GUILDHALL CHAMBERS

Crime News

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Team News

The Guildhall Chambers Crime Team are delighted to anounce our two new silks. Peter Blair Q.C. combined his elevation to silk with becoming our new Head of Chambers. Andrew Langdon Q.C.'s position will come as no surprise to the many who have known him in his time here. With four specialist criminal silks now in Chambers we believe we can provide a truly comprehensive service to all our professional clients throughout all aspects of our field.

Finally, we also welcome our newest member to the team, James Haskell. James is a Bristolian, achieved a First Class degree and was our first exclusively criminal pupil here. We are sure he will be a great success.

Ian D Pringle Q.C.

Editorial

This edition, albeit printed on paper, is 50% silk! I am very grateful to our newly appointed silks Peter Blair and Andrew Langdon for finding the time to contribute to our latest edition amidst their appointments and professional life changes. They join with Ian Pringle our Crime Team Leader in providing substantial material for this edition.

Criminal Justice Act 2003. Not again I hear you say! It is perhaps unsurprising that we have had to include in this edition no less than three articles bringing up to date some of the more arcane provisions of the 2003 Criminal Justice Act. Andrew Langdon provides a much needed review of the 'dangerousness' provisions of the Act and for good measure provides an up-to-date and scathing assessment of the position as to Sexual Offences Prevention Orders. Ian Pringle leads us through the labyrinthine provisions of murder sentencing in the first decade of this century. Finally Anna Vigars gives us a very practical guide as to how to approach 'bad character' evidence, now that the dust has settled and some of the excitement diminished.

The Future. Haven't we all heard for so long that there is going to be a new Fraud Bill that it never seemed likely to become a reality? Well, it is about to become the Fraud Act any day now; possibly before you receive this edition. With a timely piece Peter Blair, with acknowledgements to the Monty Python Team, has given us a very valuable introduction to this ground breaking legislation. You read it here first!

ASBOs. Another topic receiving much press attention. From some of the opinion polls I can just imagine hooded yeeth (as my dearly departed father-in-law termed them) coming into chambers just to find out from Jenny Tallentire how they can get the ASBO of their dreams.

Don't bug me! Robert Davies has provided us with a window into the murky area of covert surveillance; a topic that is also very much in the political domain currently as a prospective means of successfully prosecuting terrorists. What Rob has been too modest to mention, so I will, is that the case of R v Sly and others to which he refers, was his!

I cannot finish this editorial without quoting Lord Justice Rose in the concluding paragraph of the judgement in *R v Lang and others* [2006] 1WLR 2509: *"It would be inappropriate to conclude these proceedings without expressing our sympathy with all those sentencers whose decisions have been the subject of appeal to this Court. The fact that, in many cases, the sentencers were unsuccessful in finding their way through the provisions of this Act, which we have already described as labyrinthine, is a criticism not of them but of those who produced these astonishingly complex provisions. Whether now or in the fullness of time the public will benefit from sentencing provisions of such complexity is not for us to say. But it does seem to us that there is much to be said for a sentencing system which is intelligible to the general public as well as decipherable, with difficulty by the judiciary."*

This legislation was intended to deter, how can anyone be deterred by that which even judges find hard to comprehend? When will politicians learn?

Andrew Macfarlane, Editor.

Dangerous legislation

Grappling with the 'dangerousness' provisions of the CJA 2003

A number of sentences of imprisonment passed for public protection ('IPPs') under the mechanics of sections 224-229 of the Criminal Justice Act 2003 have very recently been considered by the Court of Appeal *en bloc*.

Most related, as is so often the case in practice, to the complicated question, whether:

1. when faced with an offender who had committed a 'specified' offence
2. who at the time had at least one relevant previous conviction for another specified offence
3. the assumption which the Court must otherwise make – namely that there was *'a significant risk to the public of serious harm occasioned by the commission of specified offences'*
4. would in the light of all relevant material
5. amount to an unreasonable conclusion that there was such a risk

The tortuous language of section 229(3) places a burden on a Judge who does not want to pass an IPP notwithstanding the fact that such a sentence appears to be triggered by the categorisation of the instant and a past offence, to find that the statutory assumption leads to an unreasonable conclusion as to the level of risk.

If the Judge thinks that the statutory assumption might lead to an injustice, in that the offender poses something less than a significant risk of causing serious harm in the future, a careful explanation of the unreasonableness of the otherwise automatic conclusion needs to be spelt out in careful language in the sentencing remarks if a successful appeal by the prosecution is to be avoided.

There are 153 categories of offences that might trigger these provisions[1] and the consequences of the offending upon victims varies enormously, such that the assumption which the court must otherwise make, can lead to a draconian outcome and burgeoning prisons.

Most practitioners and judges, not to mention those charged with looking after prisoners serving a sentence of IPP, were accordingly relieved when Rose L.J., the Vice President of the Court of Appeal Criminal Division, provided the judgement in *R v Lang and others* [2006] 1WLR 2509. Most of the focus in that case was upon the issue of the true meaning of 'dangerousness', and the hurdle seemed there to have been set higher than the Act, at first blush at least, wanted to place it. The word 'risk' even when qualified by 'significant' might, without *Lang* have been interpreted in such a way as to include a mere possibility: But Rose LJ in *Lang* described it as *'a higher threshold than the mere possibility of occurrence and in our view can be taken to mean 'noteworthy, of considerable amount or importance'* '

So it was that as a matter of practice, there was a collective sigh of relief, and Judges and Recorders alike were given, it seemed, licence to conclude that the assumption they 'must' make, was often an assumption which would lead to an unreasonable conclusion. That the law required, literally as a matter of routine, assumptions to be made which would so often be described as unreasonable, did not appear to surprise or depress anyone unduly.

