CRIMINAL LAW—CONSPIRACY

[2009] EWCA Crim 2575

An illegal ‘cartel’ price fixing agreement may be prosecuted and punished in the Crown Court as an offence under the Enterprise Act 2002, s. 188, even where it has a ‘European dimension’. The Court of Appeal rejected arguments that, if the cartel in question relates to trade in the European Union, then only the Office of Fair Trading has any powers of enforcement under EU law.

See Blackstone’s Criminal Practice: A6.33

OFFENCES—HARASSMENT

James v Crown Prosecution Service

[2009] EWHC 2925 (Admin)

D frequently rang his local authority’s social services department to complain about the care he was receiving. If nobody was available to take his call, they were

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obliged to ring him back, upon which he would swear at and verbally abuse the caller, and in some cases threaten violence. The care team manager was abused in that way on two occasions, as well as on occasions when she answered his calls. The Divisional Court held that D’s behaviour could amount to a course of conduct involving harassment, even where the calls were made to him, rather than by him. Elias LJ said:

The fact that the appellant did not initiate [certain] calls is irrelevant. … The appellant knew when he rang [the care manager] that she would be obliged to return his call if she were not immediately available [and] in any event, it matters not whether he directly initiated the telephone calls or not. If I am continually abusive to someone who comes within my vicinity, that may still be capable of constituting a course of conduct, even if the victim chooses to come within my vicinity. The fact that he or she chooses to do so might arguably be relevant to the question of whether there is harassment, but not to the question of whether there is a course of conduct.

See Blackstone’s Criminal Practice: B2.134

OFFENCES—BLACKMAIL

Lambert

[2009] EWCA Crim 2860

The Court of Appeal was required to consider whether an alleged blackmailer can be guilty of the offence within the meaning of the Theft Act 1968, s. 21, when he poses as a victim as opposed to the one who is going to be the aggressor or who will arrange for aggression to occur. The short answer was ‘Yes’. Moses LJ said:

We think it makes absolutely no difference whether the person pretending that someone has been tied up and will be hurt if money is not handed over is pretending to be the victim, or pretending to be the aggressor or pretending that he has it within his power to see that harm comes to the fictitious victim.

See Blackstone’s Criminal Practice: B5.43

ROAD TRAFFIC—HANDLING EMERGENCIES

Warring-Davies v Crown Prosecution Service

[2009] EWHC 1172 (Admin)

D suffered from diabetes. He claimed that he was a quarter of a mile from his home when he realised he was about to suffer a hypoglycaemic attack, and briefly accelerated to 37 mph on a restricted road in order to get to somewhere where he could safely come to a stop, but in so doing was caught by a speed camera. He argued that these were special circumstances that might justify him being spared what would otherwise be mandatory endorsement of his licence, but the magistrates and (on appeal) the Crown Court disagreed, and declined to find that special circumstances existed at all. The Divisional Court felt bound to dismiss the appeal. The sudden onset of a medical condition can amount to special reasons. But on the findings in the case stated, this was not such a case.

See Blackstone’s Criminal Practice: C8.12

PROCEDURE—ENTRY AND SEARCH WITHOUT WARRANT

Syed v DPP

[2010] EWHC 81 (Admin)

The test to be applied to determine whether an officer may use force to enter and search premises, without a warrant, for the purpose of ‘saving life or limb or preventing serious damage to property’ was whether some
serious or dangerous incident had occurred, or was likely to occur, within the premises. It cannot suffice that the officer is merely ‘concerned for the welfare’ of someone in the premises.

See Blackstone’s Criminal Practice: B2.31 and D1.94

PROCEDURE—DEFENCE CASE STATEMENT
R (Tinnion) v Reading Crown Court
[2009] EWHC 2930 (Admin)
At a Crown Court appeal from the youth court, two alibi witnesses were not allowed to be called on the basis (inter alia) that notice had not been given, they had not been named when the appellant had been interviewed, they had not been called in the court below, and the Crown had had no opportunity to check their antecedents etc. which might have gone to their credibility. Allowing the Crown an opportunity to make those checks would have involved aborting the hearing of the appeal at a very late stage. The Divisional Court held that the Crown Court had no power to prevent the witnesses being called. David Clark J said:
The sanction against a defendant who fails to give such notice is not that a witness cannot be called, but that adverse comment can be made and cross-examination can be conducted, and that the court or jury may draw such inference as is proper from the failure to give such notice ….. It may be that the Recorder was thinking back to the time when leave of the court was required before a defendant in the Crown Court could call an alibi witness where no notice had been served.

See Blackstone’s Criminal Practice: D9.18

PROCEDURE—TERMINATING RULINGS
Prosecution Appeal (No. 11 of 2009); C
[2009] EWCA Crim 2614
The Court of Appeal warned that, where the prosecution launch an appeal against a terminating ruling, failure to give a s. 58(8) undertaking in open court at the time is necessarily fatal to that appeal. The Court noted an apparent inconsistency between its earlier rulings in LSA [2009] EWCA Crim 1034 and H [2008] EWCA Crim 483; It will be recalled that in H the defendant was acquitted after the Crown offered no evidence, but that did not prevent the Crown’s appeal going ahead and being successful, albeit this court concluded that it would not be in the interests of justice for the proceedings against H to be resumed. In LSA on the other hand, Hughes LJ said that there could be no appeal after an acquittal. We think that this apparent inconsistency may be no inconsistency in fact: in H the adjournment prior to the acquittal ‘stopped the clock’; but in LSA the acquittal preceded any subsequent attempt of the Crown to bring itself within [section 58] and thus the clock could not be stopped. On that basis, this case would appear to be within, or much closer to, the precedent of LSA.

