silence falls into the second category outlined in the preceding paragraph."

The ECtHR followed the Court of Appeal in concluding that the jury must have rejected the accused's explanation for his silence because they had rejected his defence, and not the other way around:

> "54. As regards the effect of the omission, the court observes that in light of the defective direction, the jury members might well have considered themselves able to draw an adverse inference from the applicant's silence even if they were satisfied with his explanation that the reason he did not respond to police questions was that he was afraid of incriminating others. However, as noted above (see paragraph 52), the applicant's explanation for his silence was inherently linked to his substantive defence. Accordingly, unlike in *Condron*, cited above, § 63, there is some indication of how the jury approached the question of the weight to be given to the applicant's silence during the police interviews. The Court of Appeal concluded that, as the jury had convicted the applicant, it had clearly rejected his defence and in doing so must also have rejected his explanation for his silence. The court agrees that in order to consider plausible the applicant's explanation that he was afraid of incriminating others, the jury would have had to accept that the applicant's movements on certain days and at certain times, as well as his connection with certain people, was explained by his involvement in buying and selling stolen cars and not by his participation in a robbery conspiracy. It can be concluded from the fact that the jury rejected the applicant's defence that it also rejected his explanation for his silence. It is not plausible to suggest that, having accepted the applicant's explanation for his silence, wrongly-drawn adverse inferences led the jury to reject the applicant's overall defence to the robbery charges. Moreover, the jury's conclusions as to the lack of credibility of the applicant's explanation are supported by the comments of the trial judge when passing sentence on the applicant (see paragraph 18 above)."

It remains the trial judge's responsibility to apply section 34 Criminal Justice and Public Order Act 1994 in the *Mountford* situation as advised at paragraph 15, page 263 of the Bench Book. The appropriate directions are listed at page 264.

Note *Chivers* [2011] EWCA Crim 1212 in which the court held that in general no inference adverse to the accused could be drawn from the fact that he asserted in evidence a fact which was accepted on all sides to be true merely because he had not disclosed the same fact on an earlier occasion in interview.

What to do when section 34 and *Lucas* directions overlap

In *Hackett* [2011] EWCA Crim 380 (Moses LJ, Treacy J, HH Judge Scott-Gall) the Court of Appeal provided important guidance upon the interaction of section 34 Criminal Justice and Public Order Act 1994 and a lies direction. D and P were charged with attempted arson with intent to endanger life. P had a grudge against the victim V and, in the presence of D and witnesses, threatened to fire-bomb V's house. An hour later D took P to a petrol station where D filled a jerry can with petrol. The prosecution case was that D and P returned to V's house where P threw a petrol bomb which hit an adjoining property. D's defence at trial was that although present when P confronted V he had heard no threat to fire-bomb his house. He went with P to a petrol station to purchase petrol for a strimmer at P's girlfriend's request. He called a witness who heard the girlfriend asking P to get petrol for the strimmer. D said he was not present when the petrol bomb was thrown.

When interviewed under caution D failed to mention that he had driven P to a petrol station to buy petrol. A month later he provided a prepared statement to the police but refused to answer further questions. In the statement he claimed that he had visited the petrol station to buy petrol because P's girlfriend had been pestering P all day to get petrol for the strimmer. The judge directed the jury under section 34 that they could

draw an inference adverse to D's case from his failure to mention when first interviewed that he made a trip to the petrol station. He then gave the jury a *Lucas* direction as to D's admitted lie when denying in his first interview making a journey to the petrol station. His explanation at trial was that he did not want the police to know that he been drink-driving when he had only just got his licence back.

The court drew attention to the following principles: (1) A section 34 direction is not appropriate in relation to facts which are admittedly true: *Webber* [2004] 1 Cr App R 40 (513) (per Lord Bingham CJ at paragraph 28); (2) Where section 34 and lies overlap it is usually unhelpful to give two separate directions. The judge should select and adapt the more appropriate direction given the evidence in the case: *Mushabbar Rana* [2007] EWCA Crim 2261 (per Auld LJ at paragraphs 10–11); (3) When a section 34 and a lies direction are given they should be logically justifiable and include those warnings which are appropriate to the facts: *Stanislas* [2004] EWCA Crim 2266 (per Mance LJ at paragraphs 11–13).

Moses LJ pointed out that in his written statement and at trial D admitted his journey to the petrol station to purchase petrol. His failure to mention that fact in interview was not a proper subject for the section 34 direction. His denial of the journey *was* a proper subject for the *Lucas* direction. The fact in dispute which D failed to mention was the purpose of the journey to the petrol station and was the proper subject of a section 34 direction. If the circumstances required a *Lucas* direction they could be incorporated within the section 34 direction. Two separate directions were not required. The focus should have been on section 34.

The following illustration is an attempt to reflect the guidance in *Hackett.*

Illustration – *failure to mention facts and lies*

The prosecution case is that the defendant drove to the petrol station with P, purchased petrol and supplied it to P to enable P to petrol bomb V's house. The defendant admits purchasing petrol for P but denies any knowledge that P intended to petrol bomb V's house. He says that the petrol was for a strimmer and was purchased at the request of P's girlfriend.

First, the prosecution relies on the evidence of witnesses who heard P, when the defendant was present, threatening to firebomb V. Second, you are asked to consider carefully the way in which the defendant's explanation emerged. It is suggested that the only realistic conclusion is that the defendant's explanation is false and that he has lied in an attempt to conceal his guilt. I need to give you some assistance as to how you approach that evidence.

The defendant admits that when he was interviewed he did not mention the trip to the petrol station. Furthermore, when asked by the police whether he knew about the purchase of some petrol for P, he denied it. He now says that his reason for not disclosing his trip to the petrol station and the reason for it is that he had only just completed a period of disqualification from driving and did not want the police asking questions about his drink-driving.

The prosecution suggest that the real reason for the defendant's late disclosure of his defence is that it is untrue. He thought it was easier to lie than to answer questions about the trip to the garage. He knew that if questioned about a trip to the garage he would have no account to give or none that would stand up. Better to keep quiet and see what evidence emerged. Secondly, he had not yet thought up any innocent reason for the trip. Having thought about it he knew he had to come up with a reason and that explains his written statement.

The defendant was cautioned at the start of his interview that he did not have to say anything and that was his right. However, he was also warned that it might harm his defence if he did not mention when questioned any fact on which he later relied at trial. Consider first whether the case being put him was sufficiently strong to require an answer from him if he had one. If not you should not hold his silence against him.

Next you will need to consider the defendant's explanation for not disclosing the defence he is now putting forward. If you conclude that the defendant could reasonably have been expected to mention when questioned the facts on which he now relies at his trial, but chose to remain silent, you can reach any conclusion from that silence which you think is fair and proper. The reason is the commonly held belief that those who have an innocent explanation to give will reveal it as soon as they are challenged. If, however, you conclude that the defendant is or may be telling the truth when he says he did not want be questioned about drink driving his silence will not assist you.

If you are sure that despite his explanation the defendant could reasonably have been expected to mention his defence you may conclude that the only sensible explanation for his silence is that the defendant did not then have any answer to the questions being put to him or none that would stand up to scrutiny and that his present account is false. I say "may conclude". You must decide whether that is the fair and right conclusion.

You should not, however, convict because or mainly because of the way the defence emerged. It may, depending on your conclusions, amount to some support for the prosecution case that the defendant is not telling you the truth.

(7) Failure of defendant to make proper disclosure of the defence case

Bench Book page 272

The Criminal Justice Act 2003 (Commencement No 24 and Transitional Provisions) Order 2010 (SI 2010 No 1183) brought into force on 1 May 2010, s34 (notification of intention to call defence witnesses) and (insofar as it substitutes s11(4) to (7) in the CPIA 1996) s39 (faults in defence disclosure) of the Criminal Justice Act 2003 (see paragraph 2, page 272 of Bench Book).