On the 3rd October 2006 a number of appellants - the unhappy minority still receiving IPPs post *Lang* - marched up the Court of Appeal, brandishing a copy of Rose LJ's judgement and asked the Court what had gone wrong.

In a judgement given on 20th October *R v Johnson and others* [2006] EWCA Crim 2486, the Court of Appeal dealt with five Appeals concerning IPPs which were apparently listed, 'by coincidence', before the Court consecutively on the same date.

The President of the Queen's Bench Division whilst describing Lang as a judgement *'by one of the pre-eminent criminal judges of this generation'* went on to criticise counsel for treating the judgement as synonymous with statute. The Court then dismissed four appeals against IPPs and in relation to the fifth case passed an IPP on the appeal of the Attorney-General where Judge Cutler sitting in Winchester had found that the statutory assumption led to an unreasonable conclusion. The Court of Appeal said that it was *'not reasonable to conclude that the statutory assumption was displaced.'* This of course amounted to an unreasonable conclusion by the judge that a statutory assumption led to an unreasonable conclusion. And all this, notwithstanding that, as the President put it, *'Judge Cutler is an experienced and highly respected trial judge.'*

Of course the simple fact that in *Johnson* each of five appellants came second, does not by itself signal a turning of the tide. More alarming to those at risk of an IPP were some of the observations made which, while the court went out of its way to indicate that *'nothing in this judgement is intended to undermine the guidance provided by Lang'*, seem at least to strike a rather different tone than that set by Rose L.J.

For example:

- A sentencer should not regard previous convictions as irrelevant to the issue merely because they were not 'specified' offences: a pattern of minor previous offences of gradually escalating seriousness may be significant.
- Where the facts of the instant or the previous specified offence had not resulted in any harm actually occurring, that may be merely fortuitous. *'Faced with such a case the sentencer considering dangerousness may wish to reflect, for example, on the likely response of the offender if his victim, instead of surrendering, resolutely defended himself.'* In response it is tempting to observe that all sorts of things may have happened; but the serious response is that this is a sentiment which while undoubtedly logical in its reasoning, does not chime with the stricter approach taken by Rose LJ in *Lang*. *Lang* suggested that something rather more concrete and less theoretical in terms of identifiable risks, ought to be looked for, when scrutinising what has been the effect of the offences on the victims.

[1] Schedule 15 of the Act

- Inadequacy, suggestibility and vulnerability of the offender – whilst they might amount to mitigation in ordinary cases might in fact *'serve to produce or reinforce the conclusion that the offender is dangerous'*.
- In *Lang* Rose LJ said the prosecution ought to be able to produce the facts of the previous specified offences. Many judges were in the light of this observation, disinclined to make the statutory assumption otherwise called for. But Johnson demotes this requirement by describing it merely as '*good practice*', which if not followed did not preclude the imposition of an IPP – after all counsel for the defendant should be in a position to explain the circumstances on the basis of his instructions – or the Court could draw inferences from the sentence passed on the earlier occasion.

Furthermore the Court gave short shrift to the idea that account ought to be taken of what was described as the *'administrative problem'* within the prison system whereby (as is commonly the case) no proper assessment of the risk posed by the offender would be made before the expiry of the minimum period set. It was suggested that that problem might be one to take up with the Administrative Court. No doubt many would agree that it is not for judges to relieve pressures in the system brought about by a lack of foresight by the Legislature. But it hardly credits the Judicial system if sentences are passed in the full knowledge that the mechanism set in train (and spelt out to the offender) is not in fact going to operate.

It is difficult to know whether the Court in *Johnson* deliberately set out to change the tone set by *Lang*, or whether it was simply irritated by being taken by four puzzled practitioners (watched by smug Treasury Counsel for the A-G) to passages in *Lang* which seemed to support their submissions. Perhaps it was the product of the listing of so many cases of that sort, quite by coincidence, consecutively on one day.

SOP for the Public

Some may think that Sexual Offences Prevention Orders (see Sexual Offences Act 104) can step in to protect the public at least in relation to sex offenders, if the criteria for an IPP are not met. But, as Dr Thomas has pointed out[2], the criteria for passing one, in terms of dangerousness, seem to be the same as for an IPP. A SOPO may be passed if the Court needs to find that it *'is necessary...for the purpose of protecting the public or any particular member of the public from serious sexual harm from the defendant.'*

In response Alisdair Gillespie argued[3] that whilst in *D* [2005]EWCA 1951 the Court of Appeal said that *'necessary'* is something more than *'desirable'*, the same Court also spoke in terms of a mere likelihood of re-offending. If Mr Gillespie was right, and a *'likelihood'* is less likely than a 'significant risk', then a judge who shrank from an IPP could, no doubt with a sense of relief that the public can still be protected, pass a SOPO as part of the sentencing package, argued Mr Gillespie. If on the other hand Dr Thomas was right, the conclusion could only be that SOPOs should never be passed, because a judge who finds that SOPO criteria are met ought to be passing an IPP. Whatever the correct view, it was difficult to disagree with Mr Gillespie who observes that 'the dangerousness provisions are something of a mess.'

Very recently (27.10.06) the Court of Appeal has found the answer. In *R v Richards* [2006] EWCA Crim 2519, a practitioner whose client had received neither an extended sentence nor an IPP but had still received a SOPO, went to the Court of Appeal and quoted Dr Thomas at them. The Court of Appeal in a judgement provided by the President, paid the usual compliments to Dr Thomas and said that the result of his argument if correct, *'would be astounding'*.

The Court pointed to a number of differences in terminology between the two Acts. For example, a SOPO is concerned with the protection of the public from serious physical or psychological harm, but not encompassing the risk of *death*, which is part of the definition in section 244.