The Court also made some observations on the requirement that the Crown give notice ‘immediately’ after the ruling.

PROCEDURE—JURY UNABLE TO AGREE
Bell
[2010] EWCA Crim 3
The Court of Appeal confirmed that no rule of law forbids a second retrial in cases where juries in the first two trials have failed to reach a verdict. Where no verdict can be reached at a first retrial, it is initially for the prosecutor to judge whether, taking account of all relevant considerations, the public interest is better served by offering no evidence or by seeking a further retrial. The judge must then consider whether or not the proposed second retrial would be oppressive and unjust, or whether it would be justified in the public interest, the two questions being inextricably linked. The Court warned that:
The broad public interest in the administration of criminal justice leads us to the clear view that a second retrial should be confined to the very small number of cases in which the jury is being invited to address a crime of extreme gravity which has undoubtedly occurred (as here) and in which the evidence that the defendant committed the crime (again, as here), on any fair minded objective test remains very powerful.

See Blackstone’s Criminal Practice: D18.82

PROCEDURE—ANTI-SOCIAL BEHAVIOUR ORDERS: APPEALS
R (Birmingham City Council) v Crown Court at Birmingham
[2009] EWHC 3329 (Admin)
When considering an application without notice to extend the time for appealing against an anti-social behaviour order, a judge may take the age of the
applicant into account, and may do so whether or not that has been offered as an explanation for the delay. The judge's discretion is broad and he is entitled to take account of what he knows of the circumstances of the case. Whilst it is desirable for a judge to give succinct reasons for granting or refusing an extension of time, he is under no duty to do so.

See Blackstone's Criminal Practice: D24.9

EVIDENCE—BAD CHARACTER ADDUCED BY PROSECUTION TO PROVE GUILT

Clements

(2009) The Times 4 December

The defendant was charged with sexually assaulting two adult women at a hostel for the homeless. His defence was that the allegations were a fabrication. His previous conviction for sexual activity with a child under 16 was admitted under the Criminal Justice Act 2003, s. 101(1)(d) as evidence of a propensity to commit such behaviour, but in the view of the Court of Appeal, the facts of that earlier case had little bearing on the case with which the defendant was charged.

See Blackstone's Criminal Practice: F12.20

EVIDENCE—PRESENTATION AND EVALUATION OF DNA EVIDENCE

Reed

[2009] EWCA Crim 2698

The reliability of low copy number DNA was reconsidered in this case and the Court of Appeal also emphasised the distinction between the admissibility of expert evidence and the assessment of that evidence by the court or jury. After extensive consideration of expert views, the Court of Appeal concluded (at [74]) that, on the present state of scientific development Low T emplate DNA can be used to obtain profiles capable of reliable interpretation if the quantity of DNA that can be analysed is above the stochastic threshold. The Court then added guidance as to pre-trial procedure and the exclusion of inadmissible evidence in the context of DNA cases.

See Blackstone's Criminal Practice: F18.32

SENTENCING

Involuntary Manslaughter

Appleby [2009] EWCA Crim 2693

A five-judge Court of Appeal considered three sentencing appeals: one involving murder and two involving unlawful act (or constructive) manslaughter following unprovoked acts of violence. The Court took the opportunity to issue fresh guidance on sentencing in cases of constructive manslaughter where, notwithstanding that the defendant intended neither to kill nor to cause the deceased grievous bodily harm, he is convicted of manslaughter on the basis that the death was consequent on an act of unlawful violence. Such cases, said Lord Judge CJ (at [3]):

... are, of course, always tragic in their consequences, but they do not constitute murder, and they cannot be sentenced as if they were. If the defendant is convicted of manslaughter the consequences must be treated as if they were unintentional and unintended. The court must honour the verdict of the jury (if the jury convicts of manslaughter) or the plea to manslaughter accepted by the Crown (if that is the basis on which the case is prosecuted).

The Court nevertheless held that, since death has resulted, such cases must attract significantly greater sentences than ones in which similar violence does not result in death. Such an approach is in effect required under the Criminal Justice Act 2003, s. 143(1).

As Lord Judge CJ explained, some of the guidance provided in older sentencing cases (including Coleman (1991) 13 Cr App R (S) 508) can no longer be relied upon.

See Blackstone's Criminal Practice: B1.40
Wounding or Causing Grievous Bodily Harm with Intent: Sentencing

Hussain [2010] EWCA Crim 94

MH, a middle-aged businessman of previously impeccable good character, was initially sentenced to two years and six months' imprisonment for taking part in a ferocious 'revenge attack' on a burglar who had previously forced his way into MH's house and held his family hostage. MH's brother, TH, was sentenced to three years and three months' imprisonment for taking part in the same attack, which left the burglar with serious injuries including some brain damage.