(8) Defendant's silence at trial

Bench Book page 283

In *Barry* [2010] EWCA Crim 195 it was argued that where the defendant was relying on the partial defence to murder of diminished responsibility it was not appropriate to give the jury the adverse inference direction under section 35(3) Criminal Justice and Public Order Act 1994. In *Bathurst* [1968] 2 QB 99 Lord Parker CJ had expressed the opinion that when an accused was suffering from delusions or was otherwise on the borderline of insanity it would not be appropriate for the judge to comment adversely upon his failure to give evidence. The Court of Appeal (Maurice Kay LJ, Sharpe J, Sir Christopher Holland) held that the sole test was now provided by section 35(1)(b) namely whether the judge concludes that the physical or mental condition of the defendant makes it undesirable that he should give evidence. In the present appeal the defendant had suffered Alcohol Dependency Syndrome. He was, however, fit to give evidence and could have given evidence relevant to factual issues raised by the defence, e.g. how much of his drinking was involuntary. The court recognised that, as Lord Taylor CJ said in *Cowan* [1996] 1 Cr App R 1 at page 6, there would be cases where

it would be inappropriate for the jury to draw any adverse inference and should be so directed. This was not such a case.

Bench Book Page 285

In *Scott Clarke* [2010] EWCA Crim 684 the case against the appellant upon an indictment charging him with conspiracies to burgle, to steal and to handle stolen property respectively, was entirely circumstantial. He gave lengthy answers in interview but elected not to give evidence. The Court of Appeal (Rix LJ, Stadlen J and HH Judge Cooke QC, Recorder of Cardiff) reiterated the importance of placing the defence case before the jury in summing up despite the absence of evidence from the accused at trial.

Chapter 16: Defences

(2) Self-defence and related issues

Bench Book page 293

The Vice-President emphasised in *Keane and McGrath* [2010] EWCA 2514 (Hughes LJ, VP, Owen and Roderick Evans JJ) that section 76 Criminal Justice and Immigration Act 2008 had not changed the law of self-defence. Directions did not need to be complicated (e.g. it is suggested, by drunken belief) if the facts of the case did not require elaboration of the basic concept. At paragraphs 4 and 5, Hughes LJ said:

> "4. The law of self-defence is not complicated. It represents a universally recognised commonsense concept. In our experience juries do not find that commonsense concept at all difficult to understand. The only potential difficulty for a judge is that he needs to remember the potential possibility of what lawyers would call a subjective element at an early stage of the exercise, while the critical question of the reasonableness of the response is, in lawyer's expressions, an objective one. In using those lawyer's terms we do not for a moment suggest that it is helpful to use them in a summing up.
>
> 5. It is however very long established law that there are usually two and sometimes three stages into any enquiry into self-defence. There may be more, but these are the basic building blocks of a large proportion of the cases in which it is raised:
>
> > 1. If there is a dispute about what happened to cause the defendant to use the violence that he did, and there usually is such a dispute, then the jury must decide it, attending of course to the onus and standard of proof.
> >
> > 2. *If* the defendant claims that he thought that something was happening which the jury may find was not happening, then the second question which arises is what did the defendant genuinely believe was happening to cause him to use the violence that he did? That question does not arise in every case. If it does arise then whether his belief was reasonable or not, providing it is genuinely held, he is to be judged on the facts as he believed them to be unless his erroneous belief is the result of voluntarily taken drink or drugs, in which event it is to be disregarded.
> >
> > 3. Once it has thus been decided on what factual basis the defendant's actions are to be judged, either because they are the things that actually happened and he knew them or because he genuinely believed in them even if they did not occur, then the remaining and critical question for the jury is: was his response reasonable, or proportionate (which means the same thing)? Was it reasonable (or proportionate) in all the circumstances? Unlike the earlier stages which may involve the belief of the defendant being the governing factor, the reasonableness of his response on the assumed basis of fact is a test solely for the jury and not for him. In resolving it the jury must usually take into consideration what are often referred to as the 'agony of the moment' factors. That means that the jury must be reminded when it arises, as it very often does, that there is in a confrontation no opportunity for the kind of hindsight or debate which can take place months afterwards in court. The defendant must act on the instant at any rate in a large number of cases. If he does so, and does no more than seems honestly and

> instinctively to be necessary, that is itself strong evidence that it was reasonable. It is strong evidence, not conclusive evidence. While the jury's attention must be directed to these factors if they arise, the jury must also be made to understand that the decision of what is a reasonable response is not made by the defendant, it is made by the jury. We should perhaps add that 'in all the circumstances' means what it says. There can be no exhaustive catalogue of the events, human reactions and other circumstances which may affect the reasonableness or proportionality of what the defendant did. That is explicitly recognised by section 76(8)."

At paragraph 5.2 above the Vice-President referred to the possibility that the defendant claims he understood the circumstances to be different from those the jury find to exist. If so, subject to mistake caused by drink, the jury should judge the reasonableness of the defendant's actions according to the circumstances as the defendant believed them to be. We should add "or as he may have believed them to be", the burden being on the prosecution.

(5) Provocation

Bench Book page 334

Directions – slow burn provocation

The appeal of *Kirsty Scamp* [2010] EWCA Crim 2259 (Laws LJ, Christopher Clarke J, HH Judge Gilbart QC) demonstrates once again the importance of discussion with counsel before speeches. The appellant, aged 19, lived with the deceased, aged 28. There was a history of drunken violence between the two. It was accepted that the appellant killed the deceased with a single thrust with a knife to the chest. The defence was self-defence. The appellant relied on previous acts of violence in support of that defence. She gave evidence that, during a telephone call made by the deceased to a woman friend shortly before the fatal wound was inflicted, the deceased made hurtful and insulting remarks about her. He had also made hurtful remarks to the appellant about her parents. The appellant said she picked up the knife to ward off the deceased while he was attacking her. Neither counsel raised the issue of provocation with the judge. However, the judge concluded that it was his duty to leave the issue of provocation to the jury. He gave the jury written directions which included the following passages:

> "(a) Is it or may it be the case that when she did what she did she had suddenly and temporarily lost her self-control. If the answer is no then she must be found guilty of murder? If the answer is yes, go on to question (b).
>
> (b) **Is it or may it be the case that her loss of self-control was caused by a thing said or done by Jason Bull immediately before the killing? Consider this against the background of what the jury find to have been the nature and history of the relationship of the defendant and Jason Bull.** If the answer is no then she must be found guilty of murder. If the answer is yes then go on to question (c).
>
> (c) **Were the things said or done by Jason Bull immediately before the killing when considered against that background such or may it be the case that they were such as to cause an ordinary reasonable person of the same age and sex as the defendant, who is not exceptionally excitable or pugnacious and is possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society, as it is today, to act as she did? If the answer is no, then she must be found guilty of murder.** If the answer is yes, then she must be found not guilty

> of murder but guilty of manslaughter on the ground of provocation. You will understand from these directions that if the answer to all three questions is yes then you must find her not guilty of murder but guilty of manslaughter. If you are sure that the answer to any one of questions (a), (b) and (c) is no, then provocation has been disproved and you must find the defendant guilty of murder." [emphasis added]

During his closing remarks the judge said:

> "Members of the jury, as I said yesterday when reading out my legal directions, neither counsel raises the question of provocation but it is my duty to leave that to you for your consideration, in case you were to conclude that was or maybe the case that she lost her self-control, as opposed to losing her temper but remaining in control, **as a result of what Jason may have said to her about her mother and father or as a result of what she heard him saying to Kelly on the phone.** It is a matter for you to consider. I have given you legal directions about it but it is not a matter which either the prosecution or the defence argue. It is not the defendant's case, in particular, that she was provoked and did lose her self-control and therefore did stab him with the knife. She said she doesn't remember doing it and that she never intended to stab him or to kill him or to cause grievous bodily harm." [emphasis added]