For this, and a variety of other equally (it is submitted un-compelling) reasons the Court concluded that *'these schemes were intended to be and are distinct'*.

Therefore, said the Court *'it is not a pre-condition to the making of* (a SOPO) *that the judge should be satisfied that the offender would also qualify for an extended sentence* (or an IPP or Life), *or that he should regard himself as deprived of necessary jurisdiction if they do not.'*

Of course the integrity of Dr Thomas's argument survives, and the Court of Appeal is really engaged in pure pragmatism. Because the natural interpretation of hastily drafted legislation leads to an 'astounding' proposition, another interpretation is called for; and so the politicians and draftsmen are protected from humiliation and (more gratifyingly) the public, to some extent, from dangerous sex offenders.

Andrew Langdon Q.C.

[2] [2006] Crim. L.R. 356

[3] [2006] Crim. L.R. 828

Sentencing in murder cases

"What do I get for murder, guv?" The accurate, but singularly unhelpful reply is, of course, "life, son." This article briefly examines the approach taken by the Courts under the provisions of the Criminal Justice Act 2003 for determining the minimum term to be served by a person sentenced to a mandatory life sentence for murder.

18 December 2003

The provisions of section 269 and schedule 21 of the Criminal Justice Act 2003 came into force on December 18, 2003 and applied to all cases of murder in which sentence is passed on or after that date. If the murder was committed before the 18 December 2003, however, the Court is required under schedule 22 of the Act to ensure that the minimum term is not greater than the minimum term which would have been notified by the Secretary of State under the old system which the Act replaced. It should be noted that the Criminal Justice Act 2003 (Mandatory Life Sentences: Appeals in Transitional Cases) Order 2005 (S.I. 2005 number 2798) makes provision in relation to appeals under paragraph 14 subsection (1) of schedule 22 to the 2003 Act by a mandatory life sentence prisoner whose minimum term has been reviewed or determined by the High Court under the transitional provisions in schedule 22. In cases where schedule 22 is appropriate, note the Judgment in *Regina v Sullivan, Gibbs, Elener and Elener* [2004] EWCA Crim. 1762; [2005] 1 Criminal Appeal Reports (S) 67 at 308.

Guidelines

In *Regina v Jones and Others* [2005] EWCA Crim. 3155; [2006] Crim. LR 262, the Lord Chief Justice laid down in a collection of seven appeals certain guidelines to be followed. These can be summarised as follows:

i The guidance given by the Criminal Justice Act 2003, schedule 21, was provided to assist the Judge to determine the appropriate sentence. Whilst the Judge must have regard to the guidance, each case would depend critically on its particular facts. If the Judge concluded that it was appropriate to follow a course that did not appear to reflect the guidance, the Judge should explain the reasons for this. See section 270 subsection 2(b).

ii There were huge gaps between the starting points. The difference between 15 and 30 years was very substantial and the difference between 30 years and a "Whole Life" Order might be even greater. It was extremely difficult to divorce the choice of starting point from the application of aggravating and mitigating factors. See paragraph 8 of schedule 21. Where aggravating factors have led the Judge to adopt the higher of two potential starting points, or mitigating factors have led him to adopt the lower starting point, the Judge must be careful not to apply those factors a second time round in making any adjustment to that starting point. In other words, the starting point must not be used mechanistically so as to reduce, in effect, the different categories of murder.

iii Regard had to be given to the particular features of each individual case so that the sentence truly reflected the seriousness of the particular offence. Section 142 (purposes of sentencing) of the Act did not apply to murder, but section 143 (determining the seriousness of an offence) was relevant.

iv The mental state of the offender was of obvious importance. See paragraph 11 of schedule 21.

v Protection of the public was not a relevant factor in fixing the minimum term. It was the task of the Parole Board to ensure that the offender was not released after serving the minimum term unless this presented no danger to the public.

vi A Whole Life Order should be imposed only where the seriousness of the offence was so exceptionally high that just punishment required the offender to be kept in prison for the rest of his or her life. If the Judge was in doubt as to whether a Whole Life Order was appropriate this might well be an indication that a finite minimum term was the appropriate disposal.

vii A minimum period of 30 years was also a very severe penalty. If the case included one or more of the factors set out in paragraph 4(2) of schedule 21 it was likely to be a case that called for a Whole Life Order.

viii Paragraph 12 of schedule 21 provided that nothing in the schedule should restrict the application of section 144 of the Act (reduction in sentences for guilty pleas). Where the Judge decided it was appropriate to fix a minimum term, an appropriate credit for the plea of guilty should be deducted from the minimum term which a Judge would have imposed had there been no plea of guilty. See the Sentencing Guidelines Council in relation to the approach to be adopted for guilty pleas.

ix The guidelines issued by the Sentencing Guidelines Council stated that where a Court determined that there should be a whole life minimum term, there would be no reduction for a guilty plea. Whilst the Sentencing Judge should consider the fact that the Defendant had pleaded guilty to murder when deciding whether it was appropriate to order a whole life term, a case which called for the imposition of a whole life term was unlikely to be a borderline case.

Cases outwith the guidelines

The Court of Appeal has continued to stress that Judges are entitled to see as aggravating or mitigating features particular circumstances which are not set out in the guidelines. See *Regina v Matthew* 2006 1 Criminal Appeal Reports (S) 88 where it was said that whilst paragraph 7 of schedule 21 identifies the age of 18 as being relevant (starting point for an under 18 year old is 12 years, whereas the starting point for an 18 year old is 15 years), there should be no sudden postponement or acceleration of levels of sentence due to age; there is a need for flexibility in that there are no sudden step changes in growth to maturity. See *Regina v Allardyce, Turner and Porter* 2006 1 Criminal Appeal Reports (S) 98 where it was said that the fact the Defendant was a member of a pack who had hunted down and killed the deceased was an aggravating factor, albeit not one which was expressly listed in paragraph 10 of schedule 21. See also *Regina v Pile* and *Rossiter* 2006 1 Criminal Appeal Reports (S) 131 where it was said that the fact the killing had taken place in public and had inevitably caused public concern was an aggravating factor, again albeit not one which is expressly listed in paragraph 10.