Both sentences were reduced on appeal. In MH's case there was 'quite exceptional' mitigation and the Court of Appeal substituted a sentence of 12 months' imprisonment, suspended for two years. In TH's case, the sentence was reduced to one of two years immediate imprisonment. Unlike his brother, TH had not himself been provoked by being the victim of a serious crime a few minutes before, nor had he been left with symptoms of post-traumatic stress disorder.

Lord Judge CJ explained that the group attack on the burglar had not in any sense been one of self defence, because the burglar had been chased down and beaten as he attempted to flee the scene. Nevertheless:

Today, as ever, the sentence of the court must address and balance the ancient principles of justice and mercy. In this case the call for a merciful sentence is intense. As we have emphasised, in the normal way group violence of this kind which produces serious injuries, even if the product of a real grievance, must result in substantial sentences of imprisonment. However, taking each of the appellants in their different positions, we consider that the call for mercy must be answered to this extent.

See Blackstone's Criminal Practice: B12.114

Sentencing Guidelines


Early Release Provisions

Round [2009] EWCA Crim 2667

Sentencing judges should not be expected to alter the ordinary manner of expressing their sentences to maximise the uncertain possibilities of release under home detention curfew (HDC). Nor was it wrong in principle for a judge to refuse to consider such early release possibilities when calculating the sentence or framing the manner or order in which they were expressed to be imposed. The HDC regime was entirely in the discretion of the Secretary of State, and there was no way of knowing in advance what decision might eventually be made about HDC release.

See Blackstone's Criminal Practice: E2.12

Confiscation

Wilkinson [2009] EWCA Crim 2733

The appellant in this case had 'test driven' a car that he rightly suspected had been stolen. He parked it on a yellow line and was then arrested before he could return it. He was convicted of an offence of possession of criminal property contrary to the Proceeds of Crime Act 2002, s. 329, and a confiscation order in the sum of £15,000 was imposed, but this was quashed on appeal. The defendant had not acquired the car, and had gained no financial or proprietary advantage from driving it. Nor was it a case in which he obtained property in the car, and passed it onto another. Accordingly, he had not derived any benefit from using the car within the meaning of the POCA 2002. The Court also considered the issue of whether a confiscation order could be made where, as in this case, the sentence was a conditional discharge but was not required to reach a conclusion on the issue which it left open.

See Blackstone's Criminal Practice: E19.14
**CASE DIGEST—IN DETAIL**

**Persaud v DPP** [2010] EWHC 52 (Admin)

The Divisional Court was required to consider, once again, the procedure by which a defendant may be invited (but not of course required) to provide a specimen of blood for analysis in replacement for a specimen of breath in accordance with the Road Traffic Act 1988, s. 8(2). The pro forma used by police forces in such cases (MG DD/B) directs the officer, once he has established that the suspect is claiming no medical reasons why a specimen of blood cannot or should not be taken from him, to say:

> I have decided the specimen shall be of blood. Do you consent to provide a specimen of blood, which will be taken by a doctor (or health care professional)?

If the answer to this question (at B14 on the pro forma) is ‘yes’ the instruction on the form is to ‘call a doctor (or health care professional) unless already called’ and, if the answer is ‘no’, the instruction on the form is to state any reasons given. Against question B14 there are printed on the form the words YES / NO with an instruction to delete as applicable. But in this particular case, the defendant did not answer and the officer marked the form accordingly, noting that he ‘took this as a refusal’. He was then prosecuted and convicted on the basis of the lower of the two specimens of breath he had originally provided.

The Divisional Court was asked (inter alia) to determine whether there was any legal authority for the question at B14 of the MG/DD/B pro forma.

Having considered *Friel v Dickson* [1992] RTR 366, the court observed that the insertion of question B14 (which had not appeared in earlier pro formas) was a convenient and practical amendment, since it will usually prevent the possibility of a doctor, or health care professional, being called to the police station only to be met by the driver declining to give consent when he arrives. However an affirmative answer given to question B14 in the absence of a doctor or health care professional will not obviate the need for consent to be given again in the presence of the doctor or health care professional. Tomlinson J said:

> If the driver gives his consent to the police constable, the doctor or health care professional will be summoned. It follows from *Friel v Dickson* that at that second stage the driver will nonetheless have the opportunity, and must be given the opportunity, to give or to decline his consent to the taking of a blood specimen by the doctor or health care professional who attends with a view to taking it. His earlier consent given to the police constable does not bind him and if he refuses consent at this second stage the specimen of breath will simply be used as evidence of commission of the offence.

On the other hand the driver may when the question in terms of B14 is posed by the police constable indicate unequivocally that he does not consent to provide a specimen of blood, which may be taken as an unequivocal indication that, were a doctor or health care professional summoned to attend, he would not on their arrival give his consent to that person taking a specimen of blood. Such would in my view amount to an abandonment of the election earlier made to provide a specimen for laboratory alcohol analysis, with the obvious consequence that the specimen of breath would again be used to prove the commission of the offence of driving with excess alcohol.