Relying on *Stewart* [1996] 1 Cr App R 229 it was argued on appeal that the judge appeared to confine the events relevant to provocation to the remarks made to and about the appellant before the killing. The judge should have explained the possible relevance of earlier acts of violence and insult not just to the issue of self-defence but also to the issue of loss of self-control (in other words the slow burn or last straw concept: *Humphreys* [1995] 4 All ER 1008). The appeal was allowed and a verdict of manslaughter substituted. Laws LJ explained:

> "29 . . . Mr Nelson also submits that given the whole of the summing up, and the kaleidoscope of information to which the judge referred, it is not realistic to suppose that the jury would have taken into account only those two particular factors when considering provocation and not the whole case.
>
> 30. We have found this a difficult question. One of the factors which we consider, however, to be of particular importance arises from the fact, which we have now mentioned more than once, that provocation was not the defence that was advanced on behalf of this appellant. She was running self-defence. The judge thought it his duty to introduce provocation and no complaint is made of that. Its consequence, however, was that the jury had no assistance from the submissions of counsel as to how they should approach the issue of provocation. They had the summing up of the judge, nothing more, nor less.
>
> 31. In those circumstances it seems to us that it is not possible to exclude the possibility that the jury hearing those words towards the end of the summing up may have considered that the provocation issue was in fact more limited than it was. We could only conscientiously discount such a possibility if we regarded it as merely fanciful, or not arising at all. That is not the position. After anxious consideration it is for that reason, and that reason only, that we consider that this appeal has force and should be allowed."

It is so well known that the trial judge has a responsibility to leave provocation to the jury when on one view of the evidence the jury could conclude that the defendant lost her self-control under provocative words or conduct, he should, as a matter of routine when the occasion arises, be assisted to identify the relevant provocative conduct.

When the defence must be left to the jury

In *Mahmuda Khatun* [2010] EWCA Crim 138 the prosecution case was that the appellant planned and carried out the murder of her husband by stabbing. The appellant's case was that she had defended herself against the deceased's violence by picking up a knife, but the wounding of the deceased had been accidental. The trial judge directed the jury that if the appellant may have picked up the knife and if the deceased may have been wounded in the circumstances she described she was not guilty of any offence. They could only convict if they were sure the prosecution had proved that the appellant had planned to make the killing look like the act of an intruder and that she executed that plan. The judge declined to leave the issue of provocation to the jury. The Court of Appeal (Hooper LJ, Openshaw J, HH Judge Nicholas Cooke QC) agreed. This was a case of murder or nothing.

NEW DEFENCE OF LOSS OF CONTROL

Sections 54–56 Coroners and Justice Act 2009

The new law applies to any alleged murder committed after 4 October 2010. If any relevant act was committed before that date the old law applies (Schedule 22, paragraph 7 CAJA 2009).

Sections 54–56 Coroners and Justice Act 2009 read:

> **"54. Partial defence to murder: loss of control**
>
> (1) Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if—
>
> > (a) D´s acts and omissions in doing or being a party to the killing resulted from D´s loss of self-control,
> >
> > (b) the loss of self-control had a qualifying trigger, and
> >
> > (c) a person of D´s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
>
> (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
>
> (3) In subsection (1)(c) the reference to 'the circumstances of D' is a reference to all of D´s circumstances other than those whose only relevance to D´s conduct is that they bear on D´s general capacity for tolerance or self-restraint.
>
> (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
>
> (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
>
> (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

55. Meaning of 'qualifying trigger'

(1) This section applies for the purposes of section 54.

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D´s loss of self-control was attributable to D´s fear of serious violence from V against D or another identified person.

(4) This subsection applies if D´s loss of self-control was attributable to a thing or things done or said (or both) which—

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D´s loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger—

(a) D´s fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;

(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7) In this section references to 'D' and 'V' are to be construed in accordance with section 54.

56. Abolition of common law defence of provocation

(1) The common law defence of provocation is abolished and replaced by sections 54 and 55.

(2) Accordingly, the following provisions cease to have effect—

(a) section 3 of the Homicide Act 1957 (c 11) (questions of provocation to be left to the jury);

(b) section 7 of the Criminal Justice Act (Northern Ireland) 1966 (c 20) (questions of provocation to be left to the jury)."

Changes

For a helpful analysis of the new partial defence of loss of control see Professor David Ormerod's paper 'Coroners and Justice Act 2009 – Homicide and Partial Defences – Loss of Control' (2011). The following is a summary of the changes to the law.

- There are three requirements: (1) a loss of control, (2) attributable to a qualifying trigger (3) which, in D's circumstances, might have caused a person of D's age and sex with a normal degree of tolerance and self-restraint to act as D did. The defence must be left to the jury if "sufficient evidence is adduced to raise an issue with respect to the defence". The judge must decide whether "a jury, properly directed, *could reasonably conclude* that the defence *might* apply" (section 54(6)).

- As before, the essence of the defence is a loss of self-control (section 54(1)(a)) but, unlike the former common law of provocation, the loss of control need not be a "sudden" reaction (section 54(2)). Nevertheless, a loss of control may be more difficult to assert the longer the period between the words or conduct relied upon and the defendant's fatal reaction to it. The purpose of the new provision is clearly to make the defence easier to establish in a case in which an abused partner has reacted after a period since the last act of provocation.

- However, a killing carried out in a considered desire for revenge does not qualify as a loss of control under section 54(1) (section 54(4)).

- The loss of self-control must be attributable to a "qualifying trigger", which may be:

  a) D's *fear of serious violence* from V towards D or another (section 55(3)); or

  b) things said or done which (i) constituted circumstances of an *extremely grave character* and (ii) caused D to have a justifiable sense of being *seriously* wronged (section 55(4)); or

  c) a combination of (a) and (b) (section 55(5)).

- D will not be able to rely on a fear of serious violence trigger to the extent that it was the result of D inciting another person for the purpose of giving D an excuse to use violence (section 55(6)(a)).

- D will not be able to rely on a sense of being seriously wronged by the things said or done trigger if D incited them for the purpose of giving D an excuse to use violence (section 55(6)(b)).

- To the extent that a thing said or done constitutes *sexual infidelity* D will not be able to rely on the thing said or done as a trigger (section 55(6)(c). This is the headline and controversial change to the law of provocation and will undoubtedly lead to appeals to the Court of Appeal. The questions arise:

  i) What is meant by the term "sexual infidelity" – is it any unfaithfulness expressed in a sexual way or is it unfaithfulness expressed only by an act of sexual intercourse? It is suggested that in order to make sense of the policy behind the disqualification (in the modern world disloyal sexual behavior can never excuse an unlawful killing) any act of sexual infidelity is excluded as a qualifying trigger.

  ii) Are the circumstances surrounding and the context in which "sexual infidelity" takes place also excluded as a qualifying trigger – in other words, may D rely on aggravating features of the sexual infidelity which are over and above and not confined to the act of infidelity itself? It is suggested that the wording of section 55(6)(c) provides the answer. Any "thing said or

done" which "constituted" sexual infidelity is to be disregarded. It would seem to follow that any "thing" which did *not* "constitute" sexual infidelity may, subject to the other provisions of sections 54 and 55, qualify as a trigger under section 55. If, therefore, the act of sexual infidelity caused D to remonstrate with V and, in the course of the argument, she feared serious violence from V or V made gravely hurtful remarks to D or both, D may argue that her loss of control had a qualifying trigger under section 55(3) and/or (4).

- The defence is not available unless a person of D's sex and age, with a normal degree of tolerance and self restraint and *in the circumstances of D*, might have reacted in the same or in a similar way to D (section 54(1)(c). In the opinion of the writer these words effectively re-state the common law. Note, however, that D's circumstances are not confined by section 54(3) only to those which affect the gravity of the provocation to D. D's circumstances will include the consumption of alcohol. The jury will no longer be directed that a reasonable man is a sober man. The jury will need to decide whether a man in D's circumstances (including the consumption of drink) but nevertheless possessing a normal degree of tolerance and self restraint might have acted as D did. It is suggested that the jury may still be directed that D's conduct is to be judged by the standard of a person who retained a normal degree of tolerance and self restraint even if that person had consumed alcohol as D did.