Days served

Finally, note that it is incumbent upon the Judge to take into account the number of days a person convicted of murder has spent on remand and deduct the same from the relevant minimum term.

Ian D Pringle Q.C.

Bad character – the first two years!

"So, when you're prosecuting all you do is play the child's video tape, read out the defendant's form and close your case!". In that way was the bad character legislation greeted. The question is whether there has been a significant change or whether, in fact, the initial excitement has settled down and it has become one of those changes which really has little bite once a few authorities have been pronounced.

General approach by the Court of Appeal

The Court of Appeal has been called upon on numerous occasions over the last year and no doubt even more defendants have made speculative applications for leave based on the novelty of the legislation. Significantly, on almost every occasion the Court has declined to involve itself in the decision made by the trial judge as to the admission of bad character evidence describing that as a matter for the discretion of the judge. That path set in the early days of the legislation is one being followed by subsequent judgments; most recently in *R v Land and Khaliq* 26th October 2006 in which the Court refused to allow an appeal against a decision by the trial judge not to permit one co-defendant to call evidence of the bad character of another co-defendant (in a case involving a defence of duress) saying that matters like this were of nuance and the trial judge was best placed to decide them. In *R v V* 27th July 2006 the Court held that a trial judge had been wrong to prevent a defendant accused of sexual abuse from calling evidence about previous false complaints of sexual abuse. Even in those circumstances, however, the trial had not been rendered unsafe – not an issue which would ever have arisen before this Act.

On a number of occasions the Court has also shied away from setting down general guidelines other than to deprecate the constant appearance of this type of appeal! That approach is perhaps not surprising given that inevitably every case turns on its own facts. However, it hasn't taken long for a significant enough body of authority to have been dealt with to permit the extraction of some useful working principles.

Is it bad character?

One of the most important of those points is the reminder to stop before rushing into a bad character application and work out whether or not the evidence is of bad character as defined by section 98:

"References in this chapter to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which-

a *has to do with the alleged facts of the offence with which the defendant is charged, or*

b *is evidence of misconduct in connection with the investigation or prosecution of that offence."*

Look at the end first

Once it has been established that the evidence is properly described as bad character then attention should be given to how a judge is to sum up that part of the case to the jury. Thought should be given both to the practicalities of calling that material before the tribunal and also to the role that it will play in the case. By that I mean that one must reflect on just how significant the evidence might be to the issues before the jury. *R v Edwards and others* (21st December, 2005) makes the point that it may well turn out that bad character evidence which has featured during a trial in fact has very little to do with the case as the jury finally has to consider it. If that is so the summing up may well need to emphasize that fact. It would obviously be preferable not to get to that stage in the first place and that can sometimes be avoided by a bit of concentration at the outset on the end to which the evidence is to be put. There is a temptation to get so tied up in the application that the final result is buried.

Wandering off the point

The Court has emphasized on a number of occasions that both advocates and the tribunal should be very reluctant to engage in what it has described as satellite litigation, in other words, to have a trial on the bad character allegation within the compass of the trial on the actual allegation which the defendant faces. The defence advocate walks a difficult path. How should he or she best represent their client while also assisting the Court in clarifying issues? No defendant, despite the imprecations within *R v Hanson; R v Gilmore* [2005] EWCA Crim 824 can be forced to make an admission against his interest and none should do so, obviously, where there is dispute about past events. The defendant can be forced into an invidious position of having to give evidence about what had gone before when in fact he would rather never have gone anywhere near the witness box.

Procedure

Help should perhaps come from a combination of *R v Bovell; R v Dowds* [2005] EWCA Crim 1091; The Times May 13th 2005 and the Criminal Procedure Rules because the first set out some procedural considerations and the second lays down a strict timetable for service of applications to adduce bad character. So far as the rules are concerned, they provide that the prosecutor must give the appropriate notice at the same time as complying with disclosure duties in the Magistrates' Court and no later than (in bald terms) fourteen days following transfer, committal or the consent being given to a draft bill of indictment within the Crown Court. The most important effect of this should be that parties are informed properly of what it was that is said to have happened in the past. *R (on the application of Robinson) v Sutton Coldfield Magistrates' Court 2nd February 2006* is little help to those faced with an application which is out of time but which comes sufficiently before the trial to allow for further investigation; it indicates that the common sense position is that the discretion to extend time limits is not governed by the finding of exceptional circumstances but questions of prejudice caused to the defendant by late service must be considered and may determine the position. *Bovell* draws attention to the obvious point that a mere memorandum of conviction may well not suffice; it may be the case that a plea was entered on a basis or that the evidence shifted radically over the course of a previous trial. It is perhaps worth bearing in mind, however, that significant digging by the Crown may reveal not just a similar previous conviction but one that was committed, when the facts are rooted out, in a way remarkably similar to that which the defendant presently faces!

R v Humphris 169 JP 441 helps to this extent; a police computer record may be used as evidence of a previous conviction but not as evidence of the facts underlying that conviction. Possibly, if the source of information leading to the record of facts on the

computer could be proved, it might stand as evidence of both the conviction and the relevant facts but that was not possible in *Humphris* and so that area remains apparently unlitigated and certainly the safer course when dealing with this area is to make rather fuller investigation. *R v Burns 1st March 2006* points out that, while in some circumstances a memorandum of conviction might be sufficient to prove that this defendant has those previous convictions, that will not always be the case and it will depend on the circumstances of each case as to whether or not that is appropriate.