Agreeing with this, Moses LJ added:

> I share Tomlinson J’s concern that a tiresome suspect who shilly-shallies may cause an unnecessary journey for a medical practitioner or registered health care professional. But it should … now be understood that the suspect should not be recorded as giving a negative answer to question B14 unless and until he has clearly demonstrated that he has withdrawn his earlier indication that he wishes to give a sample of blood or urine. Conversely, the question at B14, if answered in the affirmative, can never be a guarantee that the journey will not be wasted. If those principles are borne in mind, the Justices should have no difficulty in deciding, on the basis of the evidence, whether a suspect did withdraw his election under s. 8 or not.

In this case however, the court was (perhaps surprisingly) not satisfied that the defendant had unequivocally abandoned his election to provide a specimen for laboratory alcohol analysis as an alternative to use of the specimen of breath, or indeed that the justices had reached any clear finding on that issue. His conviction was therefore quashed.

*See Blackstone’s Criminal Practice: C5.9*

**Cleveland Police v Haggas** [2009] EWHC 3231 (Admin)

The standard of proof applicable when establishing the conditions for the making of sexual offences prevention orders (SOPOs) on application by a chief officer of police, pursuant to the Sexual Offences Act 2003, s. 104(5), was considered in this case. Collins J noted that in *B v Chief Constable of Avon and Somerset*
Constabulary [2001] 1 WLR 340, which involved essentially similar provisions under earlier legislation, Lord Bingham CJ had concluded that such proceedings were civil and that the civil standard of proof accordingly applied. As Collins J observed:

A distinction is there drawn between the civil standard, which is said to be, for all practical purposes, indistinguishable from the criminal standard in establishing whether he is a sex offender, but, in establishing whether he has committed acts which make it reasonable to make the order, there is the civil standard applied with the strictness appropriate to the seriousness of the matters to be proved.

But this concept of a ‘variable civil standard of proof’ may be considered to be inconsistent with the conclusions of the House of Lords in Re B (Children) [2008] UKHL 35 in which it was held that there can only be two standards of proof: the criminal standard or the civil standard. Baroness Hale in Re B cited this dictum of Lord Nicholls in Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563:

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind the evidence before the court concludes that the allegation is that the event occurred and, hence, the stronger should be the evidence that it did occur. …

Lord Bingham’s approach in B v Chief Constable of Avon and Somerset Constabulary was expressly singled out by Baroness Hale as an example of judicial confusion. She observed that ‘Re H was neither referred to nor cited in that case’. The House of Lords in Re B nevertheless accepted that in some civil proceedings (e.g., ASBO applications under the Crime and Disorder Act 1998, s. 1) the criminal standard of proof should be applied (see e.g., R (McCann) v Crown Court at Manchester [2003] 1 AC 787) and similar considerations may be thought to apply to SOPOs.

See Blackstone’s Criminal Practice: E21.13 and F3.37

Barker [2010] EWCA Crim 4

One of the issues in this sexual abuse case was whether the extreme youth and limited capacity of the four-year-old complainant had made it impossible for defence counsel to put the appellant’s case through cross-examination.

Giving the judgment of the Court, Lord Judge CJ quoted from the Youth Justice and Criminal Evidence Act 1999, s. 53 and made the following general observations (at [38]-[41]):

These statutory provisions are not limited to the evidence of children. They apply to individuals of unsound mind. They apply to the infirm. The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. If the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood he is not. The questions come, of course, from both sides. If the child is called as a witness by the prosecution he or she must have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to them which are understandable. The provisions of the statute are clear and unequivocal, and do not require reinterpretation. … whenever the competency question is addressed, what is required is not the exercise of discretion but the making of a judgment, that is whether the witness fulfils the statutory criteria. In short, it is not open to the judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children. In particular, although the chronological age of the child will inevitably help to inform the judicial decision about competency, in the end the decision is a decision about the individual child and his or her competence to give evidence in the particular trial.

…in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made.
in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.

Lord Judge CJ then turns to the techniques which advocates might consider when examining or cross-examining a young child. He also gives valuable guidance on the competency test, re-emphasising the need for distinction to be drawn between that test and an assessment of credibility.

In this case, the Court was satisfied that counsel was indeed able to put his case to the witness (which was that she was saying only what her sister had told her to say) and that he had done so.

As to the delay that had occurred between the initial complaint and the trial:

The decisions in Powell and Malicki should not be understood to establish as a matter of principle that where the complainant is a young child, delay which does not constitute an abuse of process within well understood principles, can give rise to some special form of defence, or that, if it does not, a submission based on ‘unfairness’ within the ambit of section 78 of the [PACE 1984] is bound to succeed, or that there is some kind of unspecified limitation period.

See Blackstone’s Criminal Practice: F4.18

**LEGISLATION AND OFFICIAL GUIDANCE**

**Terrorist Asset-Freezing (Temporary Provisions) Act 2010**

This Act was passed in response to the ruling of the UK Supreme Court in Ahmed v HM Treasury [2010] UKSC 2 (see B10.38). It provides for the temporary validity of the UN Terrorism Orders in order to maintain asset-freezing restrictions whilst the Government takes steps to put in place by means of primary legislation an asset-freezing regime to comply with the obligations in UN Security Council Resolution 1373.