Directions

- The judge will need to explain that the defence becomes relevant only if the prosecution has otherwise proved that D unlawfully killed V with the intent required for murder. It is for the prosecution to prove to the criminal standard that the defence does not apply.

- It would be prudent, when explaining the defence to the jury, to keep as closely as possible to the words of the statute. Opinions will differ as to whether it is necessary or appropriate to describe qualifying factors as a "qualifying trigger".

- As always, it is important that the defence is explained and presented to the jury in the context of the evidence in the case.

- If an issue as to "sexual infidelity" arises careful analysis will be required to identify for the jury those features of the evidence on which D can rely and those which the jury must disregard.

The following illustration is based upon the hypothetical facts of the *R v Denise* exercise used at the JSB's Partial Defences to Murder seminars in October and November 2010.

Illustration – ***loss of control – fear of serious violence – things said and done – sexual infidelity***

There is no issue between the prosecution and the defence that Victor died from the single stab wound to his chest and that the stab wound was deliberately and unlawfully inflicted by Denise. If you are sure that when Denise stabbed Victor she intended either to kill him or to cause him really serious injury she is guilty of murder subject to the defence of loss of control.

I have called loss of control a defence but if it applies here it would not entitle Denise to be found not guilty altogether. It would require you to find Denise not guilty of murder but guilty of manslaughter on the ground of loss of control.

Denise gave evidence, and it is the case advanced on her behalf, that when she stabbed Victor she had lost her self-control. She may not be convicted of murder unless the prosecution makes you sure that this was not a case of loss of self-control in the sense that the law requires.

I am about to describe to you what are the requirements of the defence of loss of self-control. When I have completed my directions I am going to hand you a document in which I have posed a series of questions. If you consider each of them in turn you will arrive at your verdict whether it is guilty of murder or guilty of manslaughter. We shall read the document together and I will answer any questions you have about it. Not all of my legal directions but all the essential parts of them will be reflected in the questions and the footnotes so you will probably be more assisted by listening carefully to what I have to say than by attempting to write them down.

Let me explain the meaning of loss of self-control as the law defines it. It has a special legal meaning which was introduced by an Act of Parliament in 2009. It does not mean, for example, killing merely in anger or for revenge.

What is self-control? Self-control is the same thing as self-restraint. It is a person's ability to resist an impulse or an urge to act. We all exercise self-control in times of stress to stop ourselves over-reacting. Denise lost her self-control if her ability to restrain herself was so overwhelmed by emotion or passion that she could not resist the impulse to attack Victor with the knife. Another way of putting it is that she was no longer mistress of her mind.

An act committed in a considered desire for revenge, whether performed calmly or in anger, is not a loss of self-control. It is an act of retribution, a deliberate decision to get your own back. If you are sure that what Denise did was to reflect on the insults and violence she had suffered over the years, up to and including the events of that Monday night, and decided to take her revenge on Victor, this defence would not apply. The prosecution points to the fact that there was a single stab wound to the chest. This, it is suggested to you, does not support the assertion that Denise had lost control. It is more consistent with an act of revenge. On the other hand, the defence points out that, having brooded on her situation, Denise burst into the kitchen unarmed, picked up the nearest weapon and stabbed Victor with it. You will need to judge the weight of these competing submissions.

Therefore, if you conclude so that you are sure, either that this was a considered act of revenge by Denise or that she had not lost her self-control, the defence does not apply and your verdict would be guilty of murder. If, however, you conclude that (1) this was not or may not have been a considered act of revenge and (2) Denise had or may have lost her self-control when she stabbed Victor, you reach the second requirement of the defence.

The second requirement is this: if someone loses their self-control it is always triggered by something, and usually but not always by something said or done by another person. Denise cannot rely upon a loss of control unless it was "attributable" to [what is called a "qualifying trigger". There are two possible qualifying triggers:] either Denise's fear of serious violence from Victor or things said or done by Victor or both.

[What do I mean by a loss of control which is "attributable" to Denise's fear or to things said or done? Ultimately that is for you to decide because "attributable" is an ordinary English word. But I can give you some assistance. The word "attributable" conveys that it was the fear of serious violence or the things Victor said or did or a combination of both which to a significant (more than trivial) extent caused or brought about Denise's loss of control.]

First, was Denise's loss of control attributable to a fear of serious violence from Victor? Denise told you that she was frightened of Victor. You will need to consider whether you accept that her evidence is true or may be true. If you conclude that Denise was or may have been, in general, frightened of Victor that would not, of itself, be enough to satisfy this requirement.

The defence applies only if Denise lost her self-control on Monday night and her loss of self-control was attributable to a fear that she was going to be the victim of serious violence from Victor. You will need to consider the prosecution submission that even if Denise was frightened of Victor it is most unlikely that, after a period of reflection, it was fear which brought about her loss of control and made her confront him. The prosecution suggests that fear was much more likely to have told her to stay where she was than to bring about a loss of self-control.

Secondly, let us think next about "things said or done" by Victor. Denise gave evidence about the history of her relationship with Victor. You heard evidence from neighbours about what they had seen and heard over the years. In the written formal admissions there is a list of occasions when the police were called to the house. All of this history is relevant. When judging whether Denise lost control and, if so, why, you should consider not just the events of Monday night but also the background against which those events occurred. The defence suggests that the events of Monday were just the final straw after years of violent abuse.

The prosecution has posed the question whether Denise's claim to have lost her self-control is consistent with the evidence that Denise went for a bath and thought about her situation. That is a question you will need to consider. The law does not, however, require the loss of self-control to have taken place suddenly or immediately after the things said or done. It requires only that the loss of self-control is attributable to her fear of serious violence or to things said or done by Victor or both. You need not be troubled by the mere fact that there was a delay between the last insult or threat from Victor. It is open to you to conclude that Denise may have brooded on the predicament in which she found herself with Victor and, in the process, became so subject to emotion and passion that she lost her self-control. I have said it is open to you. You must decide whether this is or may have been what happened.

What things, said or done by Victor, are relied on? Victor and Denise are in their late 30s. They have been in a relationship for several years. The evidence is that Victor has been violent and abusive towards Denise throughout that relationship. Sometimes she retaliated, but mostly she just took it. She was, however, very loyal. She had called the police many times but had always withdrawn her complaint before it got to court. She had never suffered injuries requiring medical treatment. Indeed, she told you that she had at worst suffered a black eye. Recently before his death Victor had become more demanding and complaining. Finally, on the Monday night, when Denise returned home unexpectedly to find Victor in the company of another woman, his reaction was aggressive and challenging. He said, "I'll get you" and started pushing her out of the kitchen before she ran out.

When asking whether Denise's loss of control was attributable to things said or done by Victor there are three conditions. You must first make an assessment of the things said and done by Victor and decide whether they amount to or may have amounted to circumstances of an "extremely grave character". Secondly, consider whether those things may have caused Denise genuinely to feel a sense of being seriously wronged? Thirdly, do you consider the circumstances to be so grave or serious that Denise's sense of being seriously wronged was or may have been justified?

You may conclude that the circumstances in which Denise discovered Victor with another woman, each of them being in a state of undress, would have given Denise every reason to believe that Victor had been sexually

unfaithful to her. It may be that you would regard sexual infidelity, in this particular relationship, as a very grave circumstance which would have given Denise a justifiable sense of being seriously wronged.

However, the Act of Parliament which created this defence provides very explicitly that the jury cannot treat sexual infidelity as a qualifying trigger for loss of control. The reason is that Parliament has taken the view that in the modern world sexual jealousy cannot excuse an unlawful killing.

So, in judging whether extremely grave conduct by Victor caused Denise to have a justifiable sense of being seriously wronged you must put Victor's sexual infidelity to one side and leave it out of account. If you concluded so as to be sure that Denise's attack on Victor was overwhelmingly the result of sexual jealousy, this defence would not apply and your verdict would be guilty of murder.