Once the evidence is before the Court it matters not how it got there. It must make its way there through one of the seven gateways (all of which are set out in section 101) but that gateway does not determine the use to which it may be put once it is through. *R v Highton and others* [2005] EWCA Crim 1985 dealt with the admission of evidence through gateway g (the defendant having made an attack upon the character of another) and the subsequent use of that material to go to propensity (which is, of course, one of the matters canvassed under gateway d). The Court held that there was a clear distinction between admission and use following admission and that the use to which it could be put depended upon the matters to which it was relevant once admitted rather than the gateway through which it had been admitted. Again the Court of Appeal emphasized how important it was that the judge summed up fully and reminded the jury to what end they might put the evidence of character. The same must be true of any Bench and what legal advice they should be given. There is a rare example of the Court of Appeal ruling a verdict unsafe after the admission of bad character evidence within *Highton*; they found that because the trial judge had not told the jury that evidence about a heroin addiction went only to background the verdict was not safe. *Highton* also reminds the advocate that PACE s 78 is additional protection for the defendant. However, it is a case worth bearing in mind where a calculated risk is to be taken and a defendant adduces his own character; it is always worth working out to what use that might be put.

The answer to the first question

In my view there is little question that the legislation has significantly changed the approach to a trial. There are ways to undermine the use of bad character evidence ("the Crown's case is so weak that they have had to use ancient history to prop it up" etc) but undoubtedly advice to any defendant, other than the one making his debut, now has to be given with an eye to that which has gone before and realistically it takes a bold jury to ignore all that has gone before.

Anna Vigars

"A nod is as good as a wink to a blind bat" - The Fraud Act 2006

This Act dramatically changes the criminal legal landscape by abolishing all offences involving "deception" under the Theft Acts of 1968 & 1978 and the Theft (Amendment) Act 1996 (the plug for the *Preddy* loophole).

Following its 3rd reading in the House of Commons on the 26th October 2006 the Fraud Bill was granted Royal Assent and became the Fraud Act on 8th November 2006. The Act is now only awaiting the Home Secretary to state when its commencement date is to be.

It will create a number of new offences (including 'fraudulent trading by sole traders') but the main new replacement offence reads as follows: (section 2):

(1) *A person is in breach of this section if he*

- (a) *dishonestly makes a false representation, and*
- (b) *intends, by making the representation*
  - (i) *to make a gain for himself or another, or*
  - (ii) *to cause loss to another or to expose another to a risk of loss.*

(2) *A representation is false if*

- (a) *it is untrue or misleading, and*
- (b) *the person making it knows that it is, or might be, untrue or misleading.*

(3) *'Representation' means any representation as to fact or law, including a representation as to the state of mind of*

- (a) *the person making the representation, or*
- (b) *any other person.*

(4) *A representation may be express or implied.*

(5) *For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).*

The most dramatic difference is that under current law the Prosecution has to prove a causative chain of events – that D actually obtained something from a victim by a dishonest deception. Whereas, under this new offence of "fraud by false representation", the Prosecution only have to prove that D dishonestly made a false representation, knowing it was or might be false, intending by which to make a gain/cause loss.

The current law has been directed at **consequences** caused by D's dishonest false representations, whereas the new law will be directed at an earlier stage of D's conduct, namely the **making** of the representations (which must be dishonest, false, and intended to make gain/cause loss).

A victim, therefore, will not actually need to have been deceived by the dishonest false representation at all. The Prosecution may not even have to call a victim to give evidence if they can prove the elements of the offence by other means.

The prosecution will have to prove that D:

(Actus reus)

a made a representation;

b that was false, in the sense of being untrue or misleading;

(Mens Rea)

c made it dishonestly;

d by doing so, intended to gain, cause loss to another, or expose another to the risk of loss; and

e it was false, in the sense that he knew that it was, or might be, untrue or misleading.

Some thoughts on the elements of the offence

A **"Made a representation"**

"Making" connotes something active.

Given this, one would anticipate a D will not be found guilty simply by remaining silent having realised another person has been misled through misunderstanding something he has said (dishonestly intending to obtain a windfall thereby).

But what if, at the moment the misunderstanding becomes apparent to him, D winks, or nods to the person? Has he then "made" a representation? What if the misled person is on the other end of the phone and cannot see the wink or nod?

Thus the reference to the Python phrase in my title: "a nod is as good as a wink to a blind bat"!

Whatever interpretation emerges there will be a fine line to be drawn because D *will* be guilty if it can be proved he has made an implied representation (s.2(4)). So, if the misled person asks D to confirm the truth of some part of their misunderstanding and D doesn't reply, perhaps he *has* then "made" an implied representation by refusing to correct it when given the opportunity.

If, however, D was under a "legal duty" to disclose information to the other person and failed to disclose it, the position will be much clearer. Section 3 of the Fraud Act creates a new offence of "fraud by failing to disclose information" (requiring dishonesty and an intention to make a gain/cause loss).

Alternatively, if D occupies a position in which he is expected to safeguard, or not to prejudice, another's financial position and he dishonestly abuses it to make a gain, cause loss or expose another to a risk of loss, then he will be guilty under section 4 of the Act of the offence of "fraud by abuse of position".

B **"False"**

If a representation is untrue it is easy to say that it is "false".