This Order *inter alia* brings into force on 25 January 2010, the following provisions of the Act: ss. 6 to 9 (authorisations to police), 26 (penalty for contravening notice relating to encrypted information), 51, 61, 62, 64 (which all relate to confiscation and civil recovery) and 67 to 78 (extradition).

**Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) (Amendment No. 2) Order 2009 (SI 2009 No. 3111)**

This Order has the effect of ensuring that, notwithstanding the introduction of the youth rehabilitation order on 30 November, where offences were committed before that date the previous sentencing regime applies.

**Misuse of Drugs Act 1971 (Amendment) Order 2009 (SI 2009 No. 3209)**

This Order amends the 1971 Act, with effect from 23 December 2009, so as to add synthetic cannabinoid receptor agonists to Part 2 of sch. 2 (which specifies drugs which are subject to control as Class B drugs). The Order also adds Gamma-butyrolactone (GBL), 1,4-butanediol (1,4-BD), 15 anabolic steroids, Oripavine, 1-benzylpiperazine (BZP) and a group of substituted piperazines to Part 3 of sch. 2 (which specifies drugs which are subject to control as Class C drugs). Matching amendments are made to certain statutory instruments under the 1971 Act (see SI 2009 Nos. 3135 and 3136).

This Order brings into force, on 14 December 2009, ss. 106 (directions to attend through live link), 107 (answering to live link bail), 108 (searches of persons answering to live link bail), 109 (use of live links in enforcement hearings) and 110 (direction of Registrar for appeal hearing by live link). However, s. 106(3), 107 and 108 are implemented only for specified local justice areas, namely those where live link police bail is available. Inter alia, the implemented amendments enable directions in relation to live links to be made by a single justice as well as a full bench, remove the need for the accused to consent to the making of a direction, and ensure that a direction may not be made unless the court is satisfied that it is not contrary to the interests of justice to do so. The Order also makes transitional provision.

Criminal Procedure Rules 2010 (SI 2010 No. 60)

These Rules revoke and replace the Criminal Procedure Rules 2005 (SI 2005 No. 384), consolidate the numerous amendments made to the 2005 Rules and make a number of material amendments. The amendments are as follows:
- Part 6 (investigation orders) is amended so that rr. 6.1 and 6.2 and a new section 5 (rr. 6.23 to 6.26) provide for investigation anonymity orders;
- r. 10.4 is replaced – the new rule (objections to committal statements being read at trial) includes provision requiring a prosecutor, when introducing a written statement in committal proceedings, to give notice to the defendant of the right to object, the time limit for objection and the consequences of failure to object;
- Part 29 is replaced – formerly entitled 'Special Measures Directions', the new and expanded Part 29 is entitled ‘Measures to Assist a Witness or Defendant to Give Evidence’;
- Part 34 (hearsay evidence) is replaced;
- Part 35 (evidence of bad character) is replaced;
- r. 37.3 (procedure on plea of not guilty) is amended so as to provide for the prosecution and defence to have the right to make final representations in most circumstances;
- Part 75 is replaced – formerly entitled ‘Reference to the European Court’ it is now entitled ‘Request to the European Court for a Preliminary Ruling’.

Coroners and Justice Act 2009 (Commencement No. 3 and Transitional Provisions) Order 2010 (SI 2010 No. 145)

This Order brings provisions of the Act into force on 1 February 2010 including the following:
- s. 59 (encouraging or assisting suicide (England and Wales));
- s. 61 and sch. 12 (encouraging or assisting suicide: information society services);
- s. 72 (conspiracy);
- s. 112 (admissibility of evidence of previous complaints);
- s. 114 (bail: risk of committing an offence causing injury);
- s. 115 (bail decisions in murder cases to be made by Crown Court judge);
- s. 140 (appeals against certain confiscation orders (England and Wales)).
intention to call any person, other than him or herself, as a witness at trial).

**Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No. 2) Order 2010 (SI 2010 No. 276)**

This Order brings s. 10 of the Act (power to order conviction etc. to be publicised) into force on 15 February 2010.

**Policing and Crime Act 2009 (Commencement No. 4) Order 2010 (SI 2010 No. 507)**

This Order *inter alia* brings into force on 25 January 2010, the following provisions of the Act: ss. 14 (paying for sexual services of a prostitute subjected to force etc: England and Wales), 16 (amendment to offence of loitering etc for purposes of prostitution), 17 (orders requiring attendance at meetings), 19 (soliciting: England and Wales); 21 (closure orders: England and Wales); 22 (disapplication of time limits for complaints) and 23 to 25 (foreign travel orders).

**Code for Crown Prosecutors**

The DPP has issued a new edition of the Code. The new Code largely reflects the provisions of the Code it replaces but it is a reorganized and expanded version that now applies. The Code is available in full at <http://www.cps.gov.uk/publications/code_for_crown_prosecutors/>.

**Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide**

The DPP has issued guidance which affects the decision of whether or not to charge an alleged offender in cases involving encouraging or assisting suicide. The guidance can be found at <http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html>.

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**A Flexible Approach to Jurisdiction over Cross-frontier Offences**

How should a court or judge decide whether an alleged offence was committed within England and Wales or abroad? If some of its elements took place within the jurisdiction and others took place abroad, the answer to that question may be far from obvious; but in most cases it is important to know the answer. It is commonly said that this is because English courts generally lack jurisdiction over crimes committed abroad, but a more accurate way of putting it is that things done abroad cannot ordinarily be regarded as offences under English law. It is not, in other words, a mere procedural issue of jurisdiction, but a fundamental issue relating to the *actus reus* of the offence.