However, there is one respect in which you can take the sexually charged circumstances into account. Denise told you that Victor's reaction to being caught red-handed in their own home with another woman was not embarrassment or sorrow or regret but aggression. He said, "Fuck off you slag. What the fuck are you doing here? I'll get you." If you accept that these or similar words were used by Victor you might conclude that quite apart from the sexual infidelity he was humiliating and threatening towards her. That is a legitimate way of treating the circumstances even though the act of sexual infidelity itself is to be left out account.

Let me just pause so that we can take stock. First you will decide whether Denise lost her self-control. If she stabbed Victor in a considered desire for revenge this defence does not apply. If she did or may have lost her self-control, secondly, you will consider to what that loss of control was attributable. In deciding that question Victor's sexual infidelity is irrelevant. Was or may it have been fear of violence from Victor, or things said or done by Victor, which you regard as extremely grave in the circumstances and caused Denise to have a justifiable sense of being seriously wronged, or could it have been a mixture of the two?

If you are sure that Denise did not lose her self-control or that, if she did, it was not caused by [a qualifying trigger] her fear of serious violence or things said or done by Victor, your verdict would be guilty of murder.

If you conclude that Denise did or may have lost her self-control and that her loss of control was or may have been attributable to her fear or to things said or done by Victor, you have reached the last question which you need to consider, and it is an important one.

The law expects that each of us should exercise an ordinary level of self-control in response to serious insult, violence or fear. So, lastly, you need to consider what might have been the reaction of a person of Denise's age and sex, with a normal degree of tolerance and self-restraint, placed in the same predicament as Denise. By Denise's predicament I mean such violence and abuse from which you decide she might have suffered at Victor's hands up to and including Monday night.

Consider the reaction of a woman in Denise's position escaping to the bathroom and brooding on her situation. Might that woman, who possessed normal powers of tolerance and self-restraint, also have lost her self-control and acted as Denise did by stabbing Victor with a kitchen knife? If you think that she might have done, Denise is not guilty of murder but guilty of manslaughter on the ground of loss of control. If you are sure that such a woman would not have lost her self-control and acted as Denise did, then the prosecution has proved its case and Denise would be guilty of murder.

Let us now read your route to verdict together.

Illustration – *loss of control – route to verdict*

Please answer question 1 first and proceed as directed.

Question 1

Did Denise deliberately stab Victor with a kitchen knife?

Admitted, please proceed to question 2.

Question 2

Did Denise when she stabbed Victor intend to kill him or to cause him really serious injury?

If you are sure that Denise intended either to kill Victor or to cause him really serious injury, proceed to question 3.

If you are not sure that Denise intended to kill Victor or to cause him really serious injury, verdict not guilty of murder but guilty of manslaughter on the ground of lack of intent.

Question 3

When Denise stabbed Victor did she act in a considered desire for revenge?

If you are sure Denise acted in a considered desire for revenge, verdict guilty of murder.

If you conclude that Denise may not have acted in a considered desire for revenge, go to question 4.

Question 4

When Denise stabbed Victor with the kitchen knife, had she lost her self-control? **[See Note 1 below]**

If you conclude that Denise had or may have lost her self-control, proceed to question 5.

If you are sure that Denise had not lost her self-control, verdict guilty of murder.

Question 5

Was Denise's loss of self-control caused by:

(1) Denise's fear of serious violence from Victor; and/or

(2) things said or done by Victor which constituted circumstances of an extremely grave character which caused Denise to have a justifiable sense of being seriously wronged? **[See Note 2 below]**

If you conclude that Denise's loss of self-control was or may have been caused by (1) or (2) or a combination of both, proceed to question 6.

If you are sure that Denise's loss of self-control was not caused by (1) or (2) or a combination of both, verdict guilty of murder.

Question 6

Might a woman of Denise's age, with a normal degree of tolerance and self-restraint, and placed in Denise's circumstances, have reacted in the same way or in a similar way as Denise did?

If you conclude that such a woman might have reacted in a similar way, verdict not guilty of murder but guilty of manslaughter on the ground of loss of self-control.

If you are sure that such a woman would not have reacted in a similar way, verdict guilty of murder.

Note 1:

The loss of self-control need not have been sudden. A loss of self-control took place if Denise was in such a state of emotion or passion that she had lost the ability to control the urge to act by stabbing Victor.

Note 2:

(a) You cannot treat sexual infidelity by Victor as a thing done by Victor for the purpose of cause (2) in question 5. Sexual jealousy cannot excuse the killing. But you can consider things said or done by Victor in the context of his sexual infidelity (words such as, "Fuck off, you slag. What the fuck are you doing here? I'll get you."). If you conclude that they were or may have been said you should consider whether they amount to circumstances of an extremely serious character which caused Denise to have a justifiable sense of being seriously wronged.

(b) You should look at the whole of the relationship between Denise and Victor, up to and including the events of the Monday night, when judging whether things said or done by Victor constituted circumstances which caused Denise to have a justifiable sense of being seriously wronged.

(6) Diminished responsibility

Bench Book page 340

In *R* [2010] EWCA Crim 194 (Lord Judge CJ, Penry-Davey and Irwin JJ) the trial judge directed the jury that substantial impairment meant impairment which was a "real cause" of the defendant's conduct. The defendant did not have to prove that his condition was the sole cause of his conduct but he must show that it was more than a merely trivial cause. In his final speech to the jury counsel for the defendant equated the word "substantial" with the phrase "of substance". The jury asked the judge to explain the difference between "trivial" and "substantial" and specifically whether "of substance = substantial". The judge answered the jury's questions by confirming that "of substance" was the same as "substantial" and continued:

> "The following direction has been approved at a senior level and it is this; the direction on the words 'substantially impaired'. Your own common sense will tell you what it means. 'Substantial' does not mean 'total'. That is to say the mental responsibility need not be totally impaired, so to

> speak, destroyed altogether. The other end of the scale, 'substantial' does not mean 'trivial' or 'minimal'. It is something in between and Parliament has left it to you to say on the evidence was the mental responsibility impaired and if so, was it substantially impaired? The word 'substantial' means more than some trivial degree of impairment which does not make any appreciable difference to a person's ability to control himself but it means less than total impairment."

It was argued on appeal that the two concepts "of substance" and "more than trivial and less than total" were not the same. "Substantial" can mean either "real" or "to a considerable degree". The court found that as between the two ways in which the judge approached the term, there was no difference in meaning. The direction given by Ashworth J in *Lloyd* [1967] 1 QB 175 had stood the test of time:

> "I am not going to try to find a parallel for the word 'substantial'. You are the judge, but your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so, was it substantially impaired?"

Beyond this form of assistance it would be unwise to elaborate. Lord Judge said at paragraph 26:

> "26. In our judgment, faced with this problem at a murder trial, it is necessary for the judge to convey to the jury the plain meaning of the statute, no more, no less. Provided in the language he uses he does not exaggerate the burden on the defendant, or improvise some extra statutory additional obligation on the defendant in relation to the meaning of 'substantially impaired', no valid ground for complaint exists."

Correction

Bench Book page 347

Illustration, line 1, should read "Dr C", not "Dr B".

Bench Book page 349

Route to verdict , line 5, should read "See Notes 1 and 2".

Route to verdict, line 10, should read "If you conclude the defendant has failed to show . . ."

NEW DEFENCE OF DIMINISHED RESPONSIBILITY

Section 52 Coroners and Justice Act 2009

The new law applies to any alleged murder committed after 4 October 2010. If any relevant act was committed before that date the old law applies (Schedule 22, paragraph 7 CAJA 2009).

Section 52(4) and (5) Coroners and Justice Act 2009 read:

> "**52. Persons suffering from diminished responsibility (England and Wales)**
>
> (4) In section 2 of the Homicide Act 1957 (c 11) (persons suffering from diminished responsibility), for subsection (1) substitute—
>
> '(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
>
> (a) arose from a recognised medical condition,
>
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
>
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are—
>
> (a) to understand the nature of D's conduct;
>
> (b) to form a rational judgment;
>
> (c) to exercise self-control.
>
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.'
>
> (5) In section 6 of the Criminal Procedure (Insanity) Act 1964 (c 84) (evidence by prosecution of insanity or diminished responsibility), in paragraph (b) for 'mind' substitute 'mental functioning'."