But what of the situation when the representation is said to be "misleading"? Presumably the jury will have to decide objectively if it was misleading or not. But what classes of persons are to be encompassed in those who may be misled? The gullible and stupid? The jury are likely to be strongly influenced by evidence from a particular person who says he was misled.

It is to be noted that Defence arguments that the falsity was immaterial to the outcome are not easily handled under the new legislation because, of course, this new offence is **'representation'** based and not **'consequence'** based. However, the Prosecution do have to prove both *dishonesty* and that he intended to make a gain *by* making the dishonest misleading representation, knowing it might be misleading.

So far I have not heard what the advertising press are making of the Act, but one anticipates that they may have to start being even more wary of aiding and abetting offences under this legislation (e.g. wild claims for homeopathic remedies and age-reversing skin products come to mind!)

C **"Dishonestly"**

In appropriate cases no doubt the *Ghosh* test will come into play for this offence - the prosecution will have to disprove the contention put forward by a D who says he didn't realise that what he did would be regarded by the general public as dishonest.

Thus the glamorous magician's assistant who entices a child to part with his pocket money to watch her sawn in half, still has a fair chance of avoiding the ubiquitous ASBO.

D **"By doing so, intended to gain/cause loss/expose to a risk of loss"**

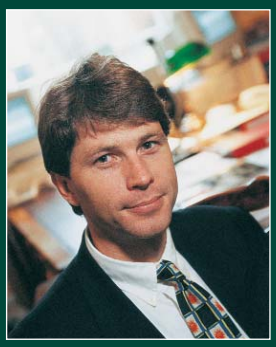
This is the only ingredient which *does* have a causation requirement - focussed upon the intention which is necessary for any kind of fraud offence (and the motivation behind them all). It is self-explanatory. The "risk of loss" is a useful widening of the law to simplify the prosecution of investment frauds etc.

E **"False - because he knew that it was, or might be, untrue or misleading"**

The last ingredient is perversely drafted as part of the test of what makes for a "false" representation (s.2(2)(b)). Common sense suggests that deciding what is "false" should be an objective part of the *actus reus*. Instead, Parliament has enacted a test for the falsity of a representation by making it partly a subjective issue of *mens rea*. Bizarrely, a representation will only be described as "false" if the prosecution can prove D knew it was, or might be, untrue or misleading! Philosophers and theologians may see this as another subtle step away from society objectively judging what is true and false, to further acceptance of personal subjective assessments of truth. Categorizing it thus is about as unpalatable and silly as Monty Python's Albatross Ice Cream!

Peter Blair Q.C.

The Crime Team



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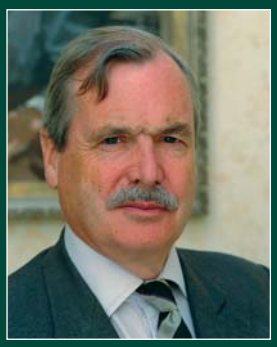

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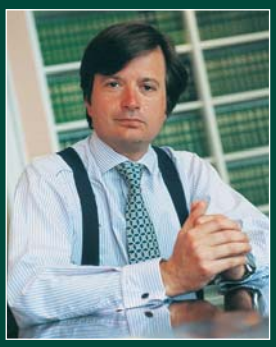

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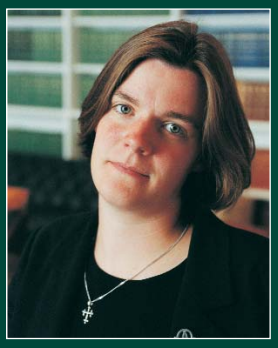

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Recent guidance on ASBOs

When can ASBOs be made?

The 2 most common ways are:

1 Upon civil application in the magistrates' and county courts, and

2 As an order after conviction for an offence in the magistrates', youth or Crown Court (section 1C CDA 1988).

In the second there is still no specific procedure set down before an order can be made, but general guidelines have recently been given in *R v W and F* (2006) EWCA Crim 686. The Court of Appeal said:

a The prosecution must identify the particular facts said to constitute anti-social behaviour;

b If the defendant accepts those facts they should be put down in writing, in the same way as a basis of plea;

c If he does not accept them they must be proved to the criminal standard before the court can act upon them;

d The defendant should have a proper chance to consider the evidence advanced by the prosecution in support of an ASBO, particularly where it goes wider than the material adduced in evidence for the criminal offence of which he was convicted;

e Hearsay evidence is capable of being adduced since the proceedings are civil in nature;

f The court should make its findings of fact expressly and they should be recorded in writing on the order.

Prohibitions

The absence of a clear definition of anti-social behaviour within the legislation means that orders can be used to tackle a wide range of behaviour. However, to be effective and enforceable the terms of the order require careful drafting.

In the recent case of *R v Boness* (2005)EWCA 2395 the CA has set out the best practice to be borne in mind when setting the prohibitions:

1 Prohibitions should be proportionate to the legitimate aim pursued and commensurate with the risk to be guarded against, e.g. an order preventing the appellant from "congregating in a group" was considered too wide as it would prevent him from attending any sporting or outdoor events.)

2 Can it be enforced? A prohibition on "entering private land" was too wide and there was no practical way to enforce it, said the CA.

3 A court should ask itself before making the order, 'Are the terms of this order so clear that the offender will know precisely what he is prohibited from doing?' (E.g an order prohibiting Mr B from "doing anything which might cause damage" was too wide.)

4 Any excluded areas should be clearly delineated. Most courts should require a map to be drawn, and on roads where the boundary falls the court should specify whether both sides of road are included or only one side.

5 The court should remember that the purpose of the prohibitions is not to further punish an offender but to prevent persons from further anti-social acts by him. A curfew may be appropriate, but only if imposed for the right reason.