The traditional approach to ascertaining the place at which a crime was committed is to ascertain the time and place at which it was completed. In the case of a conduct crime that will always be where D acted or omitted to act; in the case of a result crime, it will be where the proscribed result (or one of the prescribed results) took place. There is much authority supporting this ‘terminatory’ approach, including a number of decisions of the House of Lords, notably *Treacy v DPP* [1971] AC 537 and *Secretary of State for Trade v Markus* [1976] AC 35. It was more recently endorsed by the Court of Appeal in *Manning* [1999] QB 980, but now seems to have fallen out of favour.

If rigidly applied, the terminatory approach can produce very odd results. Thus, a murder is committed only when the victim dies, but if V is airlifted to hospital in England after being stabbed by D in a fight aboard a foreign ship, and then dies in hospital, the terminatory approach would have us say that D murdered V in England. In the context of internet publications, a rigid application of that approach may mean that an article is said to have been ‘published’ in England (and thus be subject to English law) even if it is produced by a foreigner abroad and uploaded to a foreign website, as long as it has been viewed or downloaded by at least one person in England (see *Perrin* [2002] EWCA Crim 747).
Other approaches have been tried from time to time (notably by Lord Diplock in Treacy) but until recently none have really gained any general acceptance. In some cases (notably those involving international fraud) legislation now overrides the problem by providing that the commission of any essential element of the offence within the jurisdiction will suffice to make it punishable under English law, but such provisions remain exceptional and are of limited application.

There is, however, evidence to suggest that a more flexible approach adopted by the Court of Appeal in Smith (Wallace Duncan) (No. 4) [2004] QB 141, is gaining wider judicial acceptance. According to Lord Woolf CJ in the latter hearing, a slavish reliance on the terminatory principle may ‘lead to a wholly unsatisfactory situation in contemporary circumstances’ and courts should be prepared to look beyond it, and assert jurisdiction if a substantial measure of the alleged offence occurs within England and Wales. This approach was endorsed (obiter) by Lord Hope in R (Purdy) v DPP [2009] UKHL 45 and has now been endorsed again by the Court of Appeal in Sheppard and Whittle [2010] EWCA Crim 65.

The appellants in Sheppard were convicted of publishing racially inflammatory material, contrary to the Public Order Act 1986, s. 19. The offending articles, which were anti-Jewish and referred to the holocaust as the ‘holohoax’, were written and produced by one of the appellants in England but published on the internet by uploading them to a server located in California. None of this material was illegal under Californian or US Federal law but that did not matter if the offence had been committed under English law (i.e. within the limits of English criminal jurisdiction).

The Court noted three possible theories upon which jurisdiction might be asserted over such publications:

The first is that a publication is only cognisable in the jurisdiction where the web server upon which it is hosted is situated, it is also cognisable in a jurisdiction at which the publication is targeted – the directing and targeting theory.

The Court found it unnecessary fully to explore the effect of applying these theories to the case before them, but turned instead to what it described as ‘the substantial measure principle enunciated by this court in Wallace Duncan Smith (No.4)’. There was ample evidence in Sheppard to support jurisdiction under that principle. In particular:

- Sheppard operated and controlled the website from within the jurisdiction and it had a dedicated ‘British page’;
- the material was uploaded, maintained and controlled from within the jurisdiction, and much of it was written, edited or collated there;
- e-mail traffic between the appellants revealed their intention to publish the material on the website within the jurisdiction; and
- the only ‘foreign’ element was that the website was hosted by a server in California which was merely a stage in the transmission of the material to those who would ultimately read it.

Increasing support for a ‘substantial measure’ approach to such cases is potentially very significant, but some legislation is worded in such a way that such an approach cannot be relied upon. Thus, a person who possesses controlled drugs in England cannot ordinarily be guilty of an offence of possession with intent to supply, contrary to s. 5(3) of the Misuse of Drugs Act 1971 if his intent is to supply the drugs only outside the jurisdiction. This is because the intent to supply must be an intent to supply in contravention of s. 4(1) of the Act, whereas the supplying of such drugs abroad would not ordinarily involve any contravention of the latter provision. See on that issue Hussain [2010] All ER (D) 183 (Jan) and Seymour v The Queen [2008] 1 AC 713. Similar considerations may apply where D is charged with an offence under the Firearms Act 1968, s. 18 (carrying a firearm with intent to commit an indictable offence) because things done abroad are not ordinarily indictable in English law, so an intent to use the firearm abroad would not ordinarily suffice. But if D were to be charged instead under s. 16 of that Act (possessing a firearm with intent to injure or endanger life) it would not then matter where D intended to use the firearm. Possession in England with intent to use the weapon abroad is sufficient to constitute that offence (see El-Hakkakoui [1975] 1 WLR 396).