Changes

For a helpful analysis of the new law see Professor David Ormerod's paper '[Coroners and Justice Act 2009 Homicide and Partial Defences – Diminished Responsibility]' (2011). The following is a summary of the changes:

- "Abnormality of mind" is replaced by a requirement for the accused to prove an "abnormality of mental functioning". This is not intended to be a change of substance.
- The "abnormality of mental functioning" must arise "from a recognised medical condition". Expert evidence will be required. This opens up the possibility that a defendant will rely on a recognised medical condition caused wholly or in part by the consumption of alcohol or drugs (see paragraph 5 below).

- The abnormality must have "substantially impaired" the defendant's ability to do one or more of the things identified in section 2(1A), i.e. (a) to understand the nature of D's conduct; or (b) to form a rational judgement; or (c) to exercise self-control. No change to the meaning of "substantial impairment" is contemplated or required. The essence of the defence therefore remains the same.

- The abnormality of mental functioning must provide an explanation for D's acts and omissions in doing or being a party to the killing. The abnormality will provide an explanation if it caused or was a significant contributory factor in causing D to act as he did. The section does not exclude other "explanations" but it would seem that a causative link is contemplated. Despite the use of the separate words "substantial" and "significant" (in section 52(1)(b) and section 52(1B)) it would seem that in context their effect must be identical. In other words, the abnormality need not be an important or major factor in causing D to act as he did but it must be a factor which was more than trivial or insignificant.

- Thus, D must establish the probability (1) that his capacity was "substantially impaired" in at least one of the section 2(1A) senses and (2) that his impairment made a significant contribution to causing D to act as he did. It does not appear that Parliament intended any change to the assessment of the contribution made by other factors such as drink. To this extent *Dietschmann* [2003] UKHL 10, [2003] 1 AC 1209 (paragraph 8, page 342 Bench Book) still applies. However, mental conditions which are themselves partly induced by drink may nevertheless be regarded by the medical profession as "recognised medical conditions". As HH Judge Andrew Gilbart QC, Recorder of Manchester, points out in his paper 'Effects of Voluntarily Taken Alcohol or Drugs on the New Diminished Responsibility Defence' (17 December 2010), the House of Lords in *Dietschmann* rejected the prosecution argument that the policy of the law of diminished responsibility was to exclude effects produced by voluntarily taken alcohol. The matter was to be resolved solely by interpretation of section 2 of the Homicide Act 1957. That being the case, it is arguable that the new defence is significantly more inclusive than it was when the unamended section was interpreted by the House in *Dietschmann.*

- Expert evidence will (1) identify the abnormality of mental functioning, (2) explain its effect upon D's ability to understand the nature of his conduct, to form a rational judgement or to exercise self-control, and (3) describe how that abnormality provides an explanation for the killing. The jury must decide whether the defence is established to the required standard.

Directions

- The jury will require an explanation of the terms (i) "abnormality of mental functioning" (ii) arising from "a recognised medical condition" which (iii) "substantially impaired" D's ability to "(a) understand the nature of his conduct, (b) form a rational judgement, or (c) exercise self-control" and which "provides an explanation" for D's conduct. It would be prudent to keep to the statutory language where possible.

- Where other factors, such as drink or drugs, contributed to D's conduct the question for the jury is *not* whether D would have killed in the absence of those other factors but whether the abnormality of mental functioning was at least a significant (i.e. more than trivial) contributory factor.

- Careful analysis of the expert medical evidence will be required to identify the chain of reasoning which causes the expert to express the opinion that (i) D suffered from a recognised mental condition (ii) which (substantially) impaired his ability to understand the nature of his conduct, to form a rational judgement, or to exercise self-control and (iv) made a (significant) contribution to D's conduct.

- It is suggested that, logically, where the medical condition relied upon is Alcohol Dependency Syndrome the questions for the jury remain (a) whether and to what extent D's impairment was caused by his

involuntary consumption of alcohol (see paragraphs 10–12, pages 343–345 Bench Book) and (b) whether *that* impairment made a significant contribution to D's conduct (but see paragraph 5 above).

The following illustration is based, for comparison purposes, loosely on the same hypothetical facts which applied to the illustration at pages 346–349 of the Bench Book.

Illustration – *diminished responsibility – abnormality of mental functioning – reactive depression – alcohol voluntarily consumed*

If you are sure that when D inflicted the fatal wound he intended either to kill V or to cause him really serious harm D is guilty of murder subject to the partial defence of diminished responsibility. A person who shows that his mental responsibility for a killing was diminished is not guilty of murder but guilty of manslaughter. The burden of proving the defence is on D but, unlike the prosecution, he does not have to make you sure of it. He must show that it is more probable (or more likely) than not that his mental responsibility was diminished.

Diminished responsibility has a particular legal meaning. In order to establish the defence there are three things which D must prove are more likely than not:

(1) When D stabbed V, D was suffering from an abnormality of mental functioning which arose from a medical condition; and

(2) D's abnormality of mental functioning substantially impaired his ability to understand the nature of what he was doing, to form a rational judgement or to exercise self-control; and

(3) D's abnormality of mental functioning provides an explanation for D's conduct when he stabbed V.

Both Dr A, who gave on behalf of D, and Dr B, who gave evidence on behalf of the prosecution, are reputed consultant psychiatrists who are well qualified to express an expert opinion in their field of clinical practice and study. Shortly, I will remind you in summary of the evidence they gave. In summary, they agree that D was suffering from a medical condition called "reactive depression". They explained that by the term reactive depression they mean a mental reaction by D to recent events (the death of D's father, the loss of his wife to another man and the difficulties with contact with his children) which was so severe that it affected his mental ability to function normally. It was, in other words, an illness.

They agree that D's illness impaired D's ability to form a rational judgement and to exercise self-control. They disagree, however, about two important features of the defence. The first is the degree of impairment of D's ability to function normally. Before D can rely on the abnormality he must show that he was "substantially impaired". You must decide whether the impairment of D's ability to form a rational judgement or to exercise self-control or both was substantial. I can help you to this extent – the impairment need not be total but it must be more than trivial or insignificant.

Dr A told you that, in his opinion, D's ability to form a rational judgement was "distinctly" impaired. He compared D's intellectual abilities and the exercise of judgement in his very demanding job before he became ill with the shadow of a man described by members of D's family and his friends after he was forced to take sick leave. It was Dr A's opinion that D was unable to see events in their proper perspective and to act accordingly; Dr A thought that D's symptoms of anxiety and tetchiness were signs that under severe stress he might crack.

Dr B agreed that these were indeed symptoms of D's depression but he was not prepared to say that in any respect or indeed cumulatively D was substantially impaired. While D was undoubtedly distressed he was, Dr B pointed out, still looking after himself and reacting appropriately to those around him.

The second area of disagreement between the experts concerned the question whether D's abnormality of mental functioning provides an explanation for D's conduct in killing his wife's new partner. D's abnormality of mental functioning can only provide an explanation for D's conduct if it caused or was a significant contributory factor in causing D to act as he did. A significant contributory factor is one which is more than trivial or insignificant. You first need to consider what happened. By the time he came across V in the public house D had consumed several pints of bitter. He does not challenge that he and V went outside to discuss contact arrangements for the children on the following Sunday. An argument developed and D, as he put it, completely lost it, attacking V with his fists. When V went to the ground D kicked him several times to the head. He caused V severe head injuries from which he died.

Dr A and Dr B agree that an important factor in D's conduct was the amount of alcohol taken by D that night. Dr B noted that D was said by other customers in the pub that night to have been chatty, more like his old self. Only when he approached V did his mood seem to change.