In the case of *W v DPP* (2005) DC 8/6/2005, the divisional court said that a clause imposed in an ASBO (by a District Judge, staggeringly!) that prohibited W from "committing any criminal offence" was plainly too wide and unenforceable.

ASBOs to extend the penalty for particular criminal offences – right or wrong?

In 2004 the CA had said that it was not wrong in principle to make an ASBO against a persistent driving offender with the aim of increasing the penalty for future offences of driving whilst disqualified from 6 months to 5 years (*R v Hall* (2004) EWCA Crim 261).

However in *R v Kirby* (2005) EWCA 1228, the CA changed its mind. Mr K had the dubious honour of being the first person to receive an ASBO in Teeside Crown Court. He was sentenced for dangerous driving and driving whilst disqualified. He had plenty of previous convictions for similar offences. The Judge, upon application by the Police, made an ASBO prohibiting Mr K from driving, attempting to drive, driving whilst disqualified, or allowing himself to be carried in any motor vehicle which had been taken without the consent of the owner or lawful authority. The CA said that the making of an ASBO should not be a normal part of the sentencing procedure, particularly in cases that do not specifically involve intimidation, harassment or distress. There was nothing in this case to justify an ASBO, and such an order should be not used to reinforce a disqualification from driving, or as a means to increase the sentencing powers of the court in the event that the offender commits similar offences again.

The Kirby line was followed in *R v Boness*, and *R v Theo Williams* (2005) EWCA Crim 1796. The CA have left open that such an order can be made in very exceptional circumstances (and there were none in the case of Mr W who had 233 convictions for a wide variety of offences) but it is discouraged.

Sentencing for breach of terms of ASBO

In *R v H, Stevens and Lovegrove* (2006) EWCA Crim 255, the CA said that when sentencing for conduct which constitutes a breach of the ASBO and that is also a distinct criminal offence for which the maximum sentence is less than 5 years, that is a feature to be borne in mind by the sentencing court in the interests of proportionality. However, the court is not limited to the lesser maximum. The case of *Morrison* was expressly overruled.

In *R v Lamb* (2006) 2 CAR (S) 84 (11), the appellant had breached the terms of his ASBO on several occasions by being present in an area from which he was excluded. The CA said that they were faced with a young man who had repeatedly breached his ASBO, but without committing crime or causing harassment to any member of the public. A sentence of 22 months was substituted with 6 months. The CA commented that in such cases community penalties should be considered to help the offender learn to live within the terms of the order to which they were subject.

Jenny Tallentire

Telephone tapping, intrusive surveillance and disclosure

'Telephone tapping' material has been brought to the fore following arrests relating to alleged terrorist conspiracies in the UK. The underlying presumption has been that if the telephone conversations between suspects - listened in to by the police or MI6 - were admissible in evidence (as it is in many other countries in Western Europe, and the USA), the case against those involved would be overwhelming. Furthermore, no questions may even be asked in a trial in the UK as to whether or not such covert listening has occurred.

The rationale for this state of affairs has included the suggestion that disclosure issues (of 'unused' conversation particularly) would ordinarily be so difficult to resolve that the entire evidence gathering operation would be pointless; any potential prosecution would be bound to crash on the disclosure rocks. That this fear may be grossly exaggerated may be seen when the disclosure position relating to most similar evidence currently admissible in the UK is considered and understood.

This evidence of course is recorded conversation secured via 'intrusive surveillance' operations. Put simply, the 'bugging' of a suspect's home or car, from which often extremely incriminating conversation is recorded. It is titled 'intrusive' for obvious reasons, and is to be distinguished from 'directed' surveillance, which in essence does not involve 'bugging'.

For present purposes it is sufficient to state that the law relating to this interesting area is found through a combination of the Police Act 1997 and the Regulation of Investigatory Powers Act 2000, ('RIPA').

Clearly a suspect faced with hours of recorded, incriminating conversation against him has only a few avenues to explore to avoid the consequences. One avenue is to deny that the voice recorded is his. This avenue is usually a short dead end, given other evidence available in the case, or by virtue of forensic science work on voice pattern analysis etc.

The main avenue travelled by the defence was to launch a full scale attack on the lawfulness of the intrusive surveillance operation, as a starting point to exclude the evidence. If excluded of course, the suspect never has to be put to the trouble of explaining the content.

Until the case discussed below, the net result in 'intrusive surveillance' cases was a huge effort by the defence to 'argue out' the evidence secured from the bugging. They would, in short, demand to see all the intelligence material presented to the Chief Constable and Surveillance Commissioner on the footing that it was necessary so that they could properly scrutinise the decision making process that had lead to the bugging being authorised at all, or with a view to arguing the intelligence had been erroneous and that, if this had been known, the bugging would not have been authorised, or would have been stopped at an early stage. Generally speaking, the prosecution position in such cases had been to routinely disclose all paperwork relating to the authorisation of the bugging operation, save that it was edited, often extremely heavily, to protect PII material. Weeks of legal argument would similarly follow, both on the merits of the decisions to authorise the bugging, and whether the 'lawfulness' argument could take place at all, without disclosure of 'PII' material.

If those defence lawyers involved had been candid, these pre-trial manoeuvres over the 'lawfulness' issue were designed to scupper the prosecution case by cornering them into a choice between disclosure of PII material, or dropping the case. The latter would sometimes result. It was not unknown for Chief Constables to be called as witnesses to justify their authorisations and decision making processes. This of itself was of great practical difficulty if the Chief Constable felt constrained from mentioning particular sensitive intelligence.

Anecdotally, the expectation of prolonged challenges to the lawfulness of bugging operations made Chief Constables slow to encourage such investigations at all.