In other cases, the position remains unclear. For example, despite Lord Hope’s support in Purdy for the substantial measure principle, the House of Lords ultimately declined to rule on whether D would commit any offence under the Suicide Act 1961 (prior to its amendment by the Coroners and Justice Act 2009) if he did something in England that assisted E to
commit or attempt to commit suicide abroad, and although one of the 2009 amendments now resolves that question (in respect of things done on or after 1 February 2010), it appears to have done so entirely by accident: see Hirst, ‘Assisted Suicide After Purdy’ [2009] Crim LR 870.

This is all very unsatisfactory. In any system of criminal law, the most basic issue is perhaps that of ‘to whom (and where) does this law apply?’. In English criminal law, that question is seldom addressed on anything other than an ad hoc basis. The result, inevitably, is often one of muddle and confusion.

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Special Measures Directions

The Coroners and Justice Act 2009 makes a number of amendments to the special measures introduced by the Youth Justice and Criminal Evidence Act 1999 which will greatly increase their importance in practice.

Firstly, s. 98 of the 2009 Act amends the 1999 Act so that all persons aged under 18 (rather than under 17) automatically qualify as witnesses eligible for special measures under the 1999 Act, thus extending the protection to all ‘young persons’ and thereby removing the anomaly that some young people were outside the scope of automatic eligibility.

Section 99 of the 2009 Act amends s. 17 of the 1999 Act to give automatic eligibility for assistance to witnesses in proceedings related to offences specified in a new sch. 1A to the 1999 Act (specified offences involving firearms or knives, reflecting the Government’s concerns about these crimes). In such cases, the court does not, for the purposes of establishing eligibility, have to be satisfied, as a precondition to ordering special measures, that the quality of the witness’s evidence would otherwise be diminished. However, despite the automatic eligibility, the court still has to determine (under s. 19 of the 1999 Act) whether any of the available special measures will in fact improve the quality of the witness’s evidence and whether any such measures might inhibit the evidence being effectively tested (in cross-examination). It also remains open to a witness to inform the court that he does not wish special measures to be applied.

Section 100 of the 2009 Act amends s. 21 of the 1999 Act so as to modify the ‘primary rule’ that applies to child witnesses (namely that the court must give a special measures direction for video-recorded examination-in-chief and any other evidence to be given via a live link) by removing the special category of child witnesses ‘in need of special protection’. This amendment has the effect of placing all child witnesses (i.e. those under 18) on the same footing, irrespective of the offence to which the proceedings relate and removes an unnecessary complication. Child witness are also allowed to opt out of giving evidence by a combination of video-recorded evidence-in-chief and live link, provided the court is satisfied that allowing the opt out will not diminish the quality of the child’s evidence. If the child witness testifies in court (rather than by way of a live link), his evidence must be given from behind a screen (in accordance with s. 23) unless the child (with the agreement of the court) opts out of this requirement, or the court considers a screen would not maximise the quality of the child’s evidence.

In deciding whether a child witness may opt out of the primary rule, or of the secondary requirement to give evidence from behind a screen, the court must have regard to the age and maturity of the witness; the ability of the witness to understand the consequences of testifying without special measures; any relationship between the witness and the accused; the witness’s social and cultural background and ethnic origins; and the nature and alleged circumstances of the offence to which the proceedings relate.

Section 101 of the 2009 Act inserts a new s. 22A into the 1999 Act to make special provision for complainants in respect of sexual offences being tried in the Crown Court. Under s. 22A(7) and (9), the complainant’s video-recorded statement must be admitted under s. 27 of the 1999 Act, unless that requirement would not maximise the quality of the complainant’s evidence. Under s. 22A(3), s. 22A does not apply if the witness is under 18, since the rules set out in s. 21 apply anyway. Under s. 22A(4), the requirement to admit the video-recorded evidence-in-chief applies only if a party to the proceedings makes an application for it to be admitted (and so is not automatic).

Section 102 of the 2009 Act amends s. 24 of the 1999 Act to enable the court, when making a live link direction, to direct that a person specified by the court can accompany the witness when the witness is giving evidence via a live link. The court must have regard to the wishes of the witness when determining who may accompany the witness. The person accompanying the witness is there to provide moral support, not to act as
an intermediary (for which separate provision is made).

Section 103 of the 2009 Act amends s. 27 of the 1999 Act to remove the prohibition on asking a witness questions about matters the court considers to have been covered adequately in a video-recorded statement admitted as a witness’s evidence-in-chief. The witness may, with the permission of the court, be asked questions about matters that are covered in the recorded statement, as well as questions regarding matters not covered in the recorded statement. Similarly, s. 111 repeals the CJA 2003, s. 138(1), removing the prohibition on examination-in-chief covering matters the court thinks were dealt with adequately in a recorded account which is admissible under s. 137 of the 2003 Act (a video-recorded account made by an eye-witness made at a time when the events were fresh in the person’s memory), thus enabling additional questions to be asked where necessary.

Section 112 of the 2009 Act amends s. 120(7) of the 2003 Act (admissibility of a previous consistent out-of-court statement of a witness) so as to remove the requirement that the complaint be made as soon as could reasonably be expected after the alleged conduct. This was a controversial requirement, especially in cases involving sex offences, given the difficulty complainants may understandably feel in telling someone about what has happened.