D's illness, he thought, played only a minimal, if any, role in D's conduct; in his opinion, the overwhelming cause of D's explosion of violence was a natural anger and jealousy towards V coupled with the disinhibiting effects of alcohol. Neither natural jealousy nor alcohol forms any part of the abnormality of mental functioning on which D relies or is entitled to rely.

Dr A gave evidence that while he could not say exactly what contribution was made by D's abnormality of mental functioning, it was impossible to ignore the evidence that D was normally a peaceful and gentle man. Certainly anger and jealousy are normal emotions but D's illness made him unusually susceptible to a loss of self-control under stress. In Dr A's opinion, the illness made a significant contribution to D's conduct and, for that reason, explains it.

Again, you must consider the evidence relevant to this issue, the expert medical evidence and the evidence of bystanders, and decide whether it is more likely than not that D's abnormality of mental functioning caused or was a significant contributory factor in causing D to act as he did. If so, your verdict will be not guilty of murder but guilty of manslaughter on the ground of diminished responsibility. If not, your verdict should be guilty of murder.

I have prepared a series of written questions which I have called a route to verdict. If you answer each question in turn it will lead you to a verdict which will be guilty of murder, or not guilty of murder but guilty of manslaughter. If you return a verdict of guilty of manslaughter you will be asked by the court clerk whether that is on the ground of lack of intent or on the ground of diminished responsibility. Let us now read it together . . .

Illustration – *diminished responsibility – route to verdict*

Please answer question 1 first and proceed as directed.

Question 1

Did the defendant, by his deliberate and unlawful act, kill V?

Admitted. Go to question 2.

Question 2

Did the defendant, when he attacked V, intend either to kill V or to cause him really serious bodily injury?

If you are sure the defendant intended to kill or to cause really serious injury, proceed to question 3.

If you are not sure the defendant intended to kill or to cause really serious injury, verdict not guilty of murder but guilty of manslaughter on the ground of lack of intent.

Question 3

Was the defendant, when he attacked V, suffering from an abnormality of mental functioning which arose from a medical condition?

Agreed. Proceed to question 4.

Question 4

Did D's abnormality of mental functioning substantially impair his ability (i) to form a rational judgement or (ii) to exercise self-control or (iii) both? **(See Note 1 below)**

If you conclude that it is more likely than not that the defendant's abnormality of mental functioning substantially impaired his ability (i) to form a rational judgement or (ii) to exercise self-control or (iii) both, proceed to question 5.

If you conclude that the defendant has failed to show that it is more likely than not that his abnormality of mental functioning substantially impaired his ability (i) to form a rational judgement **or** (ii) to exercise self-control, verdict guilty of murder.

Question 5

Did D's abnormality of mental functioning (whether (i), (ii) or (iii) question 4 above) cause or was it a significant contributory factor in causing D's conduct in attacking and killing V? **(See Note 2 below)**

If you conclude that it is more likely than not that D's abnormality of mental functioning did cause or was a significant contributory factor in causing D's conduct, verdict not guilty of murder but guilty of manslaughter on the ground of diminished responsibility.

If you conclude the defendant has failed to show that it is more likely than not that his abnormality of mental functioning caused or was a significant contributory factor in causing his conduct, verdict guilty of murder.

Note 1

(a) A substantial impairment is less than total impairment but more than trivial or insignificant impairment.

(b) You need to decide whether the defendant has shown that it is more likely than not that his mental functioning was substantially impaired in either or both respects because you will need to use your answer when considering question 5.

Note 2

(a) A significant contributory factor is a more than trivial or insignificant factor.

(b) In considering this question you will need to apply your answer to question 5. In other words, did the substantial impairment of the defendant's ability to form a rational judgement or to exercise self-control or both (as you conclude the defendant has shown) cause or was it a significant contributory factor in causing the defendant to act as he did?

Chapter 17: The trial of sexual offences

(1) Alerting the jury to the danger of assumptions

Bench Book pages 353–357

In *Miller* [2010] EWCA Crim 1578 (Leveson LJ, Tomlinson and Davis JJ) the trial judge directed the jury to beware of stereotyping. He dealt with delay in the child's complaint, the nature of the complainant's reaction to the alleged behaviour and the reaction of children to the home environment and an alleged perpetrator. He made it clear these were not directions of law but observations about life with which the jury would be familiar and would wish to consider when assessing whether the delayed complaint was sinister or innocent. The appellant argued that such comments by the judge were improper because they were not based on evidence. The common law permitted judicial notice only of facts of particular notoriety or common knowledge. At paragraphs 23–26 of his judgment Leveson LJ noted the decisions in *MM* [2007] EWCA Crim 1558, *D* [2008] EWCA Crim 2557 and *Breeze* [2009] EWCA Crim 255. He concluded that it was the experience referred to in paragraph 4, page 353 of the Bench Book (which post-dated the trial) and the explanation given by Latham LJ in *D* at paragraph 11 (Bench Book paragraph 9, page 355) which enabled judges to "deal with these generalisations". He continued:

> "25. The single judge did not consider it arguable that the direction in this case even arguably exceeded the boundaries set by Latham LJ and this court in the cases to which we have referred. Because, as we have suggested, the direction is somewhat lengthy, and in terms of balance possibly descends into rather more example than was necessary, we grant leave to argue the point but reject it.
>
> 26. Mr Riza also complains that the judge did not inform counsel before speeches that he would be giving these directions so that counsel was not able to address any of the points made or make any application for a special warning as a counter-weight in order, for instance, to inform the jury that until recently, the courts held the opposite view about the evidence of children. In our judgment, although directions of this type have been given for some years, it would have been better had the judge discussed them as part of the routine analysis of the 'directions' to be contained within the summing up which should take place before counsel's speeches in almost every case and certainly every case of this type. His failure to do so, however, does not undermine the safety of the convictions and, taken overall, there was no unfairness in the summing up."

The warning to beware of the risk of stereotyping can legitimately be treated as a *direction* from the judge to consider the risk before reaching a concluded view about the complainant's evidence, but the *development* of the direction by reference to factual circumstances which may have affected the complainant's reaction to the alleged behaviour must be grounded within the evidence in the case. As the Bench Book advises at page 356:

> "13. Judges who try sexual offences are aware that each one of these stereotypes does not accord with experience. The purpose of comment, approved by the Court of Appeal in *D*, is merely to caution the jury against making unwarranted assumptions about the behaviour or demeanour of the complainant if the judge considers the circumstances require it. It is essential that advice from the trial judge does not implant in the jury's minds any contrary assumption. It is not the responsibility of the judge to appear to support any particular conclusion but to warn the jury against the unfairness of approaching the evidence with *any* pre-formed assumptions.

> 14. Assistance such as that proposed should not . . . be given without discussion between the judge and the advocates before speeches. The judge should take the opportunity to formulate his words carefully having received the views of the parties, the object being to ensure he does not stray from the commonplace to the controversial and, thus, appear to be endorsing argument for one side at the expense of the other."

The direction approved in *Miller* was as follows:

> "You are entitled to consider why these matters did not come to light sooner. The defence say that it is because they are not true. They say that the allegations are entirely fabricated, untrue and they say that had the allegations been true you would have expected a complaint to be made earlier and certainly once either defendant . . . was out of the way . . . of the complainant. The defence say that she could have complained to her mother or her grandmother before she left the country or to her mother on the plane, or to the headmaster of the school . . . or to the social worker who came on one occasion to speak to her (although again bear in mind there is no evidence that the complainant was ever given any contact details or instructions as to how to make such a complaint, or that she could have complained sooner to a family or extended family member once she was safe in Jamaica.
>
> On the other hand the prosecution say that it is not as simple as that. When children are abused they are often confused about what is happening to them and why it is happening. They are children and if a family member is abusing them in his own home or their own home, to whom can they complain? A sexual assault, if it occurs, will usually occur secretly. A child may have some idea that what is going on is wrong but very often children feel that they are to blame in some way, notwithstanding circumstances which an outsider would not consider for one moment them to be at blame or at fault. A child can be inhibited for a variety of reasons from speaking out. They may be fearful that they may not be believed, a child's word against a mature adult, or they may be scared of the consequences or fearful of the effect upon relationships which they have come to know, or their only relationship."