Such gloomy expectations have now been changed in the light of the Court of Appeal's ruling in *R v Gary Sly and others*, [2005] EWCA Crim 887. In all but the most exceptional case based on intrusive surveillance, there is now unlikely to be any route open to the defence to argue the evidence obtained should be excluded because the bugging was unlawful. The lawfulness issue, in effect, has been resolved as part of, and during the bugging operation itself by virtue of the initial, and continuing approval of the Surveillance Commissioner. The lawfulness issue simply cannot be re-litigated as part of the criminal trial.

R v Gary Sly and nine others

Gary Sly was a top-end drug dealer based in Dorset. He was released 'on tag' from a short sentence for an unrelated matter in October 2003. His curfew involved him being at home from about 7pm to 7am for a number of months.

His house (sitting room) was bugged for five months. There was also covert filming of visitors coming to and from the house over the same period.

Huge drug deals were discussed by Gary Sly in his home, both with visitors to the house, and via 'phone calls he was involved in, with his participation in the call recorded by the bug. After five months the police raided his home, and various addresses of other drug dealers identified as being involved in the conspiracy from the tape recordings. About £0.5m Class A and B drugs were found on the day of the arrests, a snapshot of the ongoing activity over the time of the bugging. Heavy duty presses, used for pressing and re-pressing class A drugs were also discovered.

Including Gary Sly, ten defendants eventually stood trial (one in 2006, it being asserted he was too ill for trial in 2005). Each raised the lawfulness of the intrusive surveillance as key to their defence. Given the content of the recordings, that was unsurprising. Each demanded sight of all paperwork relating to the authorisation of the bugging operation, both when it started, and for the duration of the investigation.

For these purposes it is possible to reduce the lawfulness process to a summary. Section 32(1)-(4) of RIPA empowers a Chief Constable (and other identified 'Senior Authorising Officers') to grant authorisations for the carrying out of intrusive surveillance. They may only do so if they believe that it is necessary in various interests, including 'the purpose of preventing or detecting serious crime'. It must be proportionate to what is sought to be achieved by carrying it out. It determining whether it is necessary, the Chief Constable must consider whether the information sought could reasonably be obtained by other means.

For intrusive surveillance, that is not the end of the matter by any means. The crucial role of the Surveillance Commissioner now comes into play. By sections 35 and 36 of RIPA, the Chief Constable's authorisation and its taking effect are subject to notification, providing information to, and 'scrutiny' and written approval by an independent Surveillance Commissioner. Such written approval should be in advance of the bugging, save in urgent cases. In other words, if the Surveillance Commissioner - using the same criteria essentially as the Chief Constable - does not approve the bugging, it will not be lawful under RIPA or the 1997 Police Act. Conversely, if approved, the surveillance will be lawful for 'all purposes', section 27.

At set intervals the authorisation and approval of the ongoing bugging must be repeated against the same criteria. It will be noted the language of 'necessity' and 'proportionality' closely follow Article 6 ECHR.

For information, a Surveillance Commissioner is required to be 'a person of considerable experience and standing, who holds, or who has held, high judicial office'. Present or recently retired Lord Justices are commonly selected.

The prosecution stance in the case was as follows. Prosecuting Counsel read all material relating to the Chief Constable's authorisations and the Surveillance Commissioner's approvals, including any intelligence. This was considered within the usual CPIA parameters.

The defence had disclosed to them only the single sheets of paper on which the written approval of the Surveillance Commissioner was recorded. All other paperwork was classified as sensitive unused material.

None of this material undermined the prosecution case, or supported any defence case, or potential legal argument on admissibility.

Defence Counsel invited the judge, HHJ Jarvis, to rule that the prosecution should disclose the material placed before the Surveillance Commissioner (and the Chief Constable, including the underlying intelligence) when seeking approvals and renewals of the authorisations. They accepted some editing may be necessary of PII purposes, but submitted that without it they could not formulate any argument that may lead to exclusion of the recordings under section 78 of PACE.

It was further argued the prosecution should put this material before the trial judge for his consideration for disclosure - it was unfair for the prosecution alone to assess the material in the circumstances.

The first submission was rejected. Crucially, section 91(10) of the 1997 Act (which also applies to RIPA) provides that decisions of a Surveillance Commissioner 'shall not be subject to appeal or liable to be questioned in any court'. The Court of Appeal upheld HHJ Jarvis' view that this applied to the criminal court. The Surveillance Commissioner's approval - and continuing approval - of the bugging was conclusive on the issue of its lawfulness, and in line with the scheme of the legislation of high level independent scrutiny throughout the bugging operation. Any grievance over the lawfulness of the bugging was for the independent Complaints Tribunal set up under section 65 of RIPA.

As to the suggestion HHJ Jarvis should have read this 'authorisation material' himself, again the Court of Appeal supported the prosecution view that the situation was covered by *R v H and C* [2004] 2 AC 134. It would have been wrong and unfair to put before the judge material damaging to particular defendants which would not conceivably require disclosure under CPIA.

Conclusion

Perhaps the surprising aspect is that intrusive surveillance cases had previously involved such lengthy arguments over 'lawfulness' given the rigorous scrutiny required by RIPA by an independent Commissioner, and the apparent clarity of the legislation about his decisions. It may be that prosecution and defence teams had simply fallen into the trap of copying what they had seen happen in other cases.

In relation to concerns over using 'telephone tapping' conversations in evidence, there would seem to be no reason why any statutory regime should be any different to that for intrusive surveillance. If that were the case, disclosure should not present serious problems in most cases. Given the compelling, often unanswerable evidence that can be secured from covert recording of conversations - relating often to the gravest of crimes - it is hard to see why the state should continue to maintain a jury should not consider this material when its origin is 'telephone tapping' rather than a bugged house.

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