Section 104 of the 2009 Act adds new ss. 33BA and 33BB, to the 1999 Act to provide for the use of an intermediary where certain vulnerable defendants are testifying. The court must be satisfied that making the direction is necessary in order to ensure that the defendant receives a fair trial and, if he has attained the age of 18, that he suffers from a mental disorder or otherwise has a significant impairment of intelligence and social function, and is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court; or, if under 18, his ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his level of intellectual ability or social functioning. Section 33BB gives the court power to discharge a direction for the use of an intermediary where this is no longer necessary for the purposes of a fair trial. This extends to defendants a special measure already available to witnesses.

These provisions come into force on a date to be appointed. It should be noted, however, that a court may order special measures that fall outside the ambit of the 1999 Act using its inherent powers or its case management powers under the Criminal Procedure Rules (see R(C) v Sevenoaks Youth Court [2009] EWHC 3088 (Admin)). Thus, the court may order special measures that are not in the list set out in the 1999 Act, or can give the accused the benefit of special measures for which he would not be eligible under the Act.

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New Sentencing Guidance—Corporate Manslaughter

The Sentencing Guidelines Council issued a Definitive Guideline on Corporate Manslaughter and Health and Safety Offences Causing Death in February 2010, applicable to the sentencing of organisations on or after 15 February 2010.

The offence of corporate manslaughter was created by the Corporate Manslaughter and Corporate Homicide Act 2007. The offence can be committed only by organisations and not by individuals, and has as its root element a breach of duty of care under the law of negligence. Such breach must be gross, where the conduct falls far below what can reasonably be expected of the organisation. It must also be shown that a substantial element in the breach is the way in which the organisation’s activities have been managed or organised by its senior management and the offence is committed only where death is shown to have been caused by the gross breach of duty. Health and safety offences, typically those under the Health and Safety at Work Act 1974, ss. 2 and 3, can be committed by organisations or by individuals, but the guideline relates to organisations only. Where death occurs, there may be a significant overlap between the offences, and it is to be expected that some cases will be prosecuted in the alternative.

The guidelines identify key factors likely to affect offence seriousness, including the foreseeability of serious injury, how far short of the applicable standard the defendant fell, how common is the kind of breach, and how far up the organisation the breach went. Aggravating features will include the occurrence of more than one death, the failure by the defendant to heed earlier warnings, cost-cutting at the expense of safety, and deliberate failure to comply with relevant licences. Mitigating factors include a prompt acceptance of responsibility, a high level of co-operation with the
investigation, genuine efforts to remedy the defect, and a good health and safety record.

The main applicable penalty here is obviously the fine, and the guideline considers in some detail the relevant financial information about the defendant which will be required in order properly to set the size of the fine. It says that a fixed correlation between the fine and either turnover or profit is not appropriate, but the court must look carefully at both, as well as at assets, in order the gauge the resources of the defendant. However, the offence of corporate manslaughter, because it involves gross breach at a senior level, will ordinarily require a fine of at least £500,000 and may be measured in millions of pounds. The guideline goes on to consider the appropriate approach to two new forms of order, the publicity order and the remedial order. The former may require publication in a specified manner of the fact of conviction, specified particulars of the offence, and the amount of any fine. Such an order should ordinarily be made, and is part of the punishment for the offence. A remedial order is appropriate where the defendant has not already remedied specific failings, and should be considered in such a case if it is enforceable. The judge should personally endorse the final form of the order. Such an order is ancillary to sentence and is not part of the punishment.

Murder with a Weapon

The Criminal Justice Act 2003 (Mandatory Life Sentence; Determination of Minimum Term) Order 2010 (SI 2010 No. 197) amends sch. 21 to the 2003 Act by inserting the following new paragraph:

5A (1) If—
(a) the case does not fall within paragraph 4(1) or 5(1),
(b) the offence falls within sub-paragraph (2), and
(c) the offender was aged 18 or over when the offender committed the offence,
the offence is normally to be regarded as sufficiently serious for the appropriate starting point, in determining the minimum term, to be 25 years.

(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—
(a) commit any offence, or
(b) have it available to use as a weapon,
and used that knife or other weapon in committing the murder.

There are minor consequential amendments to paras. 6 and 10. These amendments came into force on 2 March 2010, but do not apply in relation to a life sentence imposed for an offence of murder committed before that day.

The starting point of 25 years did not previously exist within the scheme in sch. 21. In a case of ‘a murder involving the use of a firearm or explosive’ which does not attract a whole life minimum term, the normal starting point is 30 years. Use of a ‘knife or other weapon’ will now normally attract a somewhat lower starting point although the scheme in sch. 21 has been interpreted by the Court of Appeal in a flexible manner, and the presence of other aggravating or mitigating factors in the particular case may properly take a murder involving the use of a knife or other weapon well above, or well below, the 25-year starting point. It is significant that, while the original proposal was to single out the use of knives for special mention in the schedule, it has now been broadened to include other weapons. There was always a logical difficulty in specifying the use of a knife, but not including other similar sharp implements such as a chisel or a screwdriver. Now, however, the category of ‘other weapon’ seems to be wide open, to include anything (such as a baseball bat) that could properly be so described and which was brought by the offender to the scene with the requisite intention.

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Jonathan Glasson and Julian B. Knowles, Barristers, Matrix Chambers

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