In *GJB* [2011] EWCA Crim 867 (Stanley Burnton LJ, Henriques and Foskett JJ) the court made an unfavourable comparison between the *Miller* direction and that provided by the judge in *GJB.* Having reminded the jury of the complainant's evidence that while he (at the age of five) was aware that "something wrong had occurred" he had not understood, the trial judge proceeded to examine possible reasons why he may not have made disclosure until several years later. The court criticised the judge's direction since it assumed the truth of the complaint and failed to strike a balance by putting the defence case before the jury in the same context.

The need for care when selecting the terms in which the dangers of stereotyping are explained to the jury was emphasised in *MM* [2011] EWCA Crim 1291 at paragraphs 38 and 39. Counsel should be forewarned of the judge's intention and permitted to address the judge upon the terms of a direction. As the Bench Book emphasises the judge should achieve balance which will require a consideration of the arguments respectively for both the prosecution and the defence. The object of the direction is not to endorse the prosecution's interpretation of the evidence but to ensure that the jury are aware of the risks of stereotyping alleged victims of sexual offences.

Delay, abuse of process and Galbraith

See *CPS v F* [2011] EWCA Crim 1844 at page 11 above.

Admissibility and treatment in summing up of material discovered in the possession of the defendant which tends to establish a relevant disposition

See *D, P and U* [2011] EWCA Crim 1474 at page 42 above.

Good character in a case of alleged historic sexual abuse

See *GJB* [2011] EWCA Crim 867 at page 38 above.

Good and bad character directions in the same summing up

See *Bill* [2011] EWCA Crim 612 at page 39 above.

When to give a direction about collusion or contamination

See *N (H)* [2011] EWCA Crim 730 (Pitchford LJJ, Treacy J and HH Judge Kramer QC) in which the court considered the authorities and concluded that it was not in every case in which it was suggested that one or more than one complainant was lying that a direction as to collusion or contamination was required. Where, however, the issue had been raised by the defence and/or the evidence had revealed the real prospect of collusion or contamination, or the evidence upon one count was treated as admissible upon the other, careful consideration would need to be given to the terms of the direction (see paragraphs 35–44).

Chapter 18: Jury management

(2) Discharge of a juror or jury

Discharge during trial and directions to remaining jurors

When a juror is discharged (other than for misconduct when further considerations will arise) the question arises whether the remaining jurors should be given any particular direction about the discharged juror's former contribution to deliberations. In *Carter* [2010] EWCA 201 at paragraph 19 Lord Judge CJ said:

> "19 . . . As it seems to us, whether one or two jurors are suddenly and for good reason discharged, and at whatever stage in the trial, the question whether the judge should direct the remaining members to ignore any views expressed by the discharged juror (or jurors) is identical. As a matter of first principle the verdict of the jury is the verdict which the members returning it conscientiously believe to be right. Before reaching their decision, they will have reflected on the arguments they have heard advanced by both, and in a multi-handed case by all the parties at trial, and then, in the privacy of their retiring room, the opinions and views expressed by each member of the jury. This is, as counsel for the Crown, Mr Brooke, put it in his written submission, a 'dynamic' process. Of course the jurors who have been discharged cannot be, and are not responsible for the eventual verdict. But until their discharge they are entitled to express their views, favourable or adverse to the prosecution or to some parts of the prosecution case, or favourable or adverse to the defendant or some part of the defence case. As the discussions proceed, the views expressed at an earlier stage may well develop and change. It is a continuing process. But while jurors are properly empanelled, the views of each and every one of them are entitled to the same careful analysis and respect as those expressed by any juror, including jurors who are later discharged. On discharge they cease to have any responsibility for the verdict, but there is no reason to imagine that the views expressed at a time when they believed that they would be responsible for the verdict were expressed any less conscientiously and responsibly than those of any other juror. Those views become part of the fabric of opinions under consideration, impossible to isolate and compartmentalise. **It would therefore be wholly unrealistic for a direction to be given to the remaining members of the jury to ignore the views expressed on any subject by the departed jurors. What matters is that the discussion between the remaining jurors will continue to ebb and flow and, on reflection, the views expressed by the departing juror (or jurors) would have been examined and either accepted wholly or in part, or rejected wholly or in part, or treated as irrelevant by the remaining jurors in the course of reaching the decisions to which their conscience impels them.** The eventual verdict, however, is no more than that of the jurors who have been party to it as a result of the process of discussion in the privacy of the jury room. The views expressed by the departed jurors will only be relevant to the extent that the remaining jurors will have adopted or assimilated those views as their own." [emphasis added]

Carter was followed by the court (Thomas LJ, Macduff and Sweeney JJ) in *Ali and Others* [2011] EWCA Crim 1260. At paragraph 166, Thomas LJ said:

> "Although we are bound, of course, to follow *Carter*, we would have come independently to our own view that the kind of direction suggested by Mr Wood QC was wholly unnecessary. If two jurors were discharged, the way in which the jury should have conducted themselves was one that was obvious and one on which the jurors needed no direction. If the views of those

> departed had appealed to them, the remaining jurors would have taken them into account; on the other hand if they had not, they would not. That is what happens at a meeting where decisions have to be made after a participant has left; we see no reason why jurors would not proceed in the same way."

Investigation by the judge

Bench Book page 383

In *Zulhayir* [2010] EWCA Crim 2272 the judge received a note from a juror shortly after the commencement of the trial, and after she had instructed them in accordance with *Mirza and O'Connor* [2004] UKHL 2, to the effect that one member of the jury had made remarks about the defendant's ethnic background which raised questions about that juror's impartiality. The judge did not raise the matter either with counsel or with the jury until she received a second note from the same juror in retirement to the effect that in her view a fair verdict could not be reached. The judge addressed the whole jury. She informed them of the contents of the notes and reminded them that they must decide the case without prejudice or bias. She sought from the jury a considered response to the question whether they could reach true verdicts according to the evidence. She received an affirmative response. The appeal was allowed because the court was not satisfied that the appellant had received a fair trial. Observations were made on the propriety in these circumstances of proceeding to direct the whole jury before seeking more particular information from the individual juror (see *Brown* [2001] EWCA Crim 2828, paragraph 24 per Mance LJ and *Sander v UK* [2001] 31 EHRR 44), but the court appreciated that there might have been a risk that the juror would if segregated from the other jurors embark upon a disclosure of their deliberations. It is suggested that once the judge decided not to take action after receipt of the first note this trial was holed below the waterline.

In *B* [2011] EWCA Crim 1183 (Leveson LJ, Openshaw J and HH Judge Goldstone QC) a distressed juror "burst" from the jury retiring room and complained to the jury bailiff that she was being bullied by the jury foreman and could not get her point across. The tail end of the complaint was witnessed by the court clerk who went to see the judge. The Recorder informed counsel that he was going to send the jury home for the day having given them a "soft" form of *Watson* direction. Counsel were told that the juror was a little distressed and was outside the jury's room but not otherwise separated from them. Upon that information counsel made no submissions. In the court's view the action taken was inadequate and the 10-2 verdict was unsafe. The court clerk and jury bailiff should have explained to the judge in the presence of counsel and the defendant what they had seen and heard. Counsel should have been given the opportunity to make representations before the judge decided what action to take.

(4) The *Watson* direction

Bench Book page 387

The Court of Appeal (Moses LJ, Holman J, HH Judge Stokes QC) stated that while trial judges differed in their views as to whether a *Watson* direction should ever be given there was no doubt that the discretion existed and that the trial judge was in the best position to assess whether it was appropriate in the circumstances. The issue on appeal was whether the jury was put under such pressure that the safety of the verdict might be affected: *Pinches* [2010] EWCA Crim 2